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CURRENT EVENTS.

THE NEW YEAR.—In opening a new volume and a new year, we are glad to avail ourselves of the opportunity to express thanks to our subscribers for their kind appreciation of our past labors. We are glad to think that during the past year the JOURNAL has won the approbation of its subscribers. We are satisfied that the system upon which the JOURNAL is conducted in its various departments is entirely satisfactory to nearly or quite all of our subscribers, and as we design making no change in this respect, we can only promise that our utmost exertions will be devoted to making the JOURNAL for the coming year even more valuable to the profession than it has been in the past.

TELEPHONE LAW—FEDERAL JURISDICTION—PATENT LAW.—"Our modern improvements" besides contributing very greatly to the convenience, comfort and wealth of this generation, have immensely augmented the volume of the current law of the land. To our admirable railroad system we owe the great increase of "carrier law," the law of corporations, and except a very small portion, the immense body of the law relating to negligence and contributory negligence. Whether this great increase of the law is a blessing, either overt or in disguise, is a question which we will not discuss. The telegraph, too, has contributed its quota to the law, and now comes to the front the telephone, the latest and probably not the least important of modern inventions.

In our next number we will publish a very important decision relative to telephone law rendered within a few days past by the Supreme Court of Missouri. In our present number will be found the opinion of Mr. Justice Miller, in the Bell Telephone case, delivered in the Supreme Court of the United States affirming the jurisdiction of that court

to order the cancellation of patents for inventions, the issuance of which was obtained by fraud. It is almost unnecessary to say that this opinion of Mr. Justice Miller, like all his opinions, is able and exhaustive. He demonstrates beyond question the utter fallacy of the theory that a patent for inventions issued by the patent office of the United States is a fixed fact as utterly unchangeable as the laws of Medes and Persians. Such seems to have been the view of the United States circuit court for the district of Massachusetts, which held that the government of the United States having once issued a patent is bound by it for evermore, no matter how fraudulent and corrupt had been the conduct of the parties who had issued and obtained it. We will not, however, remark further on that question, but refer our readers to the opinion of Mr. Justice Miller, who treats the subject with far more ability than we can.

We take this occasion to repeat our confident opinion that there is no branch of national legislation which needs more thorough revision and reorganization than the law relating to patents for inventions. There seems to be no sort of system or general principle to which may be referred questions of the validity and operation of a patent. Everything seems to depend upon the discretion and judgment primarily of the commissioner of patents, and then upon those of the United States circuit and district judges, each case depending upon its own facts utterly irrespective of general principles. In the innumerable actions for infringement of patents to be found in the reports of federal courts, numbers of patents are declared "void for want of novelty" or other patentable quality, and yet it is very rare that any definition of patentability can be found in any of the cases. We suppose that, to a very great extent, this indefiniteness is a necessary incident of the subject-matter, and that in very many cases the questions presented and adjudicated are questions of fact, but we should suppose that in the many years that have elapsed since this line of litigation was inaugurated there would have been evolved in the opinions of courts a sufficient number of general principles to be formulated into something resembling a code.

NOTES OF RECENT DECISIONS.

HABEAS CORPUS—CHINESE EXCLUSION ACT—BILL OF ATTAINDER.—We usually confine our notes in this department of the JOURNAL to cases decided by courts of the last resort, but we owe no apology to our readers for departing from our rule by commenting on an important decision recently made by Judge Deady of the United States district court for Oregon.¹

The facts were that a Chinese woman, born in San Francisco in 1866, and therefore a citizen of the United States, was a passenger on a steamer from a port in British Columbia for Portland, Oregon, where she was not permitted to land, but was "restrained of her liberty" by the master of the steamer. Upon the hearing of her petition for a writ of *habeas corpus*, her nativity and citizenship were established to the satisfaction of the court, which held that a person born within the United States is a citizen thereof, both at common law and under the XIVth Amendment of the constitution of the United States, and as such, is entitled to free locomotion within the national territory, and to depart from and return to the United States at his (or her pleasure).²

It is well known that on the Pacific slope the popular sentiment is that "the Chinese must go," and under the recent Chinese exclusion act it is added that they must go to stay. The bill forbids any Chinese immigrant who has left the United States to return without a return certificate, and it was under this act that the landing of the Chinese woman was prevented. Judge Deady demonstrates that the Chinese exclusion act does not apply to the petitioner or any other American citizen; if it did so it would conflict with that clause of the constitution³ which forbids congress from passing any bill of attainder. He further says:

"A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, and thereby deprive him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder, within the clause of the constitution

of the United States, prohibiting the passage of such bills, and is therefore void."

DECLARATIONS ON INSURANCE POLICIES.

I. AVERMENTS AS TO

1. Status of Plaintiff and Defendant.
2. Consideration.
3. Continuance of Policy.
4. Description of Property.
5. Loss.

II. GENERAL CONCLUSIONS—CONDITIONS—SETTING OUT POLICY.

III. SPECIAL CONDITIONS AS TO

1. Application.
2. Notice; Proofs of Loss; Magistrates' Certificates.
3. Interest; Title; Ownership.
4. Occupancy.
5. Demand; Amount Due.
6. Other Insurance; Abandonment; Repair.
7. Limitations.

IV. CURE OF ERRORS IN DECLARATION.

It is rare that declarations or complaints on insurance policies are correctly drawn. Almost always inaccuracies are found, such as either necessitate demurrers and amendments, or produce embarrassments lasting throughout the litigation. These considerations appear to the writer to make it worth while to state the essential elements of the complaint or declaration in such actions, and to indicate the points wherein error is likely to arise.

I. AVERMENTS AS TO.—1. *Status of Plaintiff and Defendant.*—It is so easy to identify and describe the plaintiff and defendant in an action on an insurance policy that not much need be said on this point. Both parties should be named; the omission, without excuse, of the christian name of one of them will be specially demurrable.¹ If the declaration is against a mutual company or society plaintiff should aver membership therein.² One person renewing a policy, originally made to two, may declare on it alone.³ But the name of the person for whose use the action is brought, need not be given.⁴ A wife suing need not allege that the husband

¹ *Sturge v. Rahn*, 4 Exch. 646.

² *Manlove v. Naylor*, 38 Ind. 424; *Same v. Naw*, 39 Ind. 289; *Same v. Bender*, 39 Ind. 371; *Whitman v. Mason*, 40 Ind. 189; *Hashagan v. Manlove*, 42 Ind. 330; *Tepecanoe Twp. v. Manlove*, 39 Ind. 249; *Downs v. Hammond*, 47 Ind. 131.

³ *Lockwood v. Middlesex I. Co.*, 47 Conn. 553.

⁴ *Hayes v. Virginia M. P. A.*, 76 Va. 225; *Mintes v. Thompson*, 2 East, 385.

¹ *In re Yung Sing Hee*, 36 Fed. Rep. 437.

² *Ex parte Chin King*, 35 Fed. Rep. 354; *In re Look Tin Sing*, 19 Saw. 353; 21 Fed. Rep. 905.

³ Article 1, § 9.

did not direct payment to be made to any other person than to herself.⁵ The corporate capacity of the defendant (or plaintiff, if it be a corporation), should be averred.⁶ But it is not necessary to aver compliance with the statute authorizing the company, defendant to do business in the State.⁷ In Kansas, the non-residence of the corporation defendant is sufficiently alleged by averring that defendant is a foreign corporation created and existing under the laws of Connecticut, with its principal office in the city of Hartford in that State.⁸ Nor is it necessary, specifically, to allege that insurer's charter authorized insurance against loss by fire where the complaint alleges authority to insure good and chattels—this must include all kinds of insurance.⁹

2. *Consideration.*—It is an elementary rule of law, which is generally observed, that a consideration must be alleged.¹⁰ When dividends are relied upon as constituting payment of consideration their sufficiency must be averred.¹¹ The order and time of an assessment relied upon must be averred.¹²

3. *Continuance of Policy.*—It must be shown that the policy was in force at the time of the loss.¹³ It is well to aver the dates of the policy and of the loss under a *videlicet*, else a variance may be fatal.¹⁴

4. *Description of Property.*—The property covered should be accurately described. In a suit on marine policy, it is enough to show that divers goods were put on board and the policy was made on said goods.¹⁵ It must be averred that the property was in the building or ship lost.¹⁶ But the description need only be given by apt words reasonably applicable to the property. Thus, in insurance on "goods," it was held enough to declare that the defendant became an insurer of the "premises" in the policy mentioned.¹⁷

5. *Loss by the misfortune insured against*

in the policy must be fairly stated. A fair reasonable allegation is all that is necessary in this particular. Thus, it has been held that an allegation of loss from "one of the perils issued against" was enough.¹⁸

Where the policy excepted loss caused by fire which should ensue from the falling of a building: *Held*, sufficient to aver that the loss was caused by fire and not by the falling of any building.¹⁹ But an averment of loss, "by any reason of a fire taking place in the cellar of said premises," was held insufficient because it failed to State that the goods insured were injured or destroyed by fire.²⁰

II. GENERAL CONCLUSIONS; CONDITIONS; SETTING OUT POLICY.—Reasoning from the analogy between contracts of insurance and ordinary contracts it would seem sufficient to declare by describing the parties, averring the making and continuance of the policy, describing the goods and averring the loss, together with the demand and the refusal to pay on the part of the company. And there are decisions which appear to sustain this conclusion. A general count has been held good in New Hampshire.²¹ A count for money had and received has been held sufficient to sustain an action on a policy.²² And probably these decisions are sound as to the particular cases to which they are applied.

Declarations drawn in accordance with the foregoing observations would be comparatively brief, simple documents, and such are usually the first declaration filed in these cases. The trouble with them lies in the fact that the policy of insurance is a conditional contract, a fact which is either wholly overlooked or the pleader puts in a general averment that the plaintiff has performed all the condition on his part to be observed, leaving breaches of condition to be set up in defense.

So far as provisos and breaches of conditions subsequent are concerned it is safe pleading to leave the defense to set them up by pleas. The rule is that defenses need not be negatived.²³ Facts which defeat part of plaintiff's claim under special provisions of

⁵ *Laudenschlager v. N. W. Assn.*, 30 N. W. Rep. 427.

⁶ *Texas, etc. Co. v. Davridge*, 51 Tex. 244.

⁷ *Germania Ins. Co. v. Curran*, 8 Kan. 6.

⁸ *Ætina Ins. Co. v. Koons*, 26 Kan. 215.

⁹ *West Mass. Ins. Co. v. Duffey*, 2 Kan. 347.

¹⁰ *Texas, etc. Co. v. Davridge*, 51 Tex. 244.

¹¹ *Bulger v. Washington L. I. Co.*, 63 Ga. 328.

¹² *Atlantic, etc. Co. v. Young*, 38 N. H. 451.

¹³ *Schroeder v. Trade Ins. Co.*, 12 Bradw. (Ill.) 651.

¹⁴ *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.), 126; *Guachnor v. Keith*, 9 Bradw. (Ill.) 416.

¹⁵ *DeSymons v. Johnston*, 5 B. & P. 77.

¹⁶ *Todd v. Germania F. I. Co.*, 1 Mo. App. 472.

¹⁷ *Houghton v. Ewbank*, 4 Camp. 88.

¹⁸ *Gartside v. Orphans' Ben. I. Co.*, 62 Mo. 322.

¹⁹ *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416.

²⁰ *Rode v. Rutgers' F. I. Co.*, 6 Bosw. 23.

²¹ *New Hampshire, etc. Co. v. Hunt*, 30 N. H. 219.

²² *Metropolitan, etc. Co. v. Drach*, 101 Pa. St. 278.

²³ *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *Simmons v. Ins. Co.*, 8 W. Va. 474.

the policy need not be alleged.²⁴ Conditions subsequent need not be set out, nor performance thereof averred.²⁵ It is not necessary to aver that the loss did not happen from invasion, etc. These are provisos for the benefit of the insurer who must set them up in defense.²⁶ The plaintiff need not negative breach of conditions prohibiting the use of certain things on the premises of the insured.²⁷ Nor is an affidavit of defense necessary.²⁸ And the court will liberally interpret averments concerning provisos and defenses if made. Thus, "accepted risks" was construed "excepted risks."²⁹

But as to the condition precedent to the right of action—and it is as to them that declarations are usually defective or insufficient—a different rule exists. They are not to be ignored and left for the defendant to set up in defense with proper averments as to their breach. It is plaintiff's duty to set them out, and to aver performance on his part. I know of no contract that contains so many or such subtle conditions precedent as insurance policies. They are rarely, if ever, strait, unequivocal agreements to pay losses upon their occurrence; but are contracts with an "if" writ large and all over them. The loss will be paid *if* a peculiar notice thereof is given, *if* peculiarly formal proofs of loss and magistrates, certificates are put in, *if* the various warranties as to title, condition, etc., of the property are true, *if* the demand for payment be made not earlier than a certain named time, etc., etc. These various "ifs" arise out of as many conditions precedent which are generally ignored by the pleader but which should be set out with specific averments of performance. The general rule as to this is thus given by Chitty: "If there be any thing specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated."³⁰ Following this rule a federal court in one case says: "By this

policy of insurance the company agrees to pay the loss only upon the conditions that the plaintiff do certain things which the company deems essential for its own protection. It must appear, therefore, that each and all or these acts, as set out in the contract, have been discharged or some legal excuse for non-performance given before the plaintiffs have a right of action."³¹ In Illinois, the court lays down the following rule as to averring conditions in the policy: "The policy with the conditions annexed constitute an entire contract, and in declaring upon the contract, it, or a sufficient portion of it to show a right of recovery, must be set out either in terms or in substance. This is not like suing on a formal bond at common law, where the plaintiff might simply count on the bond and leave the defendant to set up the condition and plead performance. But in a case of this character, money only being payable upon the assured performing certain acts, all such precedent acts should be set out and their performance averred. But all conditions subsequent to the right of recovery, and all acts to be done by the company in discharge of their liability, may be omitted and left to be set up as a defense."³²

It is, therefore, desirable to set out the policy *in hæc verba* so that every condition precedent may be shown. In Illinois, the statute requires a copy of the policy to be filed as part of the declaration.³³ But it may be filed as an exhibit with the declaration and made part of it by proper allegation,³⁴ although in Mississippi, it was decided that exhibits annexed to a bill cannot be examined for the purpose of determining whether a demurrer should be sustained or overruled, and is sufficient if the bill itself discloses a *prima facie* right, notwithstanding it fails to state that all the conditions of the contract upon which it was founded have been observed and performed.³⁵ But while desirable

²⁴ *Pierce v. Charter Oak L. I. Co.*, 138 Mass. 151.

²⁵ *Forbes v. American, etc. Co.*, 15 Gray, 249.

²⁶ *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Cornell v. Leroy*, 9 Wend. 163; *Catlin v. Springfield, etc. Co.*, 1 Sumn. 434. But, *contra*, see *Simmons v. Ins. Co.*, 8 W. Va. 474.

²⁷ *Hunt v. Hudson River Ins. Co.*, 2 Duer, 481.

²⁸ *Morton v. Mutual L. I. Co.*, 12 Phila. 246; *Biley v. Mut. Ben. Assn.*, 2 Chester Co. (Pa.) Rep. 306.

²⁹ *Russel v. St. Nicholas Ins. Co.*, 52 How. Pr. 469.

³⁰ 1 Chit. Pl. 985, note 1.

³¹ *Perry v. Phoenix Assurance Co.*, 8 Fed. Rep. 643.

³² *Rockford Ins. Co. v. Nelson*, 65 Ill. 415. See also *Home Ins. Co. v. Duke*, 43 Ind. 418; *Edgerly v. Farmers' Ins. Co.*, 43 Iowa, 587; *Home Ins. Co. v. Lindsay*, 26 Ohio St. 348; *Ill. Mut. F. I. Co. v. Marseilles Mfg. Co.*, 1 Gill. (Ill.) 237.

³³ *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313. See also *Peoria, etc. Co. v. Walser*, 22 Ind. 73; *Roberts v. Germania Ins. Co.*, 71 Ga. 478; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

³⁴ *Northwestern M. L. Co. v. Hazlett*, 105 Ind. 212.

³⁵ *Statham v. New York L. I. Co.*, 45 Miss. 581.

to set out the policy *in hæc verba*, accurate averments of its substance and effect may be sufficient, if none of the essential conditions are overlooked.³⁶ It is not necessary to aver terms of a written policy in a declaration on a parol contract to insure,³⁷ and in a count upon a reinsurer's policy the original policy need not be set out.³⁸

It is also desirable to make specific averments of performance as to each condition precedent. General averments of performance are not enough.³⁹ But under the liberal practice allowed in the code States a general averment of performance is considered enough. Thus, in Indiana, it is a sufficient allegation of performance of conditions precedent for plaintiff to aver "that he has in all things observed, performed and fulfilled, all and singular, the matters and things which were on his part to be observed, performed and fulfilled, according to the conditions, form and effect" of the policy sued on,⁴⁰ and "duly fulfilled" is equivalent to "performed."⁴¹

In Alabama, a declaration on a life policy is sufficient if it contains a statement of the policy and an averment that plaintiff has fulfilled all its conditions on his part, and that in a specified way defendant has failed to perform according to its contract.⁴²

Let us now examine the cases passing upon averments relating to those conditions in the policy that are most commonly precedent.

III. SPECIAL CONDITIONS.—1. *Application*.

—The rule is that if the policy makes the proposals, answers, and declarations made by the applicant a part of it, or are warranties, the complaint in an action on the policy is insufficient unless they are stated therein.⁴³

³⁶ *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20. See also *Tripp v. Vt. L. I. Co.*, 55 Vt. 100.

³⁷ *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372.

³⁸ *Cahen v. Continental Ins. Co.*, 69 N. Y. 300.

³⁹ *Perry v. Phoenix Assurance Co.*, 8 Fed. Rep. 643, and authorities *supra*.

⁴⁰ *American Ins. Co. v. Leonard*, 80 Ind. 272.

⁴¹ *Æna Ins. Co. v. Kettles*, 81 Ind. 96. See also *Richardson v. North Mo. Ins. Co.*, 57 Mo. 413; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Continental L. I. Co. v. Houser*, 89 Ind. 253; *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; *Schobacher v. Germantown, etc. Co.*, 59 Wis. 86; *Mut. Ben. Assn. v. Bowman*, 110 Ind. 355; *The Dolphin*, 1 Flap. 580.

⁴² *Brooklyn L. I. Co. v. Bledsoe*, 52 Ala. 538. See also *Massachusetts, etc. Co. v. Kellogg*, 82 Ill. 614; *Daniels v. Andes Ins. Co.*, 2 Mont. 78a.

⁴³ *Bidwell v. Conn., etc. Co.*, 3 Saw. 261; *Bobbitt v.*

But, in Michigan, the contrary has been decided.⁴⁴

In Wisconsin, it has been decided that if the complaint shows that the policy sued upon refers to an application and declares that it was a warranty, it need not set out the terms of the application, or the existence of the facts therein stated, or the performance of the promises therein stated.⁴⁵ The court disapprove of *Bidwell v. Ins. Co.*,⁴⁶ and *Bobbitt v. Ins. Co.*,⁴⁷ which it says are the strongest cases holding the other way. The grounds upon which they are rested are sufficiently answered by 1 Chitty's Pl. 225, 246, 311, and Gould's Pl. §§ 17, 19, 20, 21; sustaining this view are also a number of other decisions.⁴⁸ It is certainly not necessary to set out the application where the representations in it are, not warranties.⁴⁹

2. *Notice, Proofs of Loss and Magistrates' Certificates*.—Averments following the language of the policy, that these prerequisites to recovery have been furnished as provided for must be made.⁵⁰ An allegation that plaintiff "had fulfilled all the conditions of the policy," will not be sufficient as an averment of furnishing proof of loss.⁵¹ If notice by mail is relied upon it must be averred that it was properly directed, stamped, and placed in the post-office.⁵² It is sufficient to aver *Ins. Co.*, 66 N. C. 70; *Glendale Woolen Co. v. Ins. Co.*, 21 Conn. 19; *Duncan v. Sun Ins. Co.*, 6 Wend. 488; *Burritt v. Saratoga Ins. Co.*, 5 Hill, 188; *Chaffee v. Cattaraugus Ins. Co.*, 18 N. Y. 376; *Battles v. York County Ins. Co.*, 41 Me. 208; *Egan v. Mutual Ins. Co.*, 5 Denio, 326; *Jennings v. Chenango Ins. Co.*, 2 Denio, 75; *Routledge v. Burrill*, 1 H. Bl. 254; *Worsley v. Wood*, 6 Term Rep. 710; *Geach v. Ingall*, 14 M. & W. 95; *Strong v. Rule*, 3 Bing. 315; *Kennedy v. St. Lawrence Ins. Co.*, 10 Barb. 285; *Murdock v. Chenango Co. Ins. Co.*, 2 N. Y. 210; *Wilson v. Herkimer Co. Ins. Co.*, 6 N. Y. 53; *Tebbetts v. Hamilton Ins. Co.*, 1 Allen, 305; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; 1 Phil. on *Ins.* (5th ed.), 413, 414, § 756; 1 Arnould on *Ins.* 578.

⁴⁴ *Throop v. North Am. Ins. Co.* 19 Mich. 423.

⁴⁵ *Redman v. Ætna Ins. Co.*, 49 Wis. 431.

⁴⁶ 3 Saw. 261.

⁴⁷ 66 N. C. 70.

⁴⁸ *Fishler v. California, etc. Co.*, 66 Cal. 178; *Continental L. I. Co. v. Kessler*, 84 Ind. 310. See also *Mut. Ben. L. I. Co. v. Cannon*, 48 Ind. 264; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Penn., etc. Co. v. Wiler*, 100 Ind. 92; *Northwestern, etc. Co. v. Hazlett*, 105 Ind. 212; *Guardian, etc. Co. v. Hogan*, 80 Ill. 35.

⁴⁹ *Union Ins. Co. v. McGookey*, 33 Ohio St. 555.

⁵⁰ *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180; *Crescent Ins. Co. v. Camp*, 64 Tex. 521; *Edgerly v. Farmers' Ins. Co.*, 43 Iowa, 587; *Tayerweather v. Phoenix Ins. Co.*, 7 N. Y. Superior Ct. 25.

⁵¹ *Royal Ins. Co. v. Smith*, 8 Ky. Law Rep. 521.

⁵² *Haskins v. Kentucky, etc. Soc.*, 7 Ky. Law Rep. 371.

facts implying notice as required.⁵³

Of course, there are decisions made under policies where notice, proofs, and certificates are either not essential or have been waived, which hold it unnecessary to aver furnishing of such papers. It has been held unnecessary to aver magistrate's certificate,⁵⁴ or that the magistrate was the one nearest the loss;⁵⁵ or that the notary who certified the loss was not interested;⁵⁶ or to allege due notice and proofs of loss furnished according to the requirements of the statute;⁵⁷ or to allege an award made.⁵⁸ But every case depends upon the wording of the condition in the policy, determining whether it is a condition precedent to be specially averred or not.

3. *Interest—Title—Ownership.*—It is common to insert a precedent condition in a policy as to the insured being either the absolute, unqualified owner of the property covered, free from incumbrance, or stating to the company what his interest or the incumbrance therein is, if it be less than a fee-simple or absolute ownership. In such cases the plaintiff must show himself within the condition. It is, therefore, necessary to aver such an interest as the policy requires.⁵⁹

What is the proper form for averring interest depends on the wording of the condition in the policy. It is best to follow this as closely as practicable. But some of the foregoing cases hold a general averment of interest is enough.⁶⁰ It has been held sufficient to aver interest in one of several

counts.⁶¹ The interest of third persons may be generally averred.⁶² An interest in the life insured must be specifically set up.⁶³ But in one case, while it was held necessary to aver interest in life of assured,⁶⁴ it was not held to be necessary where plaintiff is a third person named as beneficiary of the policy, nor where the policy is set out and shows that plaintiff insured his own life.⁶⁵ An averment that defendant insured plaintiff to the amount of \$3,000 on 10,000 bushels of oats, is a sufficient averment of interest.⁶⁶ But an allegation that defendant insured plaintiff's property, is not a sufficient allegation of interest in the plaintiff.⁶⁷

It has been held not necessary to aver the extent and nature of a trustee's interest;⁶⁸ nor to aver continuance of interest to the time of loss;⁶⁹ nor to aver interest in a ship at the time the policy was made, nor the time when the risk commenced;⁷⁰ nor to allege offer by mortgage, to assign his mortgage interest to insurer by way of subrogation;⁷¹ nor is it necessary to negative a change in the title of the property.⁷²

4. *Occupancy.*—A condition is often inserted in policies, that the premises insured shall be occupied in a certain manner or for certain purposes. This may be, and generally is by the wording of the policy, a warranty.⁷³ Where it is a warranty, compliance or performance must be averred.

5. *Demand—Amount Due.*—A common omission is of a sufficient averment of the maturity of the claim and of the demand made. Ordinarily policies provide for the payment of the money sixty days after proof have been made. It must, therefore, be averred that the sixty days have elapsed and that the money has become due and payable under the policy.⁷⁴

⁵³ *Mutual Ben. Assn. v. Graumann*, 107 Ind. 288.

⁵⁴ *Combs v. Shrewsbury, etc. R. Co.*, 32 N. J. Eq. 512.

⁵⁵ *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Cornell v. Leroy*, 9 Wend. 163; *Catlin v. Springfield, etc. Co.*, 1 Sumn. 434.

⁵⁶ *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164.

⁵⁷ *Conway, etc. Co. v. Sewall*, 54 Me. 352.

⁵⁸ *Thompson v. St. Louis Ins. Co.*, 43 Wis. 459. And see also *Fayerweather v. Phoenix Ins. Co.*, 7 N. Y. Superior Ct. 25; *Schultz v. Merchants' Ins. Co.*, 57 Mo. 331; *East Texas, etc. Co. v. Dyches*, 56 Tex. 565; *Barbaro v. Occidental Grove of Davids*, 4 Mo. App. 429.

⁵⁹ *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Aurora, etc. Co. v. Johnson*, 46 Ind. 815; *Ætna Ins. Co. v. Myers*, 63 Ind. 238; *Hartford, etc. Co. v. Webster*, 69 Ill. 392; *Am. Ins. Co. v. Paddfield*, 73 Ill. 167; *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; *Rose v. Mut. Ben. L. I. Co.*, 23 N. Y. 516; *Fowler v. New York, etc. Co.* 26 N. Y. 422; *Freeman v. Fulton, etc. Co.*, 38 Barb. 247; *Williams v. Ins. Co. of North America*, 9 How. Pr. 365. See also *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Henshaw v. Mutual, etc. Co.*, Blatch. 99.

⁷⁰ See *Ferrer v. Home, etc. Co.*, 47 Cal. 416.

⁶¹ *Crawford v. Hunter*, 8 Term Rep. 13.

⁶² *Godfrey v. Wilson*, 70 Ind. 50.

⁶³ *Elkhart, etc. Assn. v. Houghton*, 98 Ind. 149.

⁶⁴ *Guardian, etc. Co. v. Hogan*, 80 Ill. 35.

⁶⁵ *Massachusetts, etc. Co. v. Kellogg*, 82 Ill. 614.

⁶⁶ *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

⁶⁷ *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

⁶⁸ *Henshaw v. Mutual Safety Co.*, 2 Blatch. 99.

⁶⁹ *Russel v. St. Nicholas Ins. Co.*, 52 How. Pr. 459.

⁷⁰ *Henshaw v. Mutual Safety Co.*, 2 Blatch. 99.

⁷¹ *Ætna Ins. Co. v. Baker*, 71 Ind. 102.

⁷² *Clay, etc. Co. v. Wusterhausen*, 75 Ill. 285.

⁷³ *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; *Illinois, etc. Co. v. Marseilles*, 1 Gilm. 236.

⁷⁴ *Carberry v. German Ins. Co.*, 51 Wis. 606; *Lester v. Piedmont, etc. Co.*, 55 Ga. 475. But see *Excelsior Ins. Co. v. Riddle*, 91 Ind. 94, 96. And see *Western*,

In alleging the amount due, it is enough to aver the amount of the policy, and to say that such amount was due on the policy;⁷⁵ it is unnecessary to allege the cash value of the property.⁷⁶ And even where it is necessary under the policy to allege the cash value of the property, an allegation that plaintiff had an "interest" in the property insured to an amount exceeding the sum named and was the exclusive owner, is not a sufficient averment of the cash value of the property.⁷⁷

Where the allegation was that defendant "was bound by the terms of said policy to pay the plaintiff a proportionate share as hereinafter set forth of said loss," and that at the time of the loss plaintiffs held certain other policies of insurance upon the property destroyed, naming the several companies which issued them, "amounting in the aggregate, including the policy issued by the defendant corporation, to the sum of \$39,500; and the said insurance companies were liable to the plaintiffs under said policies for such portion of the loss sustained as the sum insured by each of said companies bore to the whole amount insured by all of said companies therein, and the defendant corporation was liable and bound to pay the plaintiffs its said proportionate share, to-wit. \$2,250: *Held*, that by "the said insurance companies" was meant all the companies in which insurance had been effected, including defendant, and that the declaration was good so far as the allegation of the amount due was concerned.⁷⁸

6. *Other Insurance — Abandonment — Repair.*—There may or may not be conditions precedent or warranties in the policy concerning other insurance, abandonment, or repair, and upon this will depend the necessity and form of appropriate averments relative to these matters. It has been held unnecessary to aver a request, to indorse other insurance on the policy;⁷⁹ or to negative the existence of other insurance;⁸⁰ or to allege abandonment of vessel or facts showing total loss,⁸¹

etc. *Ins. Co. v. Scheidle*, 18 Neb. 495; *Ætna Ins. Co. v. Spark*, 62 Ga. 187.

⁷⁵ *Revere, etc. Co. v. Chamberlain*, 56 Iowa, 508. See also *Hegard v. California Ins. Co.*, 11 Pac. Rep. 594.

⁷⁶ *Hegard v. California Ins. Co.*, 11 Pac. Rep. 594.

⁷⁷ *Royal Ins. Co. v. Smith*, 8 Ky. Law Rep. 521.

⁷⁸ *Butterworth v. West. Assn. Co.*, 132 Mass. 489.

⁷⁹ *Demill v. Hartford, etc. Co.*, 4 Allen (N. B.) 341.

⁸⁰ *Troy, etc. Co. v. Carpenter*, 4 Wis. 20.

⁸¹ *Snow v. Union Mut. M. I. Co.*, 119 Mass. 592.

or to aver refusal to repair,⁸² or to show insurer's failure to rebuild.⁸³

7. *Limitation.*—Excuse for failing to sue within the time limited by the policy need not be shown.⁸⁴

IV. CURE OF ERRORS IN DECLARATION.—The defendant may cure errors in a declaration by his pleas. Thus, plaintiff declared upon a certificate of insurance signed by insurer's secretary, and countersigned by the agent who accepted the risk, which stipulated that the plaintiffs were "insured according to the tenor and conditions of insurer's printed policies to be binding until a regular policy shall be issued from the principal office," etc. The conditions of a regular policy were not set out in plaintiff's petition, nor were there any averments in it showing an observance of the terms and conditions of a regular policy: *Held*, the court would examine the whole record to determine whether it was sufficient to support the judgment, and that as defendants had for the purpose of proving non-observance set out the conditions of a regular policy the record was good.⁸⁵ Averments in the answer may supply defects in the complaint.⁸⁶ Demurrer to evidence or a verdict may also cure them.⁸⁷ Absence of direct averments as to amount claimed and time of payment is cured by verdict.⁸⁸

The above constitute the principal matters to be observed in declaring on policies of insurance. The main point requisite to correct pleading, is the observance of the distinction between warranties and conditions precedent on the one hand, and representations and conditions subsequent on the other, remembering that the existence of the first and performance must be shown, while the latter may be left to be looked after by defendant and its counsel. ADELBERT HAMILTON.

⁸² *Union Ins. Co. v. McGookey*, 33 Ohio St. 555.

⁸³ *Ætna Ins. Co. v. Phelps*, 27 Ill. 71.

⁸⁴ *Andes Ins. Co. v. Fish*, 71 Ill. 620.

⁸⁵ *Dayton Ins. Co. v. Kelley*, 24 Ohio St. 345.

⁸⁶ *Hegard v. California Ins. Co.*, 11 Pac. Rep. 594.

⁸⁷ *McLean v. Equitable L. A. Co.*, 100 Ind. 127; *Royal Ins. Co. v. Smith*, 8 Ky. Law Rep. 521.

⁸⁸ *Lester v. Piedmont, etc. Co.*, 55 Ga. 475; *Phoenix Ins. Co. v. Perkey*, 92 Ill. 164. See also *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252.

PATENTS FOR INVENTIONS — FRAUD — INFRINGEMENT — REMEDY.

UNITED STATES V. AMERICAN BELL TELEPHONE COMPANY.

United States Supreme Court, November 12, 1888.

Although parties against whom actions are brought for (alleged) infringement of patents for inventions, may set up in bar of such actions the invalidity of the patent, caused by the fraud of the patentee, it is, nevertheless, also competent for the United States to maintain an action to abrogate and cancel a patent on the ground that its issuance was procured by fraud.

Mr. Justice MILLER, delivered the opinion of the court:

This is an appeal from the circuit court of the United States for the District of Massachusetts.

The United States brought its suit in equity in that court against the American Bell Telephone Company, a corporation organized under the laws of the State of Massachusetts, and against Alexander Graham Bell, a resident of the District of Columbia. The action purports to have been instituted by George M. Stearns, the United States district attorney for that district, by the direction of George A. Jenks, the solicitor-general of the United States, acting as its attorney-general in this matter, because the latter officer was under a disability to prosecute this suit.

The object of the bill was to impeach two patents for inventions issued to said Bell, the first dated March 7, 1876, and numbered 174,465, and the second dated January 30, 1877, and numbered 186,787, with a prayer that they be declared void and of no effect, and that they be in all things recalled, repealed and decreed absolutely null; that they be erased and obliterated from the records of the patent office and for other relief.

To this bill the telephone company entered an appearance and filed a demurrer. It is not shown that Bell either appeared or filed any pleading. At the hearing on the demurrer it was sustained by the circuit court, the bill dismissed, and the United States has brought the present appeal to reverse that ruling.

[Omitting two minor grounds of demurrer.]

But the second group of causes of demurrer is perhaps the most important, and the one on which counsel seem to have principally relied, the essence of which is that "no power or authority in law exists, in any person or party, or any court, to bring said suit, nor to entertain the same, nor to give the relief therein prayed, nor any relief thereunder or touching the subject-matter thereof," and "that the complainant has not made or stated a case which calls upon or justifies this court in the exercise of its discretion to permit this bill to be entertained."

It will be observed that this broad assertion admits that a party may practice an intentional fraud upon the officers of the government, who are authorized, and whose duty it is to decide upon his right to a patent, and that he may by means of that fraud perpetrate a grievous wrong

upon the general public, upon the United States and upon its representatives. It admits that by prostituting the forms of law to his service he may obtain an instrument bearing the authority of the government of the United States, entitling him to a monopoly in the use of an invention which he never originated, of a discovery which was made by others, and which, however generally useful or even necessary it may become, is under his absolute and exclusive control, either as to that use or as to the price he may charge for it, during the life of the grant. It assumes that the government, which has thus been imposed upon and deceived, is utterly helpless, that it can take no steps to correct the evil or to redress the fraud. If such a fraud were practiced upon an individual he would have a remedy in any court having jurisdiction to correct frauds and mistakes and to relieve against accident; but it is said that the government of the United States—the representatives of sixty millions of people, acting for them, on their behalf, and under their authority—can have no remedy against a fraud which affects them all, and whose influence may be unlimited.

Though by the constitution of the United States it is declared that "the judicial power shall extend to all cases, in law and in equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and "to controversies to which the United States shall be a party," the argument asserts that the practice of a gross fraud upon the United States, concerning matters of immense pecuniary value, and affecting a very large part of its population, is not a proper question of judicial cognizance. It would be a strange anomaly in a government organized upon a system which rigidly separates the powers to be exercised by its executive, its legislative and its judicial branches, and which in this emphatic language defines the jurisdiction of the judicial department, to hold that in that department there should be no remedy for such a wrong.

As we shall presently see, this court has repeatedly held, after very full argument, and after a due consideration of the proposition here stated, that in regard to patents issued by the government for lands conveyed to individuals or to corporations, the circuit courts of the United States do have jurisdiction to set aside and cancel them for frauds committed by the parties to whom they were issued. This class of cases will be considered further on. It is sufficient to say here that they establish the right of the United States to bring suits in its own courts to be relieved against fraud committed in cases of that class exactly similar to that charge in the present case. And it is also to be observed that in those cases there is no express act of congress authorizing such procedure, a ground of objection which is here urged.

Recurring to the constitution itself as the great source of all power in the United States, whether executive, legislative or judicial, there is a strik-

ing similarity in the language of that instrument conferring the power upon the government under which patents are issued for inventions and patents are issued for lands. It is declared in article 1, section 8, paragraph 8, that "the congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is by virtue of this clause that congress has passed the laws under which the patents of the defendant in this case were issued.

Article 4, section 3, paragraph 2, declares that "the congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It is under this clause that congress has passed laws by which title to public lands is conveyed to individuals, by instruments also called patents.

The power therefore to issue a patent for all invention, and the authority to issue such an instrument for a grant of land, emanate from the same source, and although exercised by different bureaux or officers under the government, are of the same nature, character and validity, and imply in each case the exercise of the power of the government according to the modes regulated by acts of congress.

With regard to the jurisdiction of the circuit court in which this suit was brought, there does not seem to be any objection made by defendants, if such suit could be brought in any court. Indeed, the language of the act of congress on that subject does not admit of any such doubt, for it declares "that the circuit court of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners." 18 U. S. Stat. 470, act of March 3, 1875.

In the present case the United States are plaintiffs, and the bill asserts that the suit is one of a civil nature and of equitable cognizance; and manifestly, if it presents a good cause of action, it arises under the laws and constitution of the United States. It is therefore within the language both of the constitution and of the statute conferring jurisdiction on the circuit courts. An examination of the specific objections made to the present bill will illustrate and enforce this general view. While it cannot successfully be denied that the general powers of a court of equity include the right to annul and set aside contracts or instruments obtained by fraud, to correct mistakes made in them, and to give all other appropriate relief against documents of that character, such as requiring their delivery up, their cancellation or their correction, in order to make them conform

to the intention of the parties, it would seem to require some special reasons why the government of the United States should not be able to avail itself of these powers of a court of equity. Accordingly the defendant objects that the appropriate remedy, if any exists, is in the common law courts, and not in a court of equity, and that in the ancient proceedings of our English ancestors in regard to patents the only remedy for relief against them when they were improvidently issued was by a *scire facias* in the name of the king, or by his express and personal revocation of them.

Charters and patents authenticating grants of personal privileges were in the earlier days of the English government made by the crown. They were supposed to emanate directly from the king, and were not issued under any authority given by acts of parliament, nor were they regulated by any statutes. Being therefore in their origin an exercise of his personal prerogative, the power of revoking them, so far as they could be revoked at all, was in the king, and was exercised by him as a personal privilege. This mode of revoking patents however seems to have fallen into disuse, and the same end was attained by the issue of writs of *scire facias* in the name of the king to show cause why the patents should not be repealed or revoked. These were of course returnable into some court, and it appears to have been the practice to do this in the court of king's bench or in the court of chancery, where the record of the patent always remained in what was called the petty bag office. If the latter mode is to be considered a proceeding in chancery, which under our adoption of the methods and jurisdiction of the high court of chancery in England, would fall within the province of a chancery court in this country, then the precedent for the exercise of this jurisdiction by a court of chancery is clear and undoubted. This however is a question, which if not in relation to this particular class of cases, has in regard to others, concerning the prerogative jurisdiction of the court of chancery in this country, been doubted. But the courts of England seem to have considered that in the matter of repealing or revoking a patent the king may sue in what court he pleases. See *Magdalen College Case*, 11 Coke Rep. 68b and 75a.

The jurisdiction to repeal a patent by a decree of a court of chancery as an exercise of its ordinary powers was sustained in the case of *Attorney-General v. Vernon*, 1 Vernon's Ch. Rep. 277. In that action a bill was brought by the attorney-general against Vernon and others to set aside a patent issued by the crown, on the ground that it was obtained by surprise and by false particulars. It was insisted by the defendant's counsel that there never had been any precedent of this nature to repeal letters patent by an English bill in chancery, but that it was a case of first impression; and they contended that the title under the letters patent was one purely at law, and returnable there; likewise that there was a remedy by *scire facias*. It was also objected that the wor

"fraud," which if any thing must give jurisdiction to the court in the case, was not in the whole bill. Also among other things it was objected that if letters patent should be impeached by an English bill in chancery upon such suggestions and pretensions as these, no patentee could be safe, nor would the king's seal be of any force. To this it was replied on the part of the king, that he may sue in what court he pleases; that the bill charges surprise and false particulars, and that fraud is properly relievable here; that the king ought not to be in a worse condition than a subject; that a nobleman would be relieved of such a fraud put upon him by his servant; and that if the king could not be relieved in this case by an English bill he would be without remedy. Whereupon the lord keeper said: "The question is short, whether there be a fraud or not? If a fraud, then properly relievable here. It is not fit such a matter as this should be stifled upon a plea; and therefore the lord keeper overruled the plea, and denied to save the benefit of it till the hearing, because he would not give any countenance to such a case."

So far as precedent is concerned, this case, which has never been overruled, establishes the doctrine that in a case of fraud in the obtaining of a patent, a court of chancery, by virtue of that fact, has jurisdiction to repeal or revoke it.

The case of *King v. Butler*, 3 Levinz's Rep. 220, which was heard in the house of lord, was one where the king had made a grant of a market by letters patent to Sir Oliver Butler, the defendant. A writ of *scire facias* was brought in the court of chancery to repeal the grant, and the lord chancellor gave judgment that it should be vacated, whereupon the matter was brought by a writ of error to the house of lords, and after argument there the peers requested the opinion of the judges then attending in parliament, who all unanimously agreed that the judgment given in chancery ought to be affirmed, and delivered their opinion accordingly. It was objected that the writ did not lie, because there was a remedy by the common law, to-wit, by assize of nuisance, where the matter should be tried by a jury, and by several judges, and not by only one, as it is in chancery. To which they answered that the king has an undoubted right to repeal a patent wherein he is deceived or his subjects prejudiced. And in none of the cases cited was there any question whether the writ would lie, but only the manner of pursuing it, and other incident matters. It was said that it was not unusual for the king to have his remedy as well as the subject also.

The whole text of the answers of the judges in this case seems to imply that a jury was not necessary, but that the existence of the record in the court of chancery was a sufficient foundation for the proceeding there, though it might be brought in some other court, when the king had declared the patent forfeited, or when there had been office found. The judgment of the court of chancery was therefore affirmed. See on this subject *Queen*

v. Aires, 10 Mod. 354; *Queen v. Eastern*, *Archipelago Co.*, 1 E. & B. 310; *Cumming v. Forrester*, 2 Jac. & Walk. Ch. Rep. 431.

But whatever may have been the course of procedure usual or requisite in the English jurisprudence, to enable the king to repeal, revoke or nullify his own patents, issued under his prerogative right, it can have but little force in limiting or restricting the measures by which the government of the United States shall have a remedy for an imposition upon it or its officers in the procurement or issue of a patent. We have no king in this country; we have here no prerogative right of the crown; and letters patent, whether for inventions or for grants of land, issue not from the president, but from the United States. The president has no prerogative in the matter. He has no right to issue a patent, and though it is the custom for patents for lands to be signed by him, they are of no avail until the proper seal of the government is affixed to them. Indeed, a recent act of congress authorizes the appointment of a clerk for the special purpose of signing the president's name to patents of that character. And so far as patents for inventions are concerned, whatever may have been the case formerly, since the act of July 8, 1870, they are issued without his signature and without his name or his style of office being mentioned in them. The authority for this procedure is embodied in the following language of the Revised Statutes:

"Sec. 4883. All patents shall be issued in the name of the United States of America, under the seal of the patent office, and shall be signed by the secretary of the interior and countersigned by the commissioner of patents, and they shall be recorded, together with the specifications, in the patent office, in books to be kept for that purpose."

This only expresses the necessary effect of the acts of congress. The authority by which the patent issues is that of the United States of America. The seal which is used is the seal of the patent office, and that was created by congressional enactment. It is signed by the secretary of the interior, and the commissioner of patents, who also countersigns it, is an officer of that department. The patent then is not the exercise of any prerogative power or discretion by the president or by any other officer of the government, but it is the result of a course of proceeding quasi judicial in its character, and is not subject to be repealed or revoked by the president, the secretary of the interior or the commissioner of patents when once issued. See *United States v. Schurz*, 102 U. S. 378.

It is not without weight, in considering the jurisdiction of a court of equity in regard to the power to impeach patents, that an appeal is provided from the decision of the commissioner of patents to the Supreme Court of the District of Columbia, and that the Revised Statutes enact as follows:

"Sec. 4915. Whenever a patent on application is refused, either by the commissioner of patents

or by the Supreme Court of the District of Columbia, upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear."

It is then further provided that if the adjudication be in favor of the applicant, it shall authorize the commissioner of patents to issue such patent upon the applicant's filing in the patent office a copy of the adjudication.

These provisions, while they do not in express terms confer upon the courts of equity of the United States the power to annul or vacate a patent, show very clearly the sense of congress that if such power is to be exercised anywhere it should be in the equity jurisdiction of those courts. The only authority competent to set a patent aside, or to annul it, or to correct it, for any reason whatever, is vested in the judicial department of the government, and this can only be effected by proper proceedings taken in the courts of the United States.

This subject has been frequently discussed in this court, and the principles necessary to its decision have been well established. The case of *United States v. Stone*, 2 Wall. 525, was a bill in chancery brought by the United States in the circuit court for the district of Kansas, to set aside a patent issued by the government to Stone, the defendant. The question of the jurisdiction of the court to entertain such a bill, which was denied by counsel for Stone, was discussed at considerable length in their brief, and in the argument of counsel for the United States the language of Chief Justice Kent in *Jackson v. Lawton*, 10 Johns. 24, was cited to the following effect: "The English practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us. In addition to the remedy by *scire facias*, etc., there is another by bill in the equity side of the court of chancery. Such a bill was sustained in the case of *Attorney-General v. Vernon*, 1 Vernon, 277, to set aside letters patent obtained by fraud, and they were set aside by a decree."

The extract from the brief of counsel in the *Stone* Case is cited to show that the attention of the court was turned to this question, and the language of the opinion, as delivered by Mr. Justice Grier, expresses in sententious terms the result arrived at by this court in regard to this entire question. It is as follows: "A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy. Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are some-

times issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court. It is contended here by the counsel of the United States that the land for which a patent was granted to the appellant was reserved from sale for the use of the government, and consequently that the patent is void. And although no fraud is charged in the bill, we have no doubt that such a proceeding in chancery is the proper remedy, and that if the allegations of the bill are supported, that the decree of the court below cancelling the patent should be affirmed."

We cite thus fully from the case because it is the first one in which the questions now before us were fully considered and clearly decided. In the previous case of *United States v. Hughes*, 11 How. 552, the same question came before the court on demurrer. The court held that the demurrer must be overruled, saying that it cannot "be conceived why the government should stand on a different footing from any other proprietor." The case afterward came again before this court, and is reported in 4 Wall. 232, later than the *Stone* Case. The court then said: "It was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of congress."

In the case of *Moore v. Robbins*, 96 U. S. 530, this court said, in a suit between private citizens, and speaking of the issue of patents by the government: "If fraud, mistake, error or wrong has been done, the courts of justice presents the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or conveyance of the land as to individuals; and if the government is the party injured this is the proper course."

In *Moffat v. United States*, 112 U. S. 24, a decree of the circuit court setting aside a patent as having been obtained by fraud was affirmed; and the same doctrine was reasserted in *United States v. Minor*, 114 U. S. 233. Still later, in the case of *Colorado Coal and Iron Co. v. United States*, 123 U. S. 307, the right of the court, by a proceeding in equity at the instance of the attorney-general and in the name of the United States, to set aside a patent for land, was fully recognized, and the language used in the case of *United States v. Minor*, *supra*, was cited to the following effect: "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite

too far to say that it cannot be assailed by a proceeding in equity and set aside as void if the fraud is proved and there are no innocent holders for value."

The whole question was reviewed at great length by this court at its last term in the case of *United States v. San Jacinto Tin Co.*, 125 U. S. 273, when all the cases above mentioned, and others, were cited and commented upon. The matter is thus summed up in the opinion of the court: "But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, and the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was careful to say that the case in which the instrumentality of the court cannot thus be used are those where the United States has no pecuniary interest in the remedy sought, and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual. The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud, and it would be difficult to find language more aptly used to include this in the class of cases which are not excluded from the jurisdiction of the court by want of interest in the government of the United States.

It is insisted that these decisions have reference exclusively to patents for land, and that they are

not applicable to patents for inventions and discoveries. The argument very largely urged for that view is the one just stated, that in the cases which had reference to patents for land the pecuniary interest of the United States was the foundation of the jurisdiction. This, however, is repelled by the language just cited, and by the fact that in more than one of the cases, notably in *United States v. Hughes*, *supra*, the right of the government to sustain the suit was based upon its legal or moral obligation to give a good title to another party who had a prior and a better claim to the land, but whose right was obstructed by the patent issued by the United States.

The case of *Mowry v. Whitney*, 14 Wall. 434, was a bill in chancery brought by Mowry in the circuit court for the eastern district of Pennsylvania against Whitney, charging that Whitney's patent for a mode of annealing and cooling cast-iron car wheels, and an extension of it made by the patent office, had been procured by fraud and false swearing, and praying that it and the extension may be declared void and of no effect. To this bill Whitney demurred. The demurrer was sustained by the court below, and from the decree dismissing the bill Mowry took an appeal to this court, where it was said "that the complainant could not in his own right sustain such a suit." In giving its reasons for this, the court said: "We are of opinion that no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government had issued to an individual, except in the cases provided for in section 16 of the act of July 4, 1836. The ancient mode of doing this in the English courts was by *scire facias*, and three classes of cases are laid down in which this may be done." One of these is: "When the king has granted a thing by false suggestion, he may by *scire facias* repeal his own grant." Citing 4 Inst. 88; Dyer, 197-8, and 276, 279. * * * The *scire facias* to repeal a patent was brought in chancery where the patent was of record. And though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its modes of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government. This is settled, so far as this court is concerned, by the case of *United States v. Stone*, 2 Wall. 525." The opinion then refers to *Attorney-General v. Vernon*, and *Jackson v. Lawton*, already cited.

It is said that this language of the court is *obiter*, and does not decide directly that a suit can be brought in chancery to cancel or annul a patent issued by the United States government for an invention. It is true that what the court was called upon to decide was that a private citizen could not bring such suit, but evidently the reason given for it must be held to establish the principle

upon which the court acted, and that reason was that the private citizen could not do it because the right lay with the government. The duty and the right of the government to bring an action which would end in the destruction of the patent, and which would thus protect everybody against the asserted monopoly of it, was the reason why the private citizen could not for himself bring such a suit.

Another reason given by the court is that the fraud, if one exists, must have been practiced on the government, which, as the party injured, is the appropriate party to seek relief, and that a suit by an individual could only be conclusive in result as between the patentee and the party suing, and the patent would remain a valid instrument as to all others; while if the action was brought by the government, and a decree had to annul the patent, this would be conclusive in all suits founded on the patent. Other reasons were given showing that the United States was the appropriate party to bring such a suit, and that the circuit court of the United States, sitting in equity, was the proper tribunal in which to bring it; all tending to show that the reason why a private citizen could not have such relief was that it belonged to the government.

The United States by issuing the patents which are here sought to be annulled, has taken from the public rights of immense value and bestowed them upon the patentee. In this respect the government and its officers are acting as the agents of the people, and have, under the authority of law vested in them, taken from the people this valuable privilege and conferred it as an exclusive right upon the patentee. This is property, property of a value so large that nobody has been able to estimate it. In a former argument in this court it was said to be worth more than \$25,000,000. This has been taken from the people, from the public, and made the private property of the patentee by the action of one of the departments of the government acting under the forms of law, but deceived and misled, as the bill alleges, by the patentee. That the government, authorized both by the constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it needs no argument; and we think we have demonstrated that the proper remedy is the one adopted by the government in this case.

But conceding that in regard to patents for land, and in reference to other transactions in which the government is a party, the courts of equity have jurisdiction to correct mistakes, to give relief for frauds, and to cancel contracts and other important instruments, it is said that in reference to patents for inventions and discoveries the acts of congress have provided another remedy for frauds committed in obtaining them, and for the very class of frauds set up in this bill. Counsel therefore contend that this supersedes all others. This remedy is found in the following provision of the Revised Statutes:

"Sec. 4920. In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

"First. That for the purpose of deceiving the public the description and specification filed by the patentee in the patent office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or

"Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or

"Third. That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or

"Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or

"Fifth. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public."

Prior to the year 1836, from the earliest enactments of patent law, certain provisions had been incorporated in that law authorizing a *scire facias* to issue to declare a patent void for want of invention by the patentee, and other matters, which though instituted by a private individual, was under the control of the official attorneys of the government. This was repealed by the act of 1836, which may be said to be the first real and successful organization of the patent office and the system of patent law in the United States. The law on this subject was revised by the act of congress of July 8, 1870 (16 U. S. Stats. 198), and the Revised Statutes of the United States, from which section 4920 is quoted, contain this language applicable to this subject.

The statute of 1836 repealed the provision for a *scire facias*. It is now argued that the repeal of this provision, together with the enactment of the provision of section 4920, show that the only remedy for the improvident issuing of a patent is to be found in the language of that section. These clauses, while they do not in any general form declare that a person sued for an infringement of a patent may set up as a defense that it was procured by fraud or deceit, do in effect specify various acts of fraud which the infringer may rely upon as a defense to a suit against him founded upon that instrument. It is therefore urged that because each individual affected by the monopoly of the patent is at liberty, when he is sued for using it without license or authority, to set up these defenses, the remedy which the United States has under the principles we have attempted to sustain, is superseded by that fact. But a consideration of the nature and effect of these different modes of proceeding in regard to the patent will show that no such purpose can be inferred from these clauses of the act of congress.

In the first place, the right given to the infringer to make this defense is a right given to him personally, and to him alone. and the effect of a successful defense of this character by one infringer is simply to establish the fact that as between him and the patentee no right of action exists for the reasons set up in such defense. But the patentee is not prevented by any such decision from suing a hundred other infringers, if so many there be, and putting each of them to an expensive defense, in which they all, or some of them, may be defeated and compelled to pay, because they are not in possession of the evidence on which the other infringer succeeded in establishing his defense. On the other hand, the suit of the government, if successful, declares the patent void, sets it aside as of no force, vacates it or recalls it, and puts an end to all suits which the patentee can bring against anybody. It opens to the entire world the use of the invention or discovery in regard to which the patentee has asserted a monopoly.

This broad and conclusive effect of a decree of the court, in a suit of that character brought by the United States is so widely different, so much more beneficial, and is pursued under circumstances so much more likely to secure complete justice, than any defense which can be made by and individual infringer, that it is impossible to suppose that congress, in granting this right to the individual intended to supersede or take away the more enlarged remedy of the government. Some of these specifications of grounds of defense are not such as would ordinarily be sufficient in a court of equity to set aside the patent, as "that it had been in public use or on sale in this country for more than two years," or "that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof." It is unnecessary to decide whether these grounds now would be sufficient cause for setting aside a patent in a suit by the United States, but they are not of that general character which would give a court of equity jurisdiction to do that, except as it may be said they are now parts of the general system of the patent law.

A question almost identical with this was made in the house of peers in the case of *King v. Butler*, 3 Levinz, 220, as to whether the judgment obtained by the king in the court of chancery repealed the grant to Butler. It was answered by the judges to some of the objections that "it was not unusual for the king to have his remedy, as well as the subject also, as for batteries, trespasses, etc., the king has a remedy by information indictment, and the party grieved by his action.

The argument need not be further extended. There is nothing in these provisions expressing an intention of limiting the power of the government of the United States to get rid of a patent obtained from it by fraud and deceit. And although the legislature may have given to private individuals a more limited form of relief, by way of defense to an action by the patentee, we think the argument that this was intended to supersede the

affirmative relief to which the United States is entitled, to obtain the cancellation or vacation of an instrument obtained from it by fraud, an instrument which affect the whole public, whose protection from such a fraud is eminently the duty of the United States, is not sound.

The decree of the circuit court dismissing the bill of plaintiff is reversed, and the case remanded to that court, with directions to overrule the demurrer, with leave to defendants to plead or answer, or both, within a time to be fixed by that court.

Mr. Justice Gray was not present at the argument, and took no part in the decision of this case.

NOTE.—The principal case is a very important one, inasmuch as it decides a principle never having before been passed upon by the Supreme Court of the United States. It is also important from the fact that the question involved is very fully and elaborately discussed in clear and terse language by Mr. Justice Miller, who delivered the opinion of the court.

The broad position was taken by the defendant telephone company that the attorney-general had no power to bring, nor the federal courts power to entertain a bill to cancel a patent for invention under *any circumstances*; that the right to grant or cancel belongs exclusively to congress. This position was sought to be established by lengthy arguments and briefs filed, both in the supreme court and in the United States circuit court for the District of Massachusetts, where the case originated. A very full abstract of the briefs submitted to the latter tribunal will be found in 32 Fed. Rep. 592-597. The circuit court, while admitting that the question was not free from doubt, held, upon the decision of Judge Shepley in *Attorney-General v. Chemical Works*¹ that, in the absence of express statutory enactment, the government possessed no power to maintain the suit.²

The rule had been established by the supreme court in *Mowry v. Whitney*³ that an individual could not maintain a suit to repeal or otherwise set aside a patent for fraud or any other ground, except that of an interference.⁴

So, as the law stood previous to the decision of the principal case, where the frauds were ingenious enough to keep clear of all known defenses to infringement suits, the wrongs which they caused were without a remedy, unless it be conceded that the government could repeal a patent which its officers had been fraudulently induced to grant or reissue. Hence, it was impossible to know, previous to this decision, whether any court had jurisdiction on any ground of fraud or mistake to repeal letter patents for inventions, although the rule had been established that equity had jurisdiction to repeal letter patents for lands, obtained by fraud or mistake, whenever the United States filed a bill stating the facts and praying that the letters may be annulled.⁵ And the principal

¹ 2 Ban. & Ard. 296; 32 Fed. Rep. 606.

² 32 Fed. Rep. 590.

³ 14 Wall. 439.

⁴ See Walker on Patent, § 321.

⁵ *United States v. Stone*, 2 Wall. 535; *Moore v. Robbins*, 98 U. S. 536; *Hughes v. United States*, 4 Wall. 233; *United States v. Hughes*, 11 How. 552; *Field v. Seaburg*, 19 How. 324; *United States v. Throckmorton*, 98 U. S. 61; *United States v. Minor*, 114 U. S. 223; *Mahn v. Harwood*, 113 U. S. 355; *Doughty v. West*, 6 Blatchf. 433; 1 Opinion Atty.-Gen. 458; 4 Opinion Atty.-Gen. 120.

case declares expressly that this doctrine is equally applicable to patents for inventions.⁶

Upon principle and authority it would seem that every government should possess an inherent right to revoke a grant made by it which had been produced by fraud, or which had been made through inadvertence or mistake,⁷ and that such power should exist in the attorney-general to bring an action to redress a public wrong.⁸

A patent for an invention or improvement is a contract between the government and the patentee. The consideration on the one hand is the invention or discovery of the patentee, and on the other, the exclusive right to use it for a specified time. And if there is a failure of consideration it would seem that the courts should permit the contract to be avoided by the party wronged, as in contract between private individuals under like circumstances. The inventor only acquires the granted rights by complying with the law, as the individual acquires rights under a contract with a private person. And if the latter has by fraud or deceit imposed upon the other party, equity will unhesitatingly grant relief to the party defrauded. Indeed, the general power of a court of equity includes the right to annul and set aside contracts or instruments obtained by fraud, to correct mistakes in them, and to give all other appropriate relief against documents, etc., of this character. Why should not the rule apply to the government where it has been wronged? The rule has been long established that a public or private corporation possesses inherent power to bring actions to enforce its rights and redress its wrongs.⁹

The defendant in the principal case denied that the government possessed this power, but insisted, if any remedy existed, in harmony with the old English practice, that the writ of *scire facias* should be invoked. But the early methods of conferring patent-rights in England differ radically from the methods established in our country, as is clearly pointed out by Mr. Justice Miller. In the early days of England, charters and patents were not authorized by act of parliament, nor regulated by statute, but were conferred directly by the crown, in exercise of the king's prerogative, and they having emanated from this source, the power of revoking was exercised as a personal privilege. This mode afterwards fell into disuse, but the same end was attained by the writ of *scire facias*, in the name of the king, and the practice was to return such writs to the court of the king's bench and the court of chancery, although the suit might be brought in any court.¹⁰ And in *Attorney-General v. Vernon*,¹¹ the jurisdiction to repeal a patent by decree of chancery on the ground of fraud was sustained. But in this country the president is not authorized to issue and revoke patents. The whole matter is regulated by law of congress and the patents are issued by the government. The government

is a party to the contract, and its right to sue is based on the same general principles as would authorize a private individual to apply to a court of chancery for relief against instruments obtained from him by fraud or deceit.

Mr. Walker, in his work upon Patents, assumed that such jurisdiction to annul, etc., under like circumstances, in patents for inventions, the same as in patents to lands, did inhere "in some class of courts," and outlined its character, based upon adjudications which he declared to be of undoubted authority, as follows: The bill for repeal must be filed by the United States;¹² acting through the United States district attorney of the district wherein it is filed;¹³ and it must be filed in the circuit court of the United States for that district;¹⁴ and be filed before the expiration of the patent which it seeks to repeal.¹⁵ No citizen has any power to compel the United States or the district attorney to file such a writ, or to control its prosecution after it is filed.¹⁶ E. M.

¹² *Mowry v. Whitney*, 14 Wall. 440.

¹³ *Attorney-Gen. v. Chemical Works*, 2 Ban. & Ard. 308.

¹⁴ *Rev. Stat. U. S. § 629*, p. 9.

¹⁵ *Bourne v. Goodyear*, 9 Wall. 811.

¹⁶ *New York & Baltimore Coffee P. Co. v. New York Polishing Co.*, 9 Fed. Rep. 580; *Walker on Patents*, § 332.

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⁶ See *United States v. Gunning*, 18 Fed. Rep. 511; *Rubber Co. v. Goodyear*, 9 Wall. 79.

⁷ *Attorney-General v. Vernon*, 1 Vern. 276; *King v. Butler*, 3 Lev. 220; *Queen v. Aires*, 10 Mod. 354.

⁸ *Soul Proprietary v. Jennings*, 1 Har. & McH. 92; *Attorney-General v. Railway Co.*, 35 Wis. 425; *Attorney-General v. Academy*, 52 Wis. 469.

⁹ 1 Dillon on Mun. Corp. § 81; Ang. & Ames on Corp. §§ 69, 370; Story on Const. § 1674; Cooley Const. Limit. 15; Spears Fed. Juris. 101; Dugan v. United States, 3 Wheat. 181; *Delafield v. Illinois*, 2 Hill, 162; *Indiana v. Woram*, 6 Hill, 33; *United States v. Bank*, 15 Pet. 401; *Cotton v. United States*, 11 How. 231.

¹⁰ *Magdalen College Case*, 11 Coke Rep. 63, 75a.

¹¹ 1 *Vernon's Ch. Rep.* 277.

1. ABATEMENT AND REVIVAL — Marriage — Contract — Cancellation. — The right of action to cancel a marriage contract, which, if genuine, and followed by consummation, would create rights in the property of the alleged husband, survives to his executors or admin-

istrators.—*Sharon v. Terry*, U. S. C. C. (Cal.), Sept. 8, 1888; 86 Fed. Rep. 337.

2. ADMIRALTY—Practice—Interest—Appeal.—Where both parties appeal from the decision of the district court apportioning damages in a collision case, the circuit court on affirming the decree of the district court will not allow interest thereon.—*Boown v. The C. P. Raymond*, U. S. C. C. (N. Y.) Dec. 9, 1887; 86 Fed. Rep. 336.

3. ADMIRALTY—Proceeding in Personam Attachment.—Rule 2, of the admiralty rules of practice, authorizing the arrest of the person of the defendant on *menes* process, and, if he cannot be found, for an attachment of his goods and chattels, does not authorize an attachment in Alabama, where imprisonment for debt has been abolished.—*Chiesa v. Conover*, U. S. D. C. (Ala.), Sept. 21, 1888; 86 Fed. Rep. 334.

4. APPEAL—Assigning Errors.—A general assignment in the motion for a new trial, that the court erred in giving each of the instructions, is too general, and will not be considered on appeal.—*Russell v. Rosenbaum*, S. C. Neb., Nov. 8, 1888; 40 N. W. Rep. 287.

5. APPEAL—Assignment of Errors—Sufficiency.—An objection, that the verdict is excessive, cannot be raised by an assignment of error in the words: "The court erred in overruling the defendant's motion for a new trial.—*Evans v. Delk*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 650.

6. APPEAL—Certificate of Bond Filed.—Under California law, a certificate simply stating that the clerk had compared the transcript with the papers on file, and it was correct, is fatally defective on appeal, though the undertaking is embodied on the transcript.—*San Francisco, etc. R. v. Anderson*, S. C. Cal., Oct. 27, 1888; 19 Pac. Rep. 517.

7. APPEAL—Dower—Final Order.—An order approving the report of commissioners appointed to apportion dower is not a judgment, from which an appeal is allowed, under Missouri law.—*Rannels v. Washington University*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 569.

8. APPEAL—Former Ruling—Stare Decisis.—A previous ruling by the appellate court upon a point distinctly made, in the case in which it made is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves.—*Chicago, etc. R. v. Hull*, S. C. Neb., Nov. 7, 1888; 40 N. W. Rep. 280.

9. APPEAL—New Trial—Bill of Exceptions.—Where a new trial is sought upon a petition filed after the term at which the judgment was rendered, the evidence on the trial, as well as the newly-discovered evidence, must be set out in a bill of exceptions.—*Omaha, etc. R. v. O'Donnell*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 298.

10. APPEAL—Nonsuit—Review.—A judgment of a nonsuit properly rendered will not be disturbed on appeal.—*Richard v. Bergeron*, S. C. La., July Term, 1888; 5 South. Rep. 15.

11. APPEAL—Order—Motion.—The denial of motions on behalf of defendants to strike out portions of an amended replication and to remove the answer of a defendant from the files, does not authorize an appeal.—*Lane v. Richardson*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 710.

12. APPEAL—Order—Motion to Vacate.—Upon an appeal from a judgment, an order denying a motion to vacate the judgment cannot be reviewed.—*Jenness v. Bowen*, S. C. Cal., Oct. 30, 1888; 19 Pac. Rep. 522.

13. APPEAL—Question—Reserved.—Construction of Indiana statutes relative to the reservation of a question of law of adjudication by the supreme court. Circumstances stated under which it was held that the questions reserved were questions of fact as well as of law.—*Woodward v. Baker*, S. C. Ind., Nov. 17, 1888; 18 N. E. Rep. 524.

14. APPEAL—Review—Decision on Appeal.—A decision of the supreme court, rendered after full argument and affirmed on rehearing, will not be reviewed, in the absence of fraud, on the sole ground of a false statement of a material fact found by a referee, and not

excepted to, but known to both parties at the hearing.—*Farrar v. Staton*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 753.

15. APPEAL—Review—Instructions.—Although the issue submitted to the jury by the court is very general in its bearings upon the pleadings and scarcely a proper one, yet, where neither party objects to it, it must be taken as admitted by consent.—*Chemical Co. v. Johnson*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 770.

16. APPEAL—Weight of Evidence.—In an action on a note where there was some evidence, without objection, that a payment was made, which would take it out of the statute of limitations, and no instructions were asked in regard to it, a verdict for plaintiff cannot be set aside as against the weight of evidence.—*Sugg v. Watson*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 709.

17. APPEAL—Weight of Evidence.—Where there is evidence to support a verdict, it will not be disturbed where there is nothing to show that it was the result of partiality, passion or prejudice.—*Ogleby v. Corby*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 684.

18. ARBITRATION AND AWARD—Appeal—Practice—Sheriff.—Where a sheriff is forbidden to become security on recognizances taken in the court it is error to dismiss an appeal from an award in which the sheriff is surety. The proper practice is to require the party to perfect his bail and on his failure to do so to dismiss the appeal.—*Kerr v. Martin*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 860.

19. ARBITRATION AND AWARD—Submission—Validity.—Where parties execute an agreement to submit a controversy to arbitration, and it is clear that a statutory arbitration was intended, but it is not valid by failure to comply with some essential requirement of the statute, it cannot operate as a common law submission.—*Holdridge v. Stowell*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 259.

20. ARREST—Civil Action—Money Collected.—Under Code N. C. § 291 an affidavit, alleging that defendant was the agent of plaintiff, and that as such he collected money, which he fraudulently and unlawfully converted to his own use, with intent to defraud and cheat the plaintiff, warrants an order of arrest, though defendant resides in another State, and though the fraud was committed in another State.—*Powers v. Davenport*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 747.

21. ASSAULT AND BATTERY—Provocation—Evidence.—In an action for assault and battery, evidence that three hours before the assault plaintiff insulted defendant's wife is inadmissible as matter of provocation.—*Dupee v. Lentine*, S. S. C. Mass., Nov. 15, 1888; 18 N. E. Rep. 465.

22. ASSIGNMENT—Creditors—Reconveyance—Jurisdiction—Res adjudicata—Accounting.—It is within the jurisdiction of the probate court to order reconveyance to the assignor, upon his request, that of the assignee and the creditors to terminate the trust. Circumstances stated under which the sureties of the assignee who has conveyed to the assignor the balance left in his hands will be held liable therefor.—*Garver v. Lisinger*, S. C. Ohio, Oct. 16, 1888; 18 N. E. Rep. 491.

23. ATTACHMENT—Error in Writ—Second Levy.—That an attaching creditor, on discovering a clerical inaccuracy in his writ rendering it invalid, levied a second suit on the same goods, does not render the suing of the first writ wrongful, or destroy the basis for the second writ.—*Baines v. Ullman*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 543.

24. ATTORNEY—Judgment—Lien.—Where a judgment has been collected, and the attorneys who collected it and have a lien on it, have notified the sheriff of their lien, he may retain the amount of the lien out of the money so collected, when the money is demanded by an assignee of the judgment.—*Gill v. Truelsen*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 254.

25. ATTORNEY—Lien—Embezzlement.—An attorney at law has a lien for a general balance of compensa-

tion upon money in his hands belonging to his client, and until such lien is discharged he is not liable to a prosecution for embezzlement of such money. — *Van Etten v. State*, S. C. Neb., Nov. 8, 1888; 40 N. W. Rep. 289.

26. BAIL—Right to—Homicide.—Deceased was shot from ambush and killed while being taken to jail. In his dying declaration he said he recognized defendants by the flash of their guns; there was evidence of previous ill-feeling and threats between them and deceased. The officer in charge of deceased saw no one near the place from which the shots were fired, and but the footprints of one person could be found: *Held*, on *habeas corpus* that they were entitled to bail. — *In re Smith et al.*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 359.

27. BANK—Paying Forged Check.—A forged B's name to a note and mortgage, and procured a loan thereon, which was paid by check in favor of B. B's indorsement was forged to the note and A added his indorsement thereto: *Held*, that the bank was not protected by payment of the check. — *Atlanta N. Bank v. Burke*, S. C. Ga., Oct. 8, 1888; 7 S. E. Rep. 738.

28. BANKS AND BANKING—National Bank—Depositions—Evidence—Declarations—Review.—A national bank can recover from a debtor a loan exceeding one-tenth of its paid up capital, although an act of congress prohibits such banks from making such loans to a single person of so large an amount. Rulings on the subject of depositions, the time of filing them, the admissibility in evidence of the admissions and declarations of the defendant, and on review. — *Corcoran v. Batchelder*, S. J. C. Mass., Oct. 22, 1888; 18 N. E. Rep. 420.

29. BANKRUPTCY—Title to Property—Presumption.—Where the record in a bankruptcy case is silent as to the execution of an instrument of assignment of the bankrupt's estate, but shows that the bankrupt was subsequently discharged from his debts, it will be presumed that the instrument of assignment was executed. — *Hale v. Christy*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 295.

30. BASTARDY—Proceedings for Support—Laches.—The fact that a prosecution under the bastardy act does not take place for more than four years after the birth of the child will not bar a recovery, when it clearly appears that the defendant is the putative father, that the mother from the first insisted that he was the father, and asked him to support the child, the parties in the mean time being on amicable terms.—*Denham v. Watson*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 308.

31. BILLS AND NOTES—Presentment for Payment—Excuse.—A, residing in Wisconsin, made his note in Minnesota to B, residing there, no place of payment being fixed. B indorsed the note to C, who resided in Minnesota, and knew that A resided in Wisconsin. Before the note fell due A removed to the city where C resided, but C was not aware of it: *Held*, that this excused the demand of payment so as to charge the indorser. — *Salisbury v. Bartleson*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 265.

32. BONDS—Forged Signatures—Sureties.—When the name of one or more obligors in a bond has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the obligee accepted the instrument without notice of a forgery. — *Lombard v. Mayberry*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 271.

33. BOUNDARIES—Processioning—Report.—When the report of the processioner and commissioners falls to state the dispute as to the boundaries, does not show any of the facts attending the survey nor the circumstances determining the conclusion at which they aimed, it is defective, under North Carolina law.—*Euliss v. McAdams*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 725.

34. BRIDGES—Repairs—Mandamus.—Mandamus will not issue to a commissioner of highways, under Michigan laws, to repair a bridge, when he answers that in his opinion it will not cost more than \$1,000, though affidavits accompanying the petition state that the cost

will be less than that sum. — *Travis v. Skinner*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 234.

35. CARRIERS—Limiting Liability—Damages.—A railroad company cannot by contract with a passenger, limit or exempt itself from liability for injuries resulting from its own negligence or the negligence of its servants. — *Mo. Pac. Ry. Co. v. Ivey*, S. C. Tex., Oct. 18, 1888; 9 S. W. Rep. 346.

36. CARRIERS—Passenger—Injury—Amendment—Assignment of Error—Verdict.—Circumstances stated under which it was held that, in an action against a carrier by a passenger for injuries suffered by a collision, the judgment must be for the defendant, because the statements of the special verdict were irreconcilable. Ruling as to amendment of complaint, unless counsel in argument on appeal insists upon an assignment of error, it will be held to be waived. — *Grand Rapids, etc. Co. v. Ellison*, S. C. Ind., Nov. 14, 1888; 18 N. E. Rep. 507.

37. CARRIERS—Passengers—Negligence—Action.—Where a passenger is killed by the collision of trains of different companies, an action may be brought jointly against both companies, whose concurrent negligence produced the accident. The negligence of the carrier, on whose train he was, is not imputable to him. — *Flaherty v. Northern P. R. R.*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 160.

38. CHINESE—Exclusion Act of 1888—Chinese Seamen.—A Chinese laborer, who ships on an American vessel at an American port for a round voyage, and who does not land at any foreign port, but remains on board until the voyage is completed, does not depart from the United States, within the meaning of the exclusion act of Oct. 1, 1888.—*In re Jack Len et al.*, U. S. S. O. (Cal.), Oct. 24, 1888; 36 Fed. Rep. 441.

39. CHINESE—Exclusion Act of 1888—Construction.—The Chinese exclusion act, approved Oct. 1, 1888, took effect from its passage, and it applies to all Chinese laborers who had departed from the United States, and had not in fact returned and arrived in the United States before the passage of the act. — *In re Chae Chan Ping*, U. S. S. O. (Cal.), Oct. 15, 1888; 36 Fed. Rep. 431.

40. CHINESE—Exclusion Act of 1888—Departure.—Chinese subjects purchasing through tickets and embarking in an American vessel, from an American port to another, who do not leave the vessel when she touches a foreign port, have not departed from the United States, within the meaning of the exclusion act of 1888. — *In re Tong Wah Sick*, U. S. S. O. (Cal.), Oct. 7, 1888; 36 Fed. Rep. 440.

41. COLLISION—Sailer and Steamer—Tow.—A propeller towing five barges on Lake Huron met a schooner coming in an opposite direction, the latter tried to cut across the tow after having passed, at a safe distance: *Held*, that the schooner was solely at fault. — *The Page and Missouri*, U. S. D. C. (Mich.), Jan. 18, 1888; 36 Fed. Rep. 329.

42. COMMISSIONS—Real Estate Agents.—The broker is entitled to his commissions when he has procured a purchaser who is able, willing, and ready to complete the purchase upon terms mutually stipulated between the parties.—*Burke v. Cogswell*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 251.

43. CONFLICT OF LAWS—Death—Damages.—Where a man's death, caused by the wrongful act of another, occurs in Arkansas, his widow cannot remove and dismiss an administration on his estate in that State, and sue in Texas for damages for his death, the laws of Arkansas and Texas being dissimilar on that subject.—*St. Louis, etc. R. R. v. McCormick*, S. C. Tex., Nov. 2, 1888; 9 S. W. Rep. 540.

44. CONTEMPT—Punishment—Imprisonment—Remission.—Defendant and his wife, during the reading of an opinion of the court in a proceeding to which they were parties, used profane, opprobrious and threatening language toward the court and officer, and violently resisted the latter in carrying out the orders of the court; defendant was sentenced to six months' imprisonment for contempt, and on a petition for re-

mission of his punishment the court held that his conduct was an indignity and insult to the power and authority of the government, and the remission was refused.—*In re Terry*, U. S. C. O. (Cal.), Sept. 17, 1888; 36 Fed. Rep. 419.

45. CONTRACT—Construction.—Where a purchaser of hotel furniture, etc., agreed to pay the debts of the seller connected with the hotel to the amount of about \$23,500, he is bound to pay all those debts although they exceed that amount, and he had notice that the exact amount was not known.—*Delph v. Bartholomay, etc. Co.*, S. C. Penn., Oct. 26, 1888; 15 Atl. Rep. 871.

46. CONTRACT—Construction.—Circumstances stated under which it was held to be error for the court to submit to the jury the construction of a written instrument, in which was embodied the terms of a contract for work.—*Spence v. Board of Commissioners*, S. C. Ind., Nov. 15, 1888; 18 N. E. Rep. 513.

47. CONTRACT—Construction—Conversations.—Evidence of a conversation between the parties, as to how the work done under a written contract should be measured, is admissible, when the terms of the written contract are uncertain.—*Eats v. Bedford*, S. C. Cal., Nov. 1, 1888; 19 Pac. Rep. 523.

48. CONTRACTS—Description of Land.—A description of land in an agreement to convey as five acres, lot 3, section 25, etc., there being nothing to show that five acres are intended, is not a good description, and the defect cannot be supplied by parol.—*Nippolt v. Kammon*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 266.

49. CONTRACT—Implied—Hiring.—A was told by a railroad's civil engineer to look after the freight and about the station till the company discharged him. He did so. After an agent was appointed for the station, he told A he would write to the company and have his name put on the pay roll. A continued to work there: Held, that no cause of action was shown.—*Willis v. Toledo, etc. R. R.*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 265.

50. CONSTITUTIONAL LAW—Bills of Attainder—Banishment—Chinese.—A legislative act which undertakes to inflict the punishment of banishment or exile from the United States, on a citizen thereof, for any cause or no cause, or because of his race or color, is a bill of attainder within the prohibition of the constitution, and therefore void.—*In re Young Sing Hee*, U. S. C. O. (Oreg.), Oct. 10, 1888; 36 Fed. Rep. 437.

51. CONSTITUTIONAL LAW—Obligation of Contract.—The act of 1886, providing for the election of directors of turnpike companies in which the State is interested, by the other stockholders with the approval of the commissioners of the sinking fund, being merely a waiver of the State's right, the resumption of the right under the act of 1888 does not impair the obligation of a contract.—*Cassell v. Lexington, etc. Co.*, Ky. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 502.

52. COPYRIGHT—Exclusiveness—Book Construction.—The grant of an "exclusive right to take orders for and sell" a book within a certain territory will not be construed as a covenant, that no other person shall sell the book in competition with the grantee, but only as a covenant that this shall not be done with the consent or concurrence of the grantor.—*Webster v. Ellsworth*, U. S. C. O. (Mich.), Feb. 21, 1888; 36 Fed. Rep. 317.

53. CORPORATIONS—Actions—Venue.—Corporations must be sued at their domicile for damages arising from the passive breach of their obligations, such as negligence and non-feasance.—*Caldwell v. Vicksburg, etc. R. R.*, S. C. La., Oct. 9, 1888; 5 South. Rep. 17.

54. CORPORATIONS—Consideration—Mortgages—Priority.—A mortgage of corporate property, to be thereafter acquired, takes effect as a valid lien immediately when the property is acquired by the mortgagor, and that, as between successive mortgages of after acquired property, priority of lien, is determined by priority of time; the mortgage first in point of time being the senior lien.—*Boston L. D. & T. Co. v. E. & M. Tel. Co.*, U. S. C. O. (N. Y.), Sept. 17, 1888; 36 Fed. Rep. 288.

55. CORPORATIONS—Denying Existence—Estoppel.—Where defendant, a corporation, admits in its counterclaim, that it purchased the lumber, for the purchase price whereof the suit is brought, it is estopped to deny it made the contract because it was not then organized.—*Williams v. Stevens P. L. Co.*, S. C. Wis., Oct. 8, 1888; 40 N. W. Rep. 154.

56. CORPORATION—Negligence—Injury.—An incorporated county fair is liable for negligence in the construction of its seats for injuries sustained by reason thereof by a person attending the fair.—*Dunn v. Brown, etc. Co.*, S. C. Ohio, Nov. 13, 1888; 18 N. E. Rep. 498.

57. COSTS—Attorney's Fee.—A sold B certain guano in trust, the proceeds, when sold to be applied on B's notes held by A. B conveyed it to C in trust for certain creditors. C, having sold it, A sued him for the proceeds. The court, on judgment for A, allowed C his attorney's fee: Held, error.—*Chemical Co. v. Johnson*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 775.

58. COSTS—Security—Time of Motion.—The federal courts may require security for costs from solvent non-resident plaintiffs at any time, when no prejudice to plaintiffs' rights is shown to have resulted from defendant's delay in moving therefor.—*Stewart v. The Sun*, U. S. C. O. (N. Y.), Aug. 31, 1888; 36 Fed. Rep. 507.

59. COURTS—Adjournment—Jury Term.—Where a district judge adjourns by written order to the sheriff a regular term of the court, under Louisiana law, the first day of the actual session becomes the first day of the regular jury term for that month, under the law relative to the drawing of the grand jury.—*State v. Pate*, S. C. La., Oct. 17, 1888; 5 South. Rep. 21.

60. COURTS—Federal—National Banks—Receivers—Agents.—The federal courts have the same jurisdiction of suits by and against the "agents" who displace receivers of an insolvent national bank as they have of suits by and against "receivers" thereof, i. e., without regard to citizenship or the amounts involved.—*McConville v. Gilmour*, U. S. C. O. (Ohio), Aug. 17, 1888; 36 Fed. Rep. 277.

61. COURTS—Federal—Action—Administrator.—The fact that a citizen of another State is selected as administrator, for the purpose of conferring on the United States circuit court jurisdiction of an action to be brought by him, does not defeat that jurisdiction.—*Goff's Admr. v. Norfolk & W. R. Co.*, U. S. C. O. (Va.), Feb. 11, 1888; 36 Fed. Rep. 299.

62. COURTS—Federal—Jurisdiction—Non-resident.—Suits in the United States circuit court cannot be instituted against a corporation created and having its principal office without the district where the suit is brought, and where these facts appear on the face of the petition the action may be dismissed on motion.—*Connor v. Vicksburg & W. R. Co.*, U. S. C. O. (Mo.), Oct. 5, 1888; 36 Fed. Rep. 273.

63. COURTS—Federal—Jurisdiction—National Banks—Receiver.—The receiver of a national bank may still maintain a suit in the United States circuit court without reference to the citizenship of the parties or to the amount involved to recover a claim due the bank.—*Armstrong v. Trautman*, U. S. C. O. (Ohio), May 31, 1888; 36 Fed. Rep. 275.

64. COVENANT—Breach—Ejectment.—A covenant in an agreement between father and son, that the latter would give a home to his sister, does not vest in the latter such a title as will enable her to support an action of equitable ejectment.—*Harkins v. Doran*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 923.

65. CREDITOR'S BILL—Improvements on Another's Land.—A owned a life estate in certain land with remainder to his daughter. B, the husband of the daughter, then insolvent, invested all his means in improving it with the knowledge and consent of the others: Held, that B's creditors were entitled to have the land rented out, and the annual rent, to the extent of its enhancement by reason of the improvements, applied to their debts until satisfied.—*Newcomb v. Phillips*, Ky. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 529.

66. CRIMINAL LAW—Absence from State—Evidence.

—The return of attachments for a witness, issued to every county in the State, not executed because no such person resided in those counties, is not sufficient evidence of his removal out of the State to render his deposition admissible in a criminal prosecution, under the Texas code. — *Martinez v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 356.

67. CRIMINAL LAW—Appeal—Jurisdiction.

—Under Crim. Code Ky. § 847, providing for appeals to the court of appeals only where the punishment exceeds \$50 fine or thirty days imprisonment, the court has no jurisdiction where the fine is \$25 and the imprisonment 10 days. — *Tankersly v. Commonwealth*, Ky. Ct. App., Sept. 15, 1888; 9 S. W. Rep. 702.

68. CRIMINAL LAW—Appeal—Record.

—An appeal in a criminal case from an order denying a motion for a new trial will be dismissed, where the record does not show the grounds upon which the motion was made. — *People v. Lemon*, S. C. Cal., Oct. 30, 1888; 19 Pac. Rep. 521.

69. CRIMINAL LAW—Arson—Corroboration.

—The testimony of an accomplice that defendants burned the barn is sufficiently corroborated by evidence of threats by defendants against the owner of the barn. — *Commonwealth v. Chase*, S. J. O. Mass., Nov. 26, 1888; 18 N. E. Rep. 565.

70. CRIMINAL LAW—Assault and Battery—Evidence.

—Under the circumstances the question of unnecessary violence, by the defendant in arresting the prosecutor as an officer, should have been left to the jury. — *State v. Pugh*, S. O. N. Car., Nov. 5, 1888; 7 S. E. Rep. 757.

71. CRIMINAL LAW—Assault with Intent to Kill—Instructions.

—A verdict of guilty of an assault with intent to commit murder will not be set aside for errors in the charge, where the evidence shows the offense to have been so wanton and inexcusable that no other verdict could have been rendered. — *Summy v. State*, S. O. Ga., Oct. 17, 1888; 7 S. E. Rep. 737.

72. CRIMINAL LAW—Balliff—Jury-room.

—Where a balliff remains in a room with the jury during the time such jury are considering their verdict in a criminal case, it is sufficient to vitiate the verdict. — *Gandy v. State*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 802.

73. CRIMINAL LAW—Burden of Proof—Instructions.

—It is error to refuse an instruction, that the burden of proof never shifts from the State to defendant, but rests on the State throughout. — *Phillips v. State*, Tex. Ct. App., Oct. 24, 1888; 9 S. W. Rep. 557.

74. CRIMINAL LAW—Burglary—Possession of Goods.

—On an indictment for burglary, evidence that the stolen articles were found the next morning in the possession of the defendant, who gave a false account as to how he obtained them, is sufficient to warrant a conviction. — *Wynn v. State*, S. O. Ga., Oct. 17, 1888; 7 S. E. Rep. 689.

75. CRIMINAL LAW—Carrying Concealed Weapons.

—On a trial for carrying a pistol concealed, where witnesses testify that they saw defendant draw a pistol from his hip pocket, and one of them states what kind of a pistol it was, there is sufficient evidence to authorize a jury to convict. — *Kinsbrew v. State*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 691.

76. CRIMINAL LAW—Change of Venue—Prejudice.

—In contesting a change of venue in a criminal case, on the ground of prejudice, the State, under Texas law, is not limited to impeaching the credibility of the witnesses, but may show that no such prejudice in fact exists. — *Mealy v. State*, Tex. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 563.

77. CRIMINAL LAW—Continuance—Absent Witness.

—The party injured testified that his wounds were inflicted by the defendant, and denied that he had stated that one J had inflicted them as testified to by three witnesses. It appeared that J was present at the affray. Held, that defendant was entitled to a continuance to procure J's evidence. — *Brooks v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 355.

78. CRIMINAL LAW—Continuance—Confession of Error

—Where evidence, for the absence of which a continuance is asked, is material, and the continuance is refused, and confession of error therein is made by the State, the judgment on conviction will be reversed. — *Spear v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 358.

79. CRIMINAL LAW—Conviction of Lesser Offense.

—Under an information charging the statutory offense of assault with intent to commit murder, a conviction may be had for assault with intent to do great bodily harm less than murder. — *People v. Prague*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 243.

80. CRIMINAL LAW—Evidence—Accomplice.

—An accomplice jointly accused with others, but discharged under a *not pros.*, is a competent witness. The trial judge cannot be required to instruct the jury to discredit his testimony unless corroborated by unimpeached evidence, nor to charge the legal maxim—*falsus in uno, falsus in omnibus*. — *State v. Banks*, S. C. La., Oct. 10, 1888; 6 South. Rep. 18.

81. CRIMINAL LAW—Forgery—Instrument.

—If the instrument is absolutely void upon its face, it cannot be made the subject of forgery; but if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery. — *Hendricks v. State*, Tex. Ct. App., Oct. 17, 1888; 9 S. W. Rep. 555.

82. CRIMINAL LAW—Forgery—National Banks.

—Where the president and cashier of a bank, with intent to deceive the United States bank examiner, forge a promissory note, and enter it upon the books of the bank as assets, the State court has jurisdiction to try them for the forgery. — *State v. White*, S. O. N. Car., Nov. 5, 1888; 7 S. E. Rep. 715.

83. CRIMINAL LAW—Indecent Assault—Child.

—Under Minnesota law, the taking of indecent liberties with or on the person of a female child under the age of ten years, without regard to whether she consents to the same or not, constitutes an assault. — *State v. West*, S. O. Minn., Nov. 2, 1888; 40 N. W. Rep. 249.

84. CRIMINAL LAW—Instruction—Evidence.

—Where the evidence relied on to convict of theft is wholly circumstantial, failure to instruct the jury in regard to the law applicable to such evidence is reversible error. — *Willard v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 358.

85. CRIMINAL LAW—Justice of the Peace—Certiorari.

—Under Michigan law, the justice's return in a criminal case of what he knows officially must determine the result of certiorari. — *People v. Etter*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 241.

86. CRIMINAL LAW—Larceny—Conversion by Bailee.

—Defendant borrowed a horse in the Indian Territory, and brought it into Texas, where he sold it, without the owner's consent, with the fraudulent intent to convert it to his own use. Held, that he was guilty of theft, under Texas law. — *Brooks v. State*, Tex. Ct. App., Oct. 20, 1888; 9 S. W. Rep. 562.

87. CRIMINAL LAW—Larceny—Embezzlement.

—On a trial for larceny, if the facts warrant it, the jury may, under Louisiana law, return a verdict of embezzlement. — *State v. Williams*, S. O. La., Oct. 6, 1888; 5 South. Rep. 16.

88. CRIMINAL LAW—Larceny—Evidence.

—Evidence that defendant shot and wounded another's hog and pursued it some distance, but did not kill or catch it, and that the owner afterwards found the hog badly wounded, and killed it and used the meat, does not show a taking warranting a conviction for theft. — *Minter v. State*, Tex. Ct. App., Oct. 24, 1888; 9 S. W. Rep. 561.

89. CRIMINAL LAW—Larceny—False Representations.

—One who obtains possession of goods by falsely representing himself to be purchasing as agent of another, to whom the goods are charged, and sells them, appropriating the proceeds, is guilty of larceny. — *Harris v. State*, S. O. Ga., Oct. 12, 1888; 7 S. E. Rep. 689.

90. CRIMINAL LAW—Limitations—Commencing Prosecution.

—A complaint before a justice, charging a person with crime, on which a warrant is not issued

and placed in the hands of an officer for service until after the expiration of the statutory period, is not a commencement of prosecution so as to prevent the statute of limitations from running.—*People v. Clement*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 190.

91. CRIMINAL LAW—Malicious Mischief—Inference.—In a prosecution for maliciously injuring a house, under Michigan law, malice may be inferred from the nature of the injuries done to the house.—*People v. Burkhardt*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 240.

92. CRIMINAL LAW—Manslaughter—Abortion—Indictment.—An indictment for manslaughter by committing an abortion, resulting in death, is not defective, in failing to aver that the deceased was quick with child.—*Peoples v. Com.*, Ky. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 509.

93. CRIMINAL LAW—Misconduct of Jury.—The testimony of a juror is inadmissible to show misconduct of the jury.—*State v. Harper*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 730.

94. CRIMINAL LAW—Misdemeanor—City Court.—Under Georgia law, where a railroad car is entered and something stolen therefrom, but it does not appear that defendant broke open the car, or that it was broken open at all, a conviction in the city court of Atlanta is proper.—*Burley v. State*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 698.

95. CRIMINAL LAW—Murder—Instruction.—An instruction in a murder case that, if the provocation was slight and the defendant used excessive force out of all proportion to the provocation, the killing would be murder, is correct.—*State v. Ellis*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 704.

96. CRIMINAL LAW—Prosecuting Attorney—Misconduct.—A verdict of assault before a justice of the peace will be reversed where, after the jury has reported they are unable to agree, the prosecuting attorney is allowed against defendant's objection to instruct them on the law.—*People v. Hicks*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 244.

97. CRIMINAL LAW—Sufficiency of Evidence.—On appeal the court will not reverse the findings of the jury in a criminal case upon a question of fact, unless the verdict is so clearly and manifestly against the weight of evidence as to suggest the presumption that it was produced by influences other than a proper consideration of the testimony.—*Robinson v. State*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 6.

98. CRIMINAL LAW—Two Counts—Sentence.—Where defendant is indicted in separate counts for burglary and larceny, and pleads guilty as charged, he may be sentenced for both, the term of the latter sentence beginning on the termination of the other.—*State v. Robinson*, S. C. La., Oct. 12, 1888; 5 South. Rep. 20.

99. CRIMINAL LAW—Verdict—Defective Count.—Where two counts in an indictment charge an offense in different degrees, and one of them is defective, but is not demurred to, a general verdict of guilty will be referred to the good count and the conviction sustained.—*May v. State*, S. C. Ala., July 26, 1888; 5 South. Rep. 14.

100. CUSTOM AND USAGE—Knowledge of Parties.—A building contract provided that the house was to be built of bricks at so much per thousand, wall count, solid measure: Held, that the universal meaning of these words among brick masons and contractors was admissible in evidence, and it was no defense that defendant did not know their meaning.—*Long v. Davidson*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 758.

101. DAMAGES—Measure—Failure to Take Goods.—Where A delivered corn under contract on the river bank for B, who failed to remove it, and it was destroyed by a flood, it was held that the measure of the damages was the value of the corn.—*Monarch v. Matthews*, Ky. Ct. App., Oct. 25, 1888; 9 S. W. Rep. 500.

102. DAMAGES—Negligence—Railroad.—To entitle a plaintiff to recover damages, under the Texas statute, against a railroad for the death of a relative, it devolves on him to prove that the death, when caused by

the neglect of the servants, etc., was by their gross negligence; ordinary neglect is insufficient to hold the company.—*Mo. Pac. R. Co. v. Hill*, S. C. Tex., Oct. 16, 1888; 9 S. W. Rep. 351.

103. DAMAGES—Unliquidated—Interest.—Where the damages are unliquidated and the existence of a claim cannot be determined before verdict, it is error to charge that plaintiff should have interest from the time the last expense was incurred.—*Coburn v. Muskegon B. Co.*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 198.

104. DEDICATION—Tenants in Common.—A tenant in common cannot dedicate the common property to public use, as for a street, without the consent of his cotenant.—*City of St. Louis v. Laclede Gas Co.*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 581.

105. DEPOSITIONS—Foreign Suit—Letters Rogatory.—Letters rogatory, issued by a district judge in Mexico, for the purpose of clearing up the details of a certain importance, concerning smuggling certain cotton, do not show that the proceedings amount to a suit as contemplated by act of congress, and do not warrant the issuing of an order to take testimony therein.—*In re Letters Rogatory, etc.*, U. S. C. C. (N. Y.), Aug. 1, 1888; 36 Fed. Rep. 306.

106. DESCENT AND DISTRIBUTION—Widow—Purchaser.—Where a widow has selected the personal property of her deceased husband, allowed her by law, and has sold it, and after her death the probate court has sanctioned her selection and allowed the property to her vendee, the latter is entitled to it.—*Benjamin v. Larroche*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 156.

107. DEVISE—Devisees—Accounting.—Where a testator devised land severally to his wife and mother, charging the lands of each with the payment of debts, and each of them paid some debts, the wife paying the most, and she released to the mother for a valuable consideration all claims upon her: Held, that the mother's liability to the wife was thereby extinguished.—*Burkam v. Hayes*, S. C. Ind., Nov. 14, 1888; 18 N. E. Rep. 511.

108. EASEMENT—Implication—Breach.—The grantee in a deed of land, on which is a mill and dam embracing an easement as to ponded water occasioned by such dam over the adjoining land of another person, although such easement is not expressly mentioned in the deed.—*Bowling v. Burton*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 701.

109. EJECTMENT—Administrator—Heir.—Ejectment does not lie in behalf of an heir as against an administrator for land, to which the latter is entitled as an asset of the estate, but the administrator is not entitled as against the heirs to the possession of the intestate's homestead.—*Barco v. Fennell*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 9.

110. EJECTMENT—Authority of Attorney.—An attorney for defendant in an action of ejectment has authority to bind his client by a stipulation to dismiss a demand by defendant under the statute for a second trial.—*Bray v. Doherty*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 262.

111. EMINENT DOMAIN—Benefits.—In awarding compensation for land taken by the United States for public buildings, benefits to the community at large should not be considered, but if the land has a special value to the owner which can be measured by money, he is entitled to have such value estimated.—*In re Rugheimer*, U. S. D. C. (S. Car.), Oct. 19, 1888; 36 Fed. Rep. 376.

112. EMINENT DOMAIN—Compensation.—Appropriation of land for a public street without first making compensation therefor is contrary to the United States constitution, although the law provides that such damages shall be assessed to the remaining land of the owners.—*Scott v. City of Toledo*, U. S. C. C. (Ohio), Sept. 28, 1888; 36 Fed. Rep. 385.

113. EMINENT DOMAIN—Compensation.—Where real estate has been condemned for public use and damages awarded to the owner by a jury, and the only error assigned on appeal is that the verdict is excess-

ive, the supreme court will not ordinarily vacate or modify the verdict if based on testimony in the case.—*Omaha, etc. Co. v. Johnson*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 134.

114. EMINENT DOMAIN—Compensation—Evidence.—In proceedings to condemn a leasehold interest in land, where a real estate agent testifies that the leasehold is worth over \$2,500 beyond the rent, but the owner himself testifies that the property is worth the amount of the rent, a verdict for \$150 for loss of the lease, and \$100 for expense of removal, is not opposed to the evidence.—*Becker v. Chicago, etc. Co.*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 564.

115. EMINENT DOMAIN—Constitutional Law.—The act of congress of August 1, 1888, conferring on the United States circuit court jurisdiction to condemn land for public buildings, on petition of the secretary of the treasury, is not void as in conflict with the constitutional provision that private property shall not be taken for public use without just compensation.—*In re Rugheimer*, U. S. D. C. (S. Car.), Oct. 15, 1888; 36 Fed. Rep. 369.

116. EQUITY—Creditor's Bill—*Lis Pendens*.—In a suit by a lien creditor to subject his debtor's real estate to the payment of the debt, an averment in the bill that there is then pending another suit by another creditor against the same, is not ground for demurrer.—*See v. Rogers*, S. C. App. W. Va., Sept. 15, 1888; 7 S. E. Rep. 436.

117. EQUITY—Equity Practice—Pro Confesso—Dismissal.—Where, after decree for want of a plea, answer or demurrer, an answer is filed, and motion made to strike off the decree, it is error to dismiss the bill at plaintiff's costs without disposing of that motion or taking any other action in the premises.—*Appeal of Cook*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 870.

118. EQUITY—Federal Courts—Judgments.—Federal courts have jurisdiction to relieve against a title fraudulently obtained by proceeding in a state court, by enjoining the assertion of the fraudulent title.—*Robb v. Vos*, U. S. C. C. (Ohio), Aug. 28, 1888; 36 Fed. Rep. 132.

119. EQUITY—Judgment Lien—Enforcement.—Plaintiff purchased land at an execution sale upon judgments against defendant. In an action for possession, defendant showed that the judgments were dormant and the executions irregular: *Held*, that the court, after setting aside the sale, could direct the sale of the land under the judgments.—*Carrie v. Clark*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 766.

120. EQUITY—Rescission—Partnership Relations.—The managing partner in a mine having actively concealed the fact from his copartner that valuable ore had been found, the latter being absent, and having misled him as to its true condition by letters, a sale by the latter to the former at a grossly inadequate price will be set aside as fraudulent.—*Bowman v. Patrick*, U. S. C. C. (Mo.), Sept. 17, 1888; 36 Fed. Rep. 138.

121. EQUITY—Rescission of Deed—Laches.—In an action to set aside a deed on the ground of fraud, under Kentucky law, it is incumbent upon plaintiff to prove, not only that he discovered the fraud within the last five years, but that he could not, with the use of ordinary diligence, have discovered the fraud until within the five years before the action was commenced.—*Woods v. James*, Ky. Ct. App., Nov. 1, 1888; 9 S. W. Rep. 513.

122. ERROR—Writ of—Auditors—Appeal.—A writ of error does not lie to the court of common pleas on an appeal from a township auditor's report, on a school district treasurer's account.—*Mohney v. School District*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 891.

123. ERROR—Writ of Error—Appellate Court.—Under the statute law of Illinois, a case in which less than \$1,000 is involved cannot be taken by appeal or writ of error to the supreme court from the appellate court, unless the latter court, or a majority of its judges shall, within twenty days after the judgment is rendered, certify that it involves points of law worthy of the ad-

judication of the supreme court.—*MacLachlan v. McLaughlin*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 544.

124. ESTOPPEL—In Pais—By Silence.—A party who, knowingly, though it may be done passively, permits another to purchase land and expend money thereon under the supposition that he is the owner, and without such party making known his own claim, will not be permitted afterwards to exercise his legal rights against the purchaser.—*Forbes v. McCoy*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 132.

125. ESTOPPEL—Pledge—Conversion.—One who acquiesces in a pledge of commercial paper until a business venture, in which the pledge figures, turns out badly, will be estopped from asserting his ignorance of the transaction against the pledgee, who is an innocent purchaser for value.—*Gregory v. Safe Deposit Co.*, U. S. C. C. (Mass.), Oct. 5, 1888; 36 Fed. Rep. 408.

126. EVIDENCE—Best and Secondary.—In a suit on a note arising from a contract to saw lumber for a specified price per thousand, as evidenced by measurement of the same when shipped, evidence of what logs were cut, is inadmissible where the lumber was measured both when loaded for shipment and when discharged.—*Eastman v. Cleaver*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 238.

127. EVIDENCE—Limitations—Burden of Proof.—Upon the issue of the statute of limitations, the burden of proof is on the plaintiff.—*Moore v. Garner*, S. C. N. Car. Nov. 5, 1888; 7 S. E. Rep. 732.

128. EVIDENCE—Lost Record.—The contents of a lost record may be proved by parol, but the witness must be able to speak of his own knowledge as to such contents.—*Appeal of Richards*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 903.

129. EVIDENCE—Witness—Leading Questions.—Upon a prosecution for selling intoxicating liquors, if the witnesses are manifestly unwilling to testify against the defendant, the court may well permit leading questions to be put to them by the prosecuting attorney.—*Commonwealth v. Chaney*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 572.

130. EVIDENCE—Writing—Parol Variance.—A written contract (an acceptance) cannot be varied by proof of a contemporary parol agreement importing conditions not expressed in the writing.—*Aullman v. Brown*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 159.

131. EXECUTION—Supplementary Proceedings—Complaint.—A statement in supplementary proceedings, that an execution had been issued against the defendant, but not stating to what county, is fatally defective.—*McKinney v. Snider*, S. C. Ind., Nov. 17, 1888; 18 N. E. Rep. 526.

132. EXECUTION—Wrongful Seizure—Judgment.—A judgment confessed under warrant of attorney, and an execution thereon, are no defense to an action for a seizure of goods thereunder, brought after the judgment and execution were set aside for irregularities, the judgment being for more than was due, and an affidavit of indebtedness having been filed.—*Anderson v. Sloane*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 214.

133. EXECUTORS—Foreign—Actions.—Personal representatives, appointed in Missouri, cannot sue for assets of their testator's estate, situate in Vermont.—*Allen v. Fairbanks*, U. S. C. C. (Vt.) Oct. 16, 1888; 36 Fed. Rep. 402.

134. EXECUTORS—Sales—Service on Devisee.—A special proceeding to sell land of a testator to pay debts against a devisee, who at the filing of the petition is a minor, but becomes of age before summons is served on him, and to which he puts in no answer, is at most only irregular.—*McIver v. Stephens*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 695.

135. EXECUTORS AND ADMINISTRATORS—Accounting—Attorney's Fees.—The allowance in an executor's account of attorney's fees to the amount of \$1,150, the estate being of the value of \$95,000, and consisting largely of judgments and mortgages, is not excessive.—

Appeal of St. Clair, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 914.

136. EXECUTORS AND ADMINISTRATORS — Compensation. — A public administrator is not entitled to compensation for services as an attorney rendered by him in the course of administration, in addition to his commissions. — *Loague v. Brennan*, S. C. Tenn., May 17, 1888; 9 S. W. Rep. 693.

137. EXECUTORS AND ADMINISTRATORS — Divorce — Dower—Caveat Emptor. — Where an executor sold the land of the decedent to pay his debts, and receives full value therefor, the purchaser being advised that he was getting a clear title, and part of the lands being afterwards assigned to the divorced wife of the decedent by the proper court: *Held*, that the purchaser could not recover from the executor any return of the purchase money to compensate him for the land so lost by the dower. — *Arnold v. Donaldson*, S. C. Ohio, Nov. 18, 1888; 18 N. E. Rep. 540.

138. EXEMPTION—Money Due—Schedule—Statute. — Construction of Illinois statutes exempting the property of debtors from execution. Ruling as to the exemption of money due to the debtor and the schedule to be filed by him. — *Fislen v. Howard*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 560.

139. FALSE IMPRISONMENT — What Constitutes — Evidence. — That one considers himself under arrest, without actual duress, is not sufficient to support a prosecution for false imprisonment. — *McClure v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 353.

140. FEES—Clerks of Court. — Under Missouri law, the fees earned in each year in a circuit court are chargeable with a trust in favor of the clerk to the extent of his salary and the compensation allowed his deputies, and are to be applied in discharge of such trust whenever collected. — *Allen v. Cowan*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 587.

141. FENCES—Injuring. — A line of posts, on which slats were nailed, intended merely to keep travelers on the road from turning off on the fields, is not a fence, within the meaning of Code N. C. § 1062, about injuring fences. — *State v. Roberts*, S. C. N. Car. Nov. 5, 1888; 7 S. E. Rep. 714.

142. FRAUDULENT CONVEYANCE—Actions. — A debtor who without consideration has transferred checks to the defendants, and afterwards gone into insolvency, may sue defendants for the proceeds of the checks in order to pay into court their amount. — *Carill v. Emery*, S. J. O. Mass., Nov. 27, 1888; 18 N. E. Rep. 574.

143. FRAUDULENT CONVEYANCE — Insolvency — Evidence. — Construction of Massachusetts statutes relative to insolvency. Circumstances stated to which were held to be sufficient evidence that the grantee of an alleged fraudulent conveyance had no knowledge that the grantor thereof was insolvent or was in contemplation of insolvency, said grantee having caused the paper to be prepared without consultation with the grantor. — *Perry v. Hadley*, S. J. O. Mass., Nov. 27, 1888; 18 N. E. Rep. 575.

144. FRAUDULENT CONVEYANCES — Return of Nulla Bona. — Judgments against A returned *nulla bona* by the sheriff are sufficient evidence of insolvency to entitle the plaintiff to bring an action to set aside a conveyance as in fraud of the rights of creditors. — *Bates v. Cobb*, S. C. S. Car., Oct. 12, 1888; 7 S. E. Rep. 743.

145. FRAUDULENT CONVEYANCES—Stock of Goods. — A, being insolvent, sold his stock of goods, worth \$300, to B for a horse worth \$100, which he subsequently turned over to his creditors, and B's undertaking to pay debts owing by A amounting to \$300: *Held*, that the transaction was not a fraud on A's creditors. — *Sweeney v. Conly*, S. C. Tex., Oct. 28, 1888; 9 S. W. Rep. 548.

146. FRAUDULENT CONVEYANCES— Withholding Deed—Record. — Withholding a deed of defeasance of deed absolute on its face, from record, by collusion to prevent inquiry of creditors, renders the conveyance void as to the then existing creditors of the grantor. — *Ferguson v. Johnston*, U. S. D. C. (Miss.), June Term, 1888; 36 Fed. Rep. 134.

147. GRAND JURY—Prosecuting Attorney— Assistance. — The State's attorney has no right to influence or direct the grand jury in their finding, or express any opinion on questions of fact, yet he may assist them in their labors, and they may call on him for advice on questions of law and procedure. — *State v. Adam*, S. C. La., Oct. 17, 1888; 5 South. Rep. 30.

148. HEALTH—Quarantine — Vessels. — The county boards of health are authorized, under Florida laws, to make charges against a vessel for quarantine services, if under the authority given by the act of 1883 they have made proper provision therefor. — *Ferrari v. Board of Health*, S. C. Fla., Oct. 9, 1888; 5 South. Rep. 1.

149. HIGHWAYS—Court of Quarter Sessions. — Construction of statutes of Pennsylvania with reference to highways and the jurisdiction and procedure of the court of quarter sessions on that subject. — *In re Road in Whiteley Tp.*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 895.

150. HIGHWAYS—Injunction. — Where one builds his house on the land which he knows will be taken for a highway, he can have no injunction against its establishments, nor any relief in equity; he will be left to his remedy, if any, at law. — *Verga v. Miller*, N. J. Ct. Chan., Nov. 10, 1888; 15 Atl. Rep. 685.

151. HOMESTEAD — Assignment — Report. — If the execution debtor is dissatisfied with the assignment of homestead, he should move to set aside the report in the court which issued the execution and before a deed is executed. He cannot question the report in a collateral proceeding. — *Lallement v. Detert*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 568.

152. HOMESTEAD—Conveyance — Wife. — One who owned land and was married before the adoption of the constitution of 1868, and who has never had the land allotted and set apart as a homestead, has the right to sell without the consent of his wife. — *Gilmore v. Bright*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 751.

153. HUSBAND AND WIFE—Deed—Blanks. — Where a wife executes a deed of her real estate and delivers it to her husband with power to fill in the grantee, the consideration and the date, for the purpose of enabling him to sell it, such deed duly filled up in the hands of a *bona fide* purchaser who purchased from the husband and paid him will be sustained. — *Reed v. Morton*, S. C. Neb., Nov. 7, 1888; 40 N. W. Rep. 282.

154. HUSBAND AND WIFE — Deed — Her Acknowledgment. — Where a married woman acknowledges a deed, it is not necessary that her husband should have gone far enough away from her to leave her free to express to the clerk her desire with respect to the deed. — *Hall v. Castleberry*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 706.

155. HUSBAND AND WIFE—Judgment—Execution. — An execution may issue on a judgment in favor of a wife against her husband without the husband's consent. — *Kinkade v. Cunningham*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 905.

156. HUSBAND AND WIFE— Limitation of Actions. — Under the act of 1855 a married woman can sue, and the statute of limitations runs against her, though she was married while an infant and remained married till suit brought. — *Douglass v. Douglass*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 177.

157. HUSBAND AND WIFE—Sale—Power—Payment. — Where a husband sold his wife's land under authority from her and received in payment therefor his own note and the worthless note of a third person: *Held*, that such notes were not payment of the purchase money, and that the wife could recover the price of the land from the purchaser thereof. — *Runyon v. Snell*, S. C. Ind., Nov. 16, 1888; 18 N. E. Rep. 523.

158. HUSBAND AND WIFE— Separate Estate—Creditors. — Real estate was purchased by a wife and paid for out of her separate earnings, and at her request conveyed to her minor child: *Held*, that a judgment creditor of the husband could not have it subjected to the payment of his judgment. — *Callahan v. Powers*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 292.

159. IMMIGRATION—Labor Contract—Clergyman. —The defendant, a religious corporation, engaged an alien residing in England to come here and take charge of its church as pastor: *Held*, that it was liable to the penalty prescribed by act of Congress prohibiting the importation of aliens under contract to perform labor in the United States.—*United States v. Rector, etc.*, U. S. C. O. (N. Y.), May 21, 1888; 36 Fed. Rep. 303.

160. INSURANCE—Policy—Beneficiary. —A policy of insurance, payable to the "devisees or heirs at law" of the insured, is payable to his widow if he dies intestate without children, she being his heir at law of personal property, under the statute of Illinois. —*Alexander v. Northwestern, etc. Co.*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 556.

161. INSURANCE—Premium—False Representation. —An agent falsely asserted to A that a rival insurance company did not contain a certain provision contained in the policies of his company, and invited A to compare his contract with that of the other company, leaving his blank form for that purpose with A. A afterwards made application and was insured: *Held*, that A must pay the premium, notwithstanding such statement.—*American S. B. I. Co. v. Wilder*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 252.

162. INTOXICATING LIQUORS—Damages—Widow. —Under Michigan laws of 1883, a widow has a right of action against the liquor-seller for the death of her husband caused by an intoxicated person.—*Brockway v. Patterson*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 192.

163. INTOXICATING LIQUORS—Defense—License. —Act Pa. May 31, 1887, prohibiting the sale of intoxicating liquors to minors and persons of intemperate habits, operates on persons to whom licenses were already granted, under the liquor law of May 8, 1854.—*Commonwealth v. Sellers*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 891.

164. INTOXICATING LIQUORS—Illegal Sale—Evidence. —Circumstances stated, the evidence of which was held to be sufficient to be submitted to the jury on the question whether defendant was guilty of illegally selling intoxicating liquors.—*Commonwealth v. Buckley*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 571.

165. INTOXICATING LIQUORS—Illegal Sale—Master and Servant. —A servant may be guilty of the offense of illegally selling intoxicating liquors, if in the absence of the master he assumes control and sells such liquors.—*Commonwealth v. Brady*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 568.

166. INTOXICATING LIQUORS—Illegal Sale—Sentence. —Under North Carolina law, where any county has provided for the working of convicts on the public roads, a person convicted in such county of unlawfully selling liquor on Sunday may be sentenced to imprisonment at hard labor upon the public roads. —*State v. Hicks*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 707.

167. INTOXICATING LIQUORS—Indictment. —Where an indictment avers the illegal keeping of intoxicating liquors for sale, and not the maintaining of a tenement for that purpose, a variance as to the place is not material. —*Commonwealth v. Kern*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 566.

168. INTOXICATING LIQUORS—Judicial Notice. —The courts will take judicial notice that lager-beer, ale, porter, and any other liquor made out of malt, is malt liquor. —*Netts v. State*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 8.

169. INTOXICATING LIQUOR—Local Option Laws. —A local option law was adopted in a precinct in March, 1886. By act of legislature of March 20, 1887, the law was amended making the penalty more severe: *Held*, that the amended law did not apply to an offense committed in that precinct in December, 1887, it not having adopted the amended law.—*Lanahan v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 855.

170. INVENTIONS—Anticipation—Hat Machines. —The second claim of patent No. 97,178, to E. Eickemeyer, for hat pouncing machine is valid, and antici-

pates the fifth claim of patent 220,889, to E. B. Taylor, for a similar device.—*Nat. Hat, etc. Co. v. Brown*, U. S. C. O. (N. J.), Sept. 25, 1888; 36 Fed. Rep. 317.

171. INVENTIONS—Composition Patents—Infringement. —A patent for a composition of matter is not infringed by another composition into which one of the ingredients named without restriction in complainant's claim does not enter, though in the specifications the use of such ingredient is stated to be for a particular use only.—*Olley v. Watkins*, U. S. C. O. (Ill.), Oct. 8, 1888; 36 Fed. Rep. 323.

172. INVENTIONS—Equity—Jurisdiction—Licensee—Royalties. —Equity has jurisdiction of a bill by the owner of a patent to obtain an account of royalties due from a licensee, and an injunction against using the patent in defiance of the agreement of license. —*Ball Glove Fastening Co. v. Ball & Locket F. Co.*, U. S. C. C. (Mass.), Aug. 16, 1888; 36 Fed. Rep. 309.

173. INVENTIONS—Infringement—Dampers. —Letters patent No. 335,060, to N. C. Locke for improvement in dampers, are not infringed by devices constructed after the Spencer patents of 1885 and 1886. —*Locke v. Smith*, U. S. C. C. (Mass.), Aug. 27, 1888; 36 Fed. Rep. 310.

174. INVENTIONS—Infringements—Measure of Damages. —In a suit for the infringement of a patent for an improvement in pavements, the amount charged by defendant for pavements containing the improvements, more than for similar pavements which do not contain it, is the measure of profits for which he is liable.—*Valcamite Par. Co. v. Am. A. S. P. Co.*, U. S. C. C. (Penn.), Oct. 8, 1888; 36 Fed. Rep. 378.

175. INVENTIONS—Novelty—Draft Equalizer. —Patent No. 172,756, to R. M. Marvin for draft equalizer attachment to harvesters, etc., is valid, and was not anticipated by the Toof patent. —*Marvin v. Gatschall*, U. S. C. C. (Minn.), Sept. 25, 1888; 36 Fed. Rep. 314.

176. JUDGMENT—Collateral Attack—Fraud. —A judgment in a special proceeding for the sale of land cannot be attacked for fraud in a collateral action; an independent action to set it aside is required.—*Spivey v. Harrell*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 698.

177. JUDGMENT—Equitable Relief—New Trial. —A bill in equity to obtain a new trial will not be entertained on the affidavit of an important witness for the prevailing party impeaching his own testimony, when it appears he is an ignorant man, that he is in the employ of the opposite party, did not make the affidavit of his own free will, and that perjury cannot be well predicated upon it. —*Cleveland I. M. Co. v. Hueby*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 168.

178. JUDGMENT—Res Adjudicata. —A purchaser from plaintiffs, after judgment, for the recovery of land pending an appeal to the supreme court, of which the purchaser had notice, is bound by the judgment of reversals afterwards entered, although no appeal bond was given, nor *superedeas* granted. —*Carr v. Cates*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 659.

179. JUDGMENT—Res Adjudicata—Consideration. —A, the mortgagee, sued B, the mortgagor, for the recovery of the mortgaged property. B's defense was, that there was no consideration for the notes secured nor for the mortgage, and B obtained a verdict: *Held*, that this was no bar to a counterclaim based on such failure of consideration, in an action on the notes brought by A against B.—*Osborne v. Williams*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 165.

180. JUDGMENT—Res Adjudicata—Contract—Service. —A having sued B on a contract of service, and having recovered therein, brought a second suit for alleged services since bringing the first suit: *Held*, that he could not recover, having exhausted his remedy by the first suit.—*Kahn v. Kahn*, S. C. Neb., Oct. 31, 1888; 40 N. W. Rep. 135.

181. JUDGMENT—Separate Trials—Setting Aside. —In an action, where defendants were entitled to separate trials, judgment was taken by default against some of the defendants, and on a trial the other defendants were successful: *Held*, that setting aside the judgment

by default did not vacate the judgment in favor of the other defendants. — *Boone v. Halsey*, S. C. Tex., Dec. 20, 1887; 9 S. W. Rep. 531.

192. JUDICIAL SALE—Notice—Statute. — Under the statute of Pennsylvania of April 18, 1853, a judicial sale, made without notice of any kind, of the land of a person who has not been heard from for seven years, conveys no title to the purchaser as against the owner who afterwards returns. — *Taylor v. Hoyt*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 892.

183. JURISDICTION — Conflicting — State and Federal Courts. — Where the jurisdiction of the circuit court of the United States has attached, in a suit on the ground of citizenship in another State, the right of the plaintiff to prosecute his suit in such court to a final determination, there cannot be arrested, defeated or impaired, by any subsequent action or proceeding of the defendant respecting the same subject-matter in a State court. — *Newland v. Terry*, U. S. C. C. (Cal.), Sept. 3, 1888; 36 Fed. 337.

184. JUROR—Expression of Opinion. — The expression of opinion, which disqualifies a juror, is a fixed, deliberate and determined one, which will not yield to evidence. — *State v. Dorsey*, S. C. La., Oct. 22, 1888; 5 South. Rep. 16.

185. LANDLORD AND TENANT — Lease — Fraud — Evidence. — In ejectment by a lessee against his lessor, evidence that the plaintiff obtained the lease by means of false representations as to its terms, which were written by him and which defendant could not read, will sustain a verdict for defendant. — *Christie v. Blakely*, S. C. Penn., Oct. 19, 1888; 15 Atl. Rep. 874.

186. LARCENY—Possession—Evidence. — An indictment for theft of cattle, alleging possession and ownership to be in S, is not sustained by proof that S, though the owner, the cattle were ranging in a county other than that of his residence, and had been under the control and management of B for about four years. — *Williams v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 357.

187. LIEN — Farm Laborer — Complaint. — The defects in a farm laborer's claim, filed with a justice of the peace, cannot be cured by obligations in the complaint, in an action to protect the alleged lien against a third party. — *Cook v. Cobb*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 700.

188. LIMITATIONS—Acknowledgment—Note. — An indorsement made and signed by a debtor on a promissory note after it is barred in these words, "I hereby acknowledge the indebtedness of this note," takes the note out of the operation of the statute. — *Drake v. Sigfoos*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 257.

189. LIMITATIONS — Action Arising in Another State. — An action against the maker of a note executed in California, who came to Kentucky before its maturity, where he has since resided and has not been in California again, does not come under Gen. St. Ky. ch. 71, art. 4, § 19, but, under the California law, providing that if defendant be absent when the cause of action accrues, suit may be brought within the time limited after his return. — *Templeton v. Sharp*, Ky. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 507.

190. LIMITATIONS—Adverse Possession—School Lands. — Where land is certified to the State as school lands by the United States and patented by the State as such, but subsequently the United States cancels the selection and patents the land to the same person, who obtained patent from the State, the second patent is void, and the statute of limitations begins to run in favor of an adverse holder against the patentee from the date of the first patent. — *Daniels v. Gualala M. Co.*, S. C. Cal., Oct. 29, 1888; 19 Pac. Rep. 619.

191. LIMITATIONS—Fraud. — An action for relief on the ground of fraud may be commenced within four years after discovery thereof or of facts sufficient to put a person of ordinary prudence on an inquiry, which if pursued would lead to such discovery. — *Helman v. Davis*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 309.

192. LIMITATIONS—Nuisances—Sewers. — An action

for damages, both past and future, caused by the construction of sewers, must be brought within four years after the work is done, under Georgia laws. — *Atkinson v. City of Atlanta*, S. C. Ga., Oct. 10, 1888; 7 S. E. Rep. 692.

193. LIMITATIONS—Trusts—Resulting. — The rule excepting cases of trust from the operation of statutes of limitation is not applicable to a mere resulting trust. — *Dob v. Wilson*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 161.

194. LIMITATION OF ACTION — Exceptions — Married Women. — A married woman who is a *cestui que trust* of land, who has reconveyed to the grantor and whose deed has been invalid, may maintain an action for her interest, and she is not within the exception of the statute of limitation of April 22, 1856 — *Thompson v. Carmichael*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 867.

195. MALICIOUS PROSECUTION—Evidence. — Where an agent is prosecuted for embezzlement and acquitted, evidence that the check alleged to have been embezzled could not have been received by him, is sufficient to sustain a verdict in his favor in an action for malicious prosecution. — *Paddock v. Watts*, S. C. Ind., Nov. 15, 1888; 18 N. E. Rep. 518.

196. MARINE INSURANCE—Broker Contract. — Concealment of material facts by a broker, employed by a party to effect insurance from an insurance company, will avoid a recovery. — *Humble v. City Ins. Co.*, U. S. D. C. (Penn.), July 13, 1888; 36 Fed. Rep. 118.

197. MASTER AND SERVANT—Contributory Negligence. — Where a section hand was injured in trying to remove some stones from a track by a train, he having acted under the order of his foreman, an instruction, that if the jury found that to obey was extrahazardous, but did not plainly imperil his life or limb, and that in obeying the order he was injured without negligence on his part, etc., he was entitled to recover, furnishes the proper limit to plaintiff's right to recover. — *Stephens v. Hannibal, etc. R. R.*, S. C. Mo. Nov. 12, 1888; 9 S. W. Rep. 589.

198. MASTER AND SERVANT—Discharge—Damages. — On a trial for wrongfully discharging plaintiff before the end of his term, the recovery may embrace all the damages to the end of the term, when the trial occurs after such end, though the suit was brought prior thereto. — *Roberts v. Rigdon*, S. C. Ga., Oct. 8, 1888; 7 S. E. Rep. 742.

199. MASTER AND SERVANT—Risk. — Where an employee undertakes a hazardous employment, he is deemed to assume the risks of the same, so far as they are open to observation or are known to him. — *Woods v. St. Paul, etc. Co.*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 510.

200. MORTGAGE—Partnership—Firm Name. — In an action to foreclose a mortgage, it is no objection that the mortgage runs to a partnership in its firm name, and not to any individual name. — *Foster v. Trowbridge*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 255.

201. MORTGAGE—Redemption—Decree. — The decree on a bill to redeem mortgaged premises should not be for a strict foreclosure, but should direct a sale on failure to pay the redemption money. — *Meigs v. McFarlan*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 246.

202. MORTGAGE—Redemption — Laches. — A *cestui que trust*, whose trustee had sold the trust security to innocent purchasers for full value, while the complainant was in the penitentiary, brought suit to have his claim therein established. It appearing, however, that he had delayed bringing suit for a period of seven years, while the purchasers were making extensive improvements on the property, his action was held to be stale and void of equity. — *Fraker v. Houck*, U. S. C. O. (Kan.), Oct. 16, 1888; 36 Fed. Rep. 403.

203. MORTGAGE—Surrender—Creditor. — Where an equitable mortgagee accepts from the mortgagee an engagement to reconvey the land upon the payment by a certain time of the mortgage debt, but afterwards surrenders this engagement, accepting a lease from the

mortgagee, the relation of mortgagor and mortgagee is thereby terminated, and a junior judgment creditor of the mortgagor cannot subject the land to the payment of his debt.—*Seymour v. Mackay*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 552.

204. MORTGAGE—What are—Assignment. — A land contract, which is assigned by a written assignment, absolute in form, but designed as a mere security for a debt, is but a mortgage, and when the debt is paid the lien of the assignee will cease, except it has been re-assigned to an innocent party without notice.—*Lipp v. South Omaha, etc. Co.*, S. C. Neb. Oct. 31, 1888; 40 N. W. Rep. 129.

205. MUNICIPAL CORPORATIONS—Franchises—Collateral Attack.—A party indicted for assaulting the marshal of a city of the fourth-class, while the latter was attempting to arrest him, cannot attack the corporate capacity of the city to show that the marshal therefor was no officer.—*State v. Fuller*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 583.

206. MUNICIPAL CORPORATIONS—Nuisance—Damages.—Where the firing of gunpowder is forbidden in a city, but the mayor is authorized to license it on certain occasions, the city is not liable in damages for injuries resulting from the firing of gunpowder by such licensee. Neither is the city liable in damages for failure to enact any particular ordinance.—*Wheeler v. City of Plymouth*, S. C. Ind., Nov. 16, 1888; 18 N. E. Rep. 532.

207. MUTUAL BENEFIT SOCIETY—Evidence—Agent.—The declarations of the pay-master of a railroad company as to deductions made in the pay of an employee are not evidence against a mutual benefit society, of which the employee was a member. The pay-master is a servant, not an agent.—*Baltimore, etc. Co. v. Ohio, etc. Co.*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 835.

208. NATIONAL COURTS—Jurisdiction—Amount.—The United States circuit courts have jurisdiction in cases arising under revenue laws, although the amount in dispute is less than \$2,000.—*Ames v. Hager*, U. S. C. C. (Cal.), Sept. 17, 1888; 36 Fed. Rep. 129.

209. NEGLIGENCE—Contributory—Jury.—In this case, where a servant sues his employer for injuries received, from all the circumstances of the case it was held that it was the province of the jury to decide as to the question of contributory negligence.—*Union P. R. Co. v. O'Hern*, S. C. Neb., Nov. 9, 1888; 40 N. W. Rep. 293.

210. NEGLIGENCE—Contributory Negligence—Gross Negligence.—Where, in an action for damages caused by negligence, an instruction is given that if the defendant was guilty of gross negligence and the plaintiff of slight negligence, the latter could recover: *Held*, that the instruction was erroneous, in omitting to state that the plaintiff must have used due care.—*Wilford v. Swanson*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 548.

211. NEGLIGENCE—Railroad—Walking on Track.—Where one constructing a sewer in a tunnel enters the tunnel when the cars are running, there being a time specified for him to do his work when the trains are not running, and is injured, he cannot recover.—*Loeffler v. Mo. P. R. Co.*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 630.

212. NUISANCE—Cemetery—Injunction.—An injunction will be granted against the laying out of a cemetery, where the proposed cemetery is to be located on higher ground than surrounding dwellings, and the drainage from which would poison the wells and injure the health of neighboring residents.—*Jung v. Neraz*, S. C. Tenn., Oct. 16, 1888; 9 S. W. Rep. 344.

213. PARTITION—Attorney and Client—Appeal.—Allowances for counsel fees in partition cases, if regular upon the face of the record, will be presumed to be correct. An appeal does not lie from the court of common pleas in partition cases.—*Laird v. Walkinshaw*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 898.

214. PARTITION—Husband and Wife.—Where a wife sues for partition of land, and her share is awarded to her husband, she cannot maintain an action to review the proceedings, and her husband holds the land for her benefit.—*Appeal of Barkley*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 896.

215. PARTITION—Limitation—Pleading—Adverse Possession.—One who has held adversely for twenty years, and pleads that fact in bar of an action for partition, is entitled to the benefit of his plea, although the statute applicable to the case is that which bars such a claim by adverse possession for fifteen years.—*McCray v. Humes*, S. C. Ind., Nov. 13, 1888; 18 N. E. Rep. 500.

216. PARTNERSHIP.—A contract by which one party was to receive \$1.50 per foot for boring a well, and one-eighth of the leases held by the other party, subject to charges for expenses, etc., creates a partnership between them.—*Kifer v. Smyers*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 904.

217. PARTNERSHIP—Dissolution—Overpayment.—A partner who, upon dissolution of the firm, is paid a sum on account of partnership profits, afterwards found to be more than is due him, is chargeable with interest on the excess from its receipt.—*Atherton v. Cochran*, Ky. Ct. App., Nov. 1, 1888; 9 S. W. Rep. 519.

218. PARTNERSHIP—Holding Out—Third Parties.—The person seeking to enforce a partnership liability against one who, though not a partner, allowed himself to be held out as such, must have acted in his dealings with reliance upon the existence of a partnership relation or responsibility.—*Brown v. Grant*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 268.

219. PAYMENT—Goods from Another—Jury.—An instruction that, an account for lumber received from another by the plaintiff, should not be allowed as a payment on the note sued on, unless plaintiff expressly so agreed, is erroneous, since the jury might so find from the facts and circumstances.—*Griffin v. Petty*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 729.

220. PHYSICIANS—Malpractice—Calmvoyance.—One who holds himself out as a healer of diseases must, no matter to what particular school or system he belongs, be held to the duty of reasonable skill in the light of the present state of medical science.—*Nelson v. Harrington*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 223.

221. PILOTS—Speaking Vessel—Half Pilotage.—Asking the master of a vessel, which was about to sail, at the custom house, if he desired a pilot, and an answer that he did not know, is not such a speaking of a ship and decline of services as entitle a pilot to half pilotage.—*Freeman v. The Australia*, U. S. D. C. (Cal.), March 9, 1888; 36 Fed. Rep. 332.

222. PLEADING—Divorce—Adultery.—The charge of adultery, in an action for divorce, must generally state time, place and person, or, when called on, to make the pleading more definite, the party must show an excuse for not doing so.—*Freeman v. Freeman*, S. C. Minn., Nov. 12, 1888; 40 N. W. Rep. 167.

223. PLEADING—Failure to Demur—Waiver.—The answer to a complaint for possession of a machine, alleged that since suit brought plaintiff had agreed to sell defendant another machine, and to take in part payment the machine in controversy, and for breach of this contract claimed \$500 damages, and asked that the prayer of the complaint be denied: *Held*, that by failure to demur plaintiff had waived the irregularity of such a defense, and that it arose after the suit was brought.—*Puffer v. Lucas*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 734.

224. PLEADING—Motion—Demurrer—Corporation—Mistake.—Indefiniteness in pleading should be corrected by motion, and not by demurrer. A corporation, unless specially authorized to do so, cannot subscribe to the stock of another corporation. A mistake of law with full knowledge of the facts, cannot entitle a party to relief. This rule is founded on public policy, and applies to corporations as well as individuals.—*Valley, etc. Co. v. Lake Erie, etc. Co.*, S. C. Ohio, Oct. 16, 1888; 18 N. E. Rep. 486.

225. PLEADING—Proof—Variance.—In an action for the recovery of the price of goods sold, proof that the purchase price was less than that alleged in the complaint, is not a material variance.—*Iverson v. Dubay*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 159.

226. PLEADING—Special Plea—Effect.—A defendant, who files a special plea, is to be judged on that plea, and none other; all else is admitted.—*State v. Hendricks*, S. C. La., Aug. 27, 1888; 5 South. Rep. 24.

227. PLEADING—Statement of Account.—Under North Carolina law, a demand for a copy of the account alleged in the petition, is not authorized where plaintiff has attached a bill of particulars to his complaint, and made it a part thereof by reference.—*Wiggins v. Guthrie*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 761.

228. POOR—Settlement—Husband and Wife.—Under Wisconsin laws, relative to the support of paupers, a husband's settlement in the State is that of his wife, though she has been abandoned or voluntarily lives apart from him.—*Monroe Co. v. Jackson Co.*, S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 224.

229. POOR AND POOR LAW—Borrowing Money.—Construction of poor laws of Pennsylvania. When overseers of the poor cannot borrow money for an emergency, so as to bind the district.—*Gibson v. Plumbrook, etc. Co.*, S. O. Penn., Oct. 29, 1888; 15 Atl. Rep. 926.

230. PRACTICE—Demurrer to Evidence—Waiver.—By putting in his evidence, after his demurrer to plaintiff's evidence is overruled, defendant does not waive his right to have the court's ruling reviewed, but he takes the chances of supplying by his own evidence any defects in the plaintiff's case.—*Erwin v. St. Louis, etc. R. R.*, S. O. Mo., Nov. 12, 1888; 9 S. W. Rep. 577.

231. PRACTICE—Dismissal—Notice.—If an action is dismissed for want of prosecution without notice, the appellant may have the cause reinstated if application is made within a reasonable time, upon such terms as to payment of costs as may be right.—*Berggren v. Berggren*, S. O. Neb., Nov. 7, 1888; 40 N. W. Rep. 284.

232. PRACTICE—Misconduct of Jury—Evidence.—Affidavits may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict. Members of the jury may testify as to any misconduct occurring in the jury room.—*Harris v. State*, S. C. Neb., Nov. 15, 1888; 40 N. W. Rep. 317.

233. PROCESS—Proof of Service—Presumption.—Where the record of judicial proceedings states the manner in which the summons were served on a party beyond the jurisdiction of the court, it will not be presumed that other proof of service was made to the court than that so shown and recited in the judgment, nor that the court acquired jurisdiction, unless it is affirmatively shown.—*Godfrey v. Valentine*, S. O. Minn., Nov. 7, 1888; 40 N. W. Rep. 163.

234. PUBLIC LANDS—Railroads—Indemnity Belt.—The act of congress of 1864, organizing the Northern Pacific R. R., and granting a certain number of alternate sections of land on each side of its line of road, and providing that for any lands coming within the description of the grant that have been sold or pre-empted other lands might be selected in lieu thereof, taken in connection with the resolution of 1870, gave the company an indemnity limit of ten miles.—*Northern Pac. R. Co. v. United States*, U. S. C. C. (Minn.), Oct. 17, 1888; 36 Fed. Rep. 282.

235. QUIETING TITLE—Equitable and Legal Title.—Under California law, one who has an equitable interest in real estate, cannot sue the holder of the legal title for the purpose of determining such adverse claim.—*Von Drachenfels v. Doolittle*, S. O. Cal., Oct. 27, 1888; 19 Pac. Rep. 518.

236. RAILROADS—Fires—Evidence.—Evidence in the case considered sufficient to justify the conclusion that a fire in an open field was caused by defendant's engine.—*Dean v. Chicago, etc. R. Co.*, S. O. Minn., Nov. 16, 1888; 40 N. W. Rep. 270.

237. RAILROADS—Negligence—Trespass.—A railroad company is liable for injuring or killing a person, though he was wrongfully on the track, if it failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted

the calamity.—*Williams v. Kansas City, etc. R. Co.*, S. O. Mo., Nov. 12, 1888; 9 S. W. Rep. 573.

238. RAILROADS—Negligence of Engineer.—An engineer running an engine over a railway crossing, is not excused from ringing the bell or blowing the whistle by the fact that a train of cars standing on the main track obstructs the crossing.—*Brown v. Griffin*, S. O. Tex., Nov. 12, 1888; 9 S. W. Rep. 546.

239. RAILROADS—Taxation—Aid Bonds.—A railroad company which has purchased a road, to the capital stock of which a county has subscribed, is liable to taxation to pay the subscription only on improvements made since the purchase, and not are the value of the road when purchased.—*Louisville, etc. R. Co. v. Hopkins Co.*, Ky. Ct. App., Oct. 20, 1888; 9 S. W. Rep. 497.

240. RAILROAD COMPANY—Fences—Notice.—Where the owner of land grants a right of way through it to a railroad company and agrees in writing to fence the railroad on each side, such agreement not being upon record is no notice to a subsequent purchaser of the land, and he can require the railroad company to fence its track according to the laws of the State.—*Pittsburg, etc. Co. v. Bosworth*, S. O. Ohio, Nov. 13, 1888; 18 N. E. Rep. 533.

241. RECORDS—Police Jury—Collateral Attack.—The minutes of a police jury are a public record, importing absolute verity, and cannot be contradicted in a collateral action, to which the members of the board are not made parties, nor in such action can their secretary be required to alter such minutes.—*State v. Simmons*, S. O. La., Sept. 15, 1888; 5 South. Rep. 39.

242. REMOVAL OF CAUSES—Separable Suit—Partnership.—Case stated wherein the county finds but a single controversy and therefore not removable under the act of congress to the federal court at the instance of a non-resident corporation.—*Yarrian v. Horner*, U. S. C. C. (Mo.), Sept. 26, 1888; 36 Fed. Rep. 130.

243. REMOVAL OF CAUSES—Time of Application.—A motion to remand a case to the State court will be sustained, where it appears that the petition and bond was not filed in the State court at the time defendant was by law required to answer or plead to the complaint, no extension of time having been granted by any rule or order of said court.—*Wedekind v. Southern Pac. Co.*, U. S. C. C. (Nev.), Oct. 1, 1888; 36 Fed. Rep. 279.

244. REPLEVIN—Writ—Statement of Value.—A summons from a justice of the peace to answer a complaint for the detention of a mule, without specifying its value, is insufficient, under North Carolina law.—*Leathers v. Morris*, S. O. N. Car., Nov. 18, 1888; 7 S. E. Rep. 733.

245. REVIEW—Appeal.—Where rulings of the court, and exceptions thereto, are not made part of the record, error cannot be assigned. An instruction that "mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence supports the allegations of the indictment, if it falls short of satisfying the jury beyond a reasonable doubt, that defendants are guilty, nor is it sufficient that upon the doctrine of chances it is more probable that defendants are guilty, though stating correct propositions of law, is argumentative, and was properly refused.—*Burns v. People*, S. O. Ill., Nov. 15, 1888; 18 N. E. Rep. 550.

246. REVIEW—Appeal—Weight of Evidence.—The Supreme Court of Illinois cannot review the findings of fact of the appellate court, but it can look into the bill of exceptions to see whether the judgment is supported by evidence sufficient for that purpose.—*Commercial, etc. Co. v. Scammon*, S. O. Ill., Nov. 15, 1888; 18 N. E. Rep. 562.

247. SALE—Action—Principal and Agent—Evidence.—In an action for goods sold, the declaration of the agent of the purchaser that the goods had arrived but had not been received because his principal had rescinded the contract are admissible in evidence, and sufficient to establish the fact of the delivery of the goods. In such case it is error to direct a nonsuit.—*Sidney, etc. Co. v. School District*, S. O. Penn., Oct. 29, 1888; 5 Atl. Rep. 381.

348. SALES—Conditional—Waiver.—In replevin for a piano by one claiming under foreclosure of a mortgage against the alleged vendor thereof on a conditional sale to the mortgagor, where it appeared that the mortgagor used the property and had possession of the room in which it was stored after his non-compliance with the conditions of such sale, it is proper to submit such circumstances by instructions to the jury as tending to show that the vendor had waived his rights. — *Begole v. Stone*, 8. O. Mich., Oct. 26, 1888; 40 N. W. Rep. 171.

349. SALE—Warranty—Breach—Remedies.—Plaintiff agreed to sell defendants certain printing presses and guaranteed that they should be "free from defective material or workmanship and do their work satisfactorily." Held, that the defendants were bound to return the presses if not satisfactory, and that they could not recoup damages in an action for the price. — *Campbell Printing Press Co. v. Throp*, U. S. O. C. (Mich.), Oct. 16, 1888; 36 Fed. Rep. 414.

350. SEAMEN—Consular Officer—Discharge.—A consular officer of the United States may discharge a seaman on the application of the master, for any cause sanctioned by the usages and principles of the maritime law, as recognized in the United States, on the payment of the wages then earned, and all claim for wages during the remainder of the voyage is thereby cut off and barred. — *Rafferty v. Oakes*, U. S. O. C. (Oreg.), Oct. 18; 1888; 36 Fed. Rep. 442.

351. SHIPPING CHARTER PARTY—Breach—Joinder.—In case of a breach of warranty of sea-worthiness in a charter party, an action for the recovery of the goods shipped and for damages for the breach of warranty may be joined. — *Balfour v. The Director*, U. S. O. C. (Oreg.), Oct. 9, 1888; 36 Fed. Rep. 335.

352. SHIPPING—Tort—Liability of Owner.—The act of congress limiting the liability of ship owners to their interest in the vessel and pending freight, for torts, must be construed with reference to the subject-matter, for which relief may be granted in admiralty, and does not cover the destruction of property on land caused by or communicated from a vessel. — *Goodrich Trans. Co. v. Gagnon*, U. S. O. C. (Wis.), Aug. 18, 1888; 36 Fed. Rep. 123.

353. SPECIFIC PERFORMANCE—Parol Contract.—Part performance of a parol contract to convey lands, is not in itself sufficient to take the same out of the statute of frauds, so as to authorize a specific performance. — *Blankenship v. Spencer*, S. Ct. App. W. Va., Sept. 19, 1888; 78 E. Rep. 433.

354. SPECIFIC PERFORMANCE—Parol Promise.—Equity will decree specific performance of a promise by a father to convey land to a daughter, who on the strength thereof moved on it, improved it, erected buildings thereon and cultivated it. — *Burkings v. Rowland*, S. O. Cal., Nov. 1, 1888; 19 Pac. Rep. 525.

355. SPECIFIC PERFORMANCE—Unilateral Contract—Pleading.—Unilateral contracts for the purchase of lands may be enforced by the vendor. In such case, the complainant not being bound, must show that he is not only willing to perform all the stipulations on his part, but that he has tendered himself ready to perform them before filing his bill. — *Miller v. Cameron*, N. J. Ct. Chan., Nov. 16, 1888; 15 Atl. Rep. 843.

356. STATUTES—Adverse Possession—Construction.—Rev. Stat. Wis. §§ 1190, 4212, do not exclude other conditions of adverse possession not mentioned therein, nor the idea of adverse possession of a character other than those therein prescribed. — *Finn v. Wisconsin*, etc. Co., S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 309.

357. STATUTES—Warrants—Appropriations.—Under the act of 1887, for selling State lands in the city of Lincoln, \$73,000 were realized, part of which was evidenced by notes due subsequently: Held, that by said act the \$73,000 were absolutely appropriated, and warrants could be drawn thereon to carry into effect the purpose of the act. — *State v. Babcock*, S. O. Neb., Nov. 14, 1888; 40 N. W. Rep. 316.

358. STOWAGE—Shipping.—It is bad stowage, for

which the carrier is liable, to place salt over iron and anvils, though crates of crockery be placed between them, and to place the salt, iron and crates within an inch or so of the mast. — *The Nith*, U. S. O. C. (Oreg.), Oct. 9, 1888; 36 Fed. Rep. 338.

359. SUBROGATION—Judgment.—Where one buys land incumbered by two judgments, and pays money into court upon the senior judgment, he is entitled to be subrogated to the amount paid by him to the rights of the senior judgment creditor as against the junior judgment. — *Appeal of Sowers*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 898.

360. SUBROGATION—Sureties—Redemption—Laches—Mortgage.—Where a mortgaged is foreclosed, and a prior judgment creditor not made a party, sureties who have purchased the judgment and stood by while the purchaser at foreclosure sale made valuable improvements, are guilty of laches, and cannot be subrogated to the right to redeem of the judgment creditor. — *Thomas v. Stewart*, S. C. Ind., Nov. 13, 1888; 18 N. E. Rep. 505.

361. TAXATION—Assessment—Presumption.—In an assessment roll made by a township supervisor, under the Michigan law of 1882, it will be presumed that the property was assessed at its true cash value. — *Mills v. Township of Richland*, S. O. Mich., Oct. 26, 1888; 40 N. W. Rep. 183.

362. TAXATION—Corporations—Property.—Under Kentucky law, the stock held by the members of a steamboat corporation is required to be listed, but not the specific property of the corporation. — *Louisville, etc. Co. v. Barbour*, Ky. Ct. App., Nov. 1, 1888; 9 S. W. Rep. 516.

363. TAXATION—Exemption.—The property of a poor district in Pennsylvania is not liable to taxation for county purposes, it being held for the use of a public charity. — *Armstrong Co. v. Overseers*, S. O. Penn., Oct. 29, 1888; 15 Atl. Rep. 392.

364. TAXATION—Fraudulent Return—Complaint.—Construction of Indiana statutes relative to taxation. What is a sufficient complaint to charge a false and fraudulent return of property liable to taxation. — *State v. Lauer*, S. O. Ind., Nov. 17, 1888; 18 N. E. Rep. 527.

365. TAXATION—Levy—Police Jury.—Police jurors are, by Louisiana law, clothed with the optional power of levying or not, as in their wisdom they may deem fit and proper the tax for school purposes. — *Directors v. Police Jury*, S. C. La., Oct. 17, 1888; 5 South. Rep. 23.

366. TAXATION—Omitted—Penalties.—The law of 1878, amended in 1881, providing for assessing taxes upon property for past years, which had not been assessed, does not authorize the including in such assessment of penalties for such years. — *State v. Winona*, etc. Co., S. O. Minn., Nov. 12, 1888; 40 N. W. Rep. 166.

367. TAXATION—Sale—Purchaser as Trustee.—Where the purchasers at a tax-sale, at the request of one pretending to be desirous of purchasing the property for the owner, decline to bid, and the land is struck off to him for a nominal sum, and he afterwards transfers to another by quitclaim deed, such title so conveyed is void against the owner in possession. — *Merritt v. Poulter*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 586.

368. TAXATION—Tax-sale—Mistake.—Circumstances stated under which it was held that where a tax-payer fails to pay his taxes by reason of mistake in the assessment and the land is thereupon sold: Held, that the sale is void. — *Freeman v. Cornwell*, S. O. Penn., Oct. 29, 1888; 15 Atl. Rep. 873.

369. TAXATION—Tax-title—Tax-roll.—Where a tax-roll contains no certificate from the supervisor, and it is not shown that leaves claimed to have been out from the roll contained such certificate, a sale based thereon is void. — *Newkirk v. Fisher*, S. O. Mich., Oct. 26, 1888; 40 N. W. Rep. 189.

370. TELEGRAPH COMPANY—Failure to Deliver Message—Penalty.—The act of Indiana forbidding telegraph companies to discriminate in their charge does not impose a penalty for mere negligence in the delivery of messages. — *Western, etc. Co. v. Jones*, S. C. Ind. Nov. 15, 1888; 18 N. E. Rep. 529.

271. **TENANTS IN COMMON** — Co-tenants — Rents and Profits. — A tenant in common who uses the estate to pasture his cattle is liable to his co-tenant for the latter's share of the value of such pasturage. — *West v. Weyer*, S. C. Ohio, Nov. 13, 1888; 18 N. E. Rep. 537.

272. **TOWAGE**—Negligence. — An unreasonable delay in sending a larger tug to take a tow of logs from a small tug engaged to bring the tow in deep water, during which time there were several logs lost from the raft, renders the tug liable for such loss. — *Wilson v. Sibley*, U. S. D. C. (Ala.), Oct. 17, 1888; 36 Fed. Rep. 379.

273. **TRADE-MARKS** — Design Patent Expiration. — Design patent No. 3,939, to H. Conant for embossing numbers, etc., on thread spools, having expired after seven years' duration, the same is common property; the law does not extend such beyond their terms. — *Coats v. Merrick T. Co.*, U. S. C. C. (N. Y.), Sept. 23, 1888; 36 Fed. Rep. 324.

274. **TROVER**—Live Stock—Damages. — In trover for a cow, wherein the plaintiff prevails, he is entitled to a return for the animal with its increase, or in the alternative to the value thereof. — *Morris v. Colum*, S. O. Tex., Oct. 16, 1888; 9 S. W. Rep. 345.

275. **TRUSTS**—Implied — Attorney. — One who procures an assignee in insolvency, the creditors and the debtor at a public sale for a nominal sum, by advising them as their attorney that thereby a sacrifice will be prevented, and by orally promising them to hold it and manage it till it can be sold more advantageously, holds it in trust for such parties. — *Broder v. Conklin*, S. C. Cal., Nov. 12, 1888; 19 Pac. Rep. 513.

276. **UNDUE INFLUENCE** — Cancellation of Deed. — Where an old man, infirm and weak of mind, conveys land to a girl thirteen years of age, and the only consideration therefor is an alleged injury to her by an assault and battery, which was committed in the presence of the girl's mother without her objection or disapproval, and the mother has threatened him therefor, the deed will be set aside as obtained by undue influence. — *Goodrich v. Shaw*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 187.

277. **USURY**—National Banks. — Under act of congress of June 3, 1864, a sum reserved by a national bank out of the money loaned, greater than the legal interest till the note matures, is forfeited, and also the interest accruing by law upon non payment after maturity. — *Alves v. Henderson N. Bank*, Ky. Ct. App., Oct. 30, 1888; 9 S. W. Rep. 504.

278. **USURY**—Recovery. — Where a note given in renewal of another note is in excess of the principal and legal interest then due, the excess is not recoverable. If usurious interest has been paid, it cannot be recovered. — *Webb v. Bishop*, S. C. N. Car., Oct. 22, 1888; 7 S. E. Rep. 698.

279. **VENDOR AND VENDEE** — Contract — Special Warranty. — A contract to "sell and convey" land "by a deed of warranty" is complied with by the delivery to and acceptance by one of the three vendees of a deed of special warranty. — *Payne v. Echols*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 895.

280. **VENDOR AND VENDEE**—Defective Title. — Where the vendee of land retains part of the purchase money until the vendor shall procure releases of outstanding claims upon the land, and the vendor performs in part his contract, the vendee procuring part of his releases: Held, that the vendor is entitled to recover the portion of the money so retained which is covered by the releases which he has procured. — *Appeal of Ganzs*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 883.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES ANSWERED.

QUERY No. 15 [27 Cent. L. J. 612.]

A and B agreed to run a horse race for \$500 a side, the winner to take the whole. The race was run. A's horse won. After the race, but before the money was paid over by C (the stakeholder), B demanded his \$500; C refused to pay to him, but paid the whole \$1,000 to the winner, A. B brought suit against C, the stakeholder, to recover his \$500. C answered, setting up the above facts, and alleged that B agreed to abide the decision of the judges of the race; that the race was won by A, and was so decided by said judges, and after said decision in A's favor, C held the money when B's demand was made, as the money of A. To this answer B demurred. The circuit court at Portland, Oreg., sustained the demurrer, holding "that, notwithstanding the statutes of Oregon are silent on the subject, the 'wager' is illegal, and contrary to public policy. That demand being made before the money was actually paid over, though after the event, B could recover." Please cite authorities holding: 1st. That in the absence of any statute to that effect, the "wager" is not illegal or against public policy. 2d. That after the event (i. e., after the race was run and decided), it is too late to rescind or recover the money staked and lost. On the second proposition New York, Texas and California have so held as to election bets.

N. H. B.

Answer. Contracts of wager are valid at common law, unless they are affected with some special cause of invalidity. When, therefore, no statutory prohibition intervenes, a bet on the result of a horse race, etc., may be recovered by the winner. The tendency of the later American decisions, however, is to treat all gaming contracts and wagers as void, regardless of the absence of statutes on that subject. The decisions *pro* and *con* are too numerous to be mentioned here, but they are cited in the following authorities: viz: *Goodsall v. Boldero*, 2 Smith's Lead. Cas. (8th Am. ed. 316-319; 7 Walt's Act. & Def. 83-91. T.

RECENT PUBLICATIONS.

A TABLE OF CASES AND INDEX TO NOTES in the 160 Volumes of American Decisions and American Reports, Together with a Brief Enumeration of the Cases Rereported Therein on Each of the Various Titles of the Law. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1888.

We think that the Bancroft-Whitney Company have rendered a very substantial service to those who possess the American Decisions and the American Reports by furnishing them in the volume before us with a complete index and table of cases referred to in the valuable notes which appear in those reports. We have no doubt that the volume will be found exceedingly valuable to those who have occasion to refer to this collection, especially as the notes are very thorough and exhaustive, and as useful to the practitioner as the reports themselves.

The Central Law Journal.

ST. LOUIS, JANUARY 11, 1889.

CURRENT EVENTS.

On the first day of the year the law passed by the New York legislature providing for the execution, by electricity, of criminals under sentence of death, went into effect, and though the public will look with interest for the result of such an experiment, there is a well settled conviction in the minds of all, that its adoption is in the right direction and will indorse the language of Governor Hill in his message recommending it:

The present mode of executing criminals by hanging has come down to us from the Dark Ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner.

The law provides that the court imposing sentence shall name merely the week within which the execution is to take place, the particular day within such week being left to the discretion of the principal officer of the prison. The execution is required to be practically private, only officials, clergymen, physicians and a limited number of citizens being allowed to be present.

Another reform now being agitated, and to which the attention of the New York legislature was called in the last annual message of Governor Hill is that of more stringent, satisfactory and uniform divorce laws. It has been suggested that a conference of representatives of all the States be held to consider the best method of securing wise and uniform marriage and divorce laws. At present the laws on these subjects vary in different States to the point of absurdity and injustice. A prominent writer who has made a study of the subject, concludes that we have no less than forty-six different codes for the accommodation of those who wish to free themselves from the bonds of matrimony, and the extent to which laws operate as sources of danger to the marriage relation may be seen in the fact that during the last twenty years the annual

average of divorces in this country has been sixteen thousand five hundred. It is not reasonable to believe that divorces were really necessary in even a majority of these cases. The courts have granted them, not because good and sufficient reasons were given, but because the laws permitted the decree to be made for causes of a trivial nature. If one State does not offer the desired opportunity, some other State does. The laws ought to be so adjusted as to attach a deeper meaning to connubial vows and duties. It is desirable that marriages shall cease to be made with the understanding that at the first sign of dissatisfaction, or upon the slightest pretext of estrangement the courts will dissolve the union, and give the parties a chance to repeat the experiment.

A very learned and exhaustive discussion of "The Legality of Trusts," prepared by the eminent jurist, Theodore W. Dwight, will be found in the "Political Science Quarterly," for December. For the purposes of the article he divides the subject into three heads, viz:

1. Is the object sought to be accomplished by a "trust," legal, at common law, either (a.) by agreement of individual producer, not acting as stockholder in a corporation, or (b.) by agreement of stockholders.
2. If the end be legal, how far will it be possible for a State legislature to prohibit it?
3. What is the power of congress to legislate upon the subject.

He concludes that "trusts" are lawful; that they are legitimate modes whereby producers may regulate prices, and that neither congress nor States can legislate to suppress a partnership having no illegal purpose. The professor grows eloquent at the close of his argument, declaring that "trusts," as a rule, are not dangerous. They cannot overcome the law of supply and demand, nor the resistless power of unlimited competition. The right or association is the child of freedom of trade. It is too late to banish it. The only way out of the difficulty, if it be one, is to invade the right of property, limit production by law, cut down the employment of large capitals, and, perhaps, in the end hand over production to the State. All English speaking people have been engaged for a hundred years, both in overcoming natural obstacles to internal trade and in abrogating absurdly restrictive laws. It is not to be credited that

we shall commit the supreme folly of resorting to mischievous legislation, fully tried and long since abandoned.

The banquet recently given Chief Justice Fuller by the Chicago Bar Association, was a notable affair and the occasion of many able addresses. That of Hon. W. C. Goudy was conspicuous in its treatment of certain practical questions, of interest to the profession. The following, only a small portion of his able address, will interest, if not commend itself to all:

We have too many lawyers, too many judges, and too many cases in the courts. It has been popular to demand easy access to the courts, upon the theory that justice should be attainable by every person, and that a remedy should be found for every wrong with little expense. * * *

In this city and State, which may be accepted as a fair example of other parts of the country, we have one licensed lawyer for every one hundred male adult inhabitants. As there cannot be legitimate legal business among each hundred to support one lawyer, it follows that illegitimate and unnecessary litigation is encouraged.

In this county, twenty courts of record are in daily session, not counting the federal judges and justices of the peace. The expense borne by taxation upon property for the maintenance of these courts exceeds \$500,000 per annum. This does not include the cost of court house or expenses met by the litigants themselves.

These facts are more startling when compared with the system of administering justice in England. There, with a population of about 30,000,000, and which is the financial and mercantile center of the world, forty judges dispose of all the business in courts of record, while in Illinois, with a population of about 4,000,000, the judges and courts corresponding to the forty in England, number 170.

Some remarks made by Mr. James L. High on the same occasion will surprise those of us who have been of the impression that the spirit of greed, gain and gold, characteristic of Chicago merchants, possessed the lawyers of that city, even in a larger degree. Mr. High said:

Another popular misconception touching the profession is that its members are accustomed to receive certain pecuniary emoluments, vulgarly called fees, as compensation for services rendered. It is a matter of simple duty to correct so gross a slander which we have too long suffered. There are, it is true, traditions that a few of our seniors, including perhaps, such Nestors of the bar as my brother Goudy or my brother Swett, have in an occasional period of mental aberration, been known to accept, under protest a modest honorarium from a confiding client. But these are only isolated cases. And the bar of Chicago constitutes a species of eleemosynary corporation whose one thousand eight hundred members are constantly

going about on a sort of perennial mission of peace on earth and good will toward men.

It is interesting, even at this late day, to learn that the members of that bar, accept, for their services, only what they can get, and that only when it is forced upon them by a guileless client, who takes advantage of their helpless mental condition.

NOTES OF RECENT DECISIONS.

An opinion of interest to the Illinois bar will be found in *Chaplin v. Commissioners, etc.*,¹ recently decided by the supreme court of that State. It was there held, directly overruling *Eckhart v. Irons*² and *Lucan v. Cadwallader*,³ that proceeding, under the highway law of Illinois to drain a road through adjacent lands, involves a question of freehold, as thereby a perpetual easement is imposed on the land, and, consequently, that the appellate court had no jurisdiction of the case.

¹ 18 N. E. Rep. 765.

² 6 N. E. Rep. 15.

³ 7 N. E. Rep. 286.

The Court of Appeals of Maryland, in the recent case of *Bowie v. Hall*,¹ decided a question upon both sides of which authorities may be found,² though the weight of them is in accordance with this decision. It was there held, that a stipulation in a note, in case of non-payment at maturity to pay costs of collecting the same, including attorneys' commissions, is valid. The court says:

We are not aware of any case in which such a contract has come before an English court; and this may result from what we believe to be the fact, that the practice of remunerating attorneys and solicitors for their professional services, by a certain percentage on the money collected by them for their clients by suits in court, has never prevailed in England. In this country, however, such a practice has been commonly adopted. Contracts, therefore, like the present, are not unusual here, and have become numerous in recent times. In some cases their validity has been denied by the courts, but it seems they are sustained by a decided preponderance of authority.

¹ 16 Atl. Rep. 64.

² See *Machine Co. v. Moreno*, 7 Fed. Rep. 808; *Bank v. Sevier*, 14 Fed. Rep. 682.

The Supreme Court of California in a recent case,¹ novel at least to that State, has

¹ *Sesler v. Montgomery*, 8, C. Cal. 19 Pac. Rep. 686.

punctured one of the numerous fictions surrounding the relation of husband and wife. It was therein held that a communication by a husband to his wife of slanderous words in regard to a woman is a publication. The court says:

We have not been referred by appellant to any decision in support of the precise point, except one,² decided by an inferior court. We have not had access to this report, but from the mention of the case in Townshend on Slander we should infer that the decision proceeded on another ground, and that what is said in relation to the question in hand is merely a *dictum*. Nor have we been able to find any case exactly in point. Upon principle we should say that there was a publication. That husband and wife are one person is a mere fiction, and is not true for all purposes. The tendency of modern law, especially in California, is certainly not to extend the operation of the fiction. Nor do we see any reason why it should be extended, at least in the present direction. The reputation of a woman can certainly be injured by slanderous communications to her female friends; and the fact that the communication came through a husband would not ordinarily deprive it of its injurious effect.

² Trumbull v. Gibbons, 8 City H. Rec. 97.

An interesting question of insurance has recently been decided by the United States Circuit Court, Northern District, Illinois.¹ The contention was whether a court of equity has jurisdiction where there is a claim against several insurance companies, for the same loss, upon different policies, to apportion the loss among the respective companies and require payment from each of the amount for which it is liable. Judge Blodgett, in deciding the question affirmatively, says:

It is obvious that, in separate suits at law against each of these insurers, the complainants would have been required to establish by proof to a jury, or to the judge in case a jury was waived, the proportion of loss to be borne by each class of insurers, as well as the amount to be paid by each member of that class—that is, how much of the loss, if any, should be borne alone by the marine insurance, and how much, if any, should be borne alone by the fire insurance, and how much, if any, should be borne by the two classes jointly; and it is clear that courts and juries might, and probably would, have differed widely as to the division of the loss between the two classes of insurers, if not as to the division between the members of such classes, and hence the complainants in suits at law would have been in peril of failing to recover perhaps a large portion of their actual loss by reason of different findings of juries or courts upon the same evidence. And, when several parties are liable to a contribution for the payment of a common debt or obligation, an apportionment of the amount to be contributed and paid by each has always been deemed within the field of equity jurisprudence.³ * * * These

authorities, and others to which my attention has been called, seem to me, to amply support the jurisdiction of this court to give the relief asked by this bill, while the complainants' remedy at law would almost necessarily be uncertain and incomplete.

In *Greenwood v. Holbrook*,¹ recently decided by the New York Court of Appeals, that court reversed the decision of the supreme court² in the interpretation of the meaning of the term "legal representatives" in a contract drawn up by way of compromise of conflicting claims under a contested will. The controversy arose between executors, who claimed that they were the legal representatives of a deceased woman, and on the other hand, her next of kin who made same claim relying upon the statute of distributions. The supreme court decided in favor of the ordinary meaning of the term, and awarded the fund to the executors. The court says:

We differ from the conclusion of the court below, and are of opinion that the proper construction of the agreement in question requires us to hold that the phrase "legal representatives" contained in it means "next of kin" to the child dying, and not the executors or administrators of that child. It must be conceded that it might mean either, and numerous cases are referred to in support of the contention of each party. No one case is, however, so like the present as to require its adoption, and little instruction would be given by an analysis of the decisions.

¹ 18 N. E. Rep. 711.

² 42 How. 633.

An opinion of exceeding interest, as to the right of sale of homestead under execution, has recently been rendered by the Supreme Court of North Carolina,¹ which is the more readable by reason of the very able dissenting opinion of Judge Davis coupled with it. The case turned on the question as to whether a sale under execution was valid where the sheriff had not caused homestead to be allotted, but where the judgment upon which the execution was issued and the land sold was for the recovery of a debt antedating the constitution and laws providing for homestead.

The court, upon the authority of *McCanless v. Flinchum*² and *Edwards v. Kearzey*,³ held that the sale was invalid, saying:

While it is conceded that under the constitution of the United States, as construed and applied to the exemption enactment, a debt previously created, and be-

¹ Fuller v. Detroit, etc. Ins. Co., 36 Fed. Rep. 469.

² Garrison v. Insurance Co., 19 How. 812.

¹ Morrison v. Watson, 7 S. E. Rep. 796.

² 98 N. O. 369.

³ 96 U. S. 595.

fore the State constitution was adopted, must be paid out of the debtor's estate, and the exemption must give way when it cannot be otherwise satisfied out of the debtor's property, yet the debtor possesses still the right to retain exempt from sale, even at the instance of such a creditor, whatever excess there may be in his hands after the disposition of so much as may be needed to discharge the debt, and to have an inquiry made, in the mode prescribed by law, to have the fact ascertained previous to the sale. * * * It has been repeatedly declared, and, after an elaborate and exhaustive examination of the subject in separate opinions, settled by a majority of the members of the court in *McCanless v. Flinchum*, already cited, that, without regard to the time of origin of the debt, the provisions of the statute for laying off the homestead must be observed.

Judge Davis, in his dissenting opinion, says:

As I understand the decision of the Supreme Court of the United States in *Edwards v. Kearzey*,⁴ and the decisions of this court in *Gheen v. Summey*,⁵ *Earle v. Hardie*,⁶ and *Richardson v. Wicker*,⁷ in conformity with that decision, and immediately following it, article 10, §§ 1, 2, of the present constitution, and the legislative enactments for carrying that article into effect, are void as to contracts made prior to the adoption of the constitution, because they violate that provision of the constitution of the United States which declares that "no State shall pass any * * * law impairing the obligation of contracts." It will not do to say that the law affects the remedy, and not the rights, of parties to the contract. If the law affecting the remedy impairs the obligation of the contract—lessens the value of the contract—it is void; and it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the constitution.

⁴ *supra*.

⁵ 80 N. C. 187.

⁶ *Id.* 177.

⁷ *Id.* 172.

Apropos of the very general litigation incident to the maintenance and public management of telephone companies and the attempts of legislature and city councils to regulate such service, comes a novel case from Indiana, decided recently by the United States Circuit Court.¹ The case grew out of the fact that the Bell Telephone Company, complainants herein, had, in most of the cities of that State, furnished telephone accommodations, but withdrew therefrom after the passage by the legislature of an act limiting its rates of charges. This was a suit by the Bell Telephone Company against a rival company, who are engaged in furnishing telephone accommodations generally in that State, for infringement of patent, and asking for an injunction. The court says:

The law gives the owner of a patent the exclusive right to the use of the device covered by his patent;

¹ *American Bell Tel. Co. v. Cushman Tel. Co.*, 86 Fed. Rep. 488.

and the rule that because the patentee, or owner of a patent, cannot agree, with those who wish to use his device, as to the price to be paid for such use, authorizes another to pirate upon the patent with impunity, would be destructive of patent property.

It was urged upon the argument that this court had decided in the former case,² that a patentee who did not put his patent into use was not entitled to an injunction, and that decision was invoked on the argument of this application for an injunction. I, however, think that the case there made was another and widely different one from this. There the patentee had never made a machine, nor put his patent into use, nor allowed another person to put it into use. He had simply locked it up, so to speak, and kept the public from the benefit of it. Here the patentee has put his patent into extensive use, and is receiving a large income for such use at rates agreed upon between the owners of the patent and the user.

² *Hoe v. Knap*, 27 Fed. Rep. 204.

The Supreme Court of New Jersey, in a recent case,¹ wherein the question was as to what constitutes a partnership, use the following language:

What constitutes a partnership is not easy to define, abstractly, so that it will apply to all cases; but whether certain facts tend to show the relation of partnership is less difficult, though often perplexing, because of the nice distinctions that have been made in the decided cases, and the variety of circumstances that surround such transactions. The recent case of *Wild v. Davenport*,² having carefully examined the cases in other courts, notably the leading case of *Cox v. Hickman*,³ together with cases in our own courts, reaches this conclusion: that a right to receive a share of the profits of a business does not furnish an invariable test of a partnership, even as to creditors; that a person not actually engaged in the business as a principal, and not holding himself out as a partner, cannot be held for debt contracted in the business as a dormant partner, unless in virtue of some contract, express or implied, on his part, in legal effect creating, as between him and the persons actually carrying on the business, the relation of principal and agent.

¹ *Seabury v. Bolles*, 16 Atl. Rep. 54.

² 48 N. J. Law, 129.

³ 8 H. L. Cas. 268; 9 C. B. (N. S.) 47.

In the case of *Town of Knightstone v. Musgrove*,¹ the Supreme Court of Indiana disregard and refuse to accept the English principle laid down in *Thorogood v. Bryan*,² and lay down the rule, followed³ with but one or two exceptions in this country, to the effect that the negligence of a driver of a vehicle is not the negligence of the passenger injured through the negligence of a third person, and holding directly that the negligence of a man, who invited plaintiff, a woman, to ride with him in his carriage, the man keeping full con-

¹ 18 N. E. Rep. 452.

² 8 C. B. 115.

³ *Little v. Hackett*, 116 U. S. 366; *Masteson v. Railway Co.*, 84 N. Y. 247.

trol of the horse, and plaintiff, having no reason to doubt his efficiency in driving, cannot be imputed to her in an action against him for injuries due to obstruction negligently left in the street.

STATUTE OF LIMITATIONS IN MORTGAGE FORECLOSURE.

1. Limitation of Actions to Foreclosure.
2. Limitations in Equity.
3. Rebuttal of Presumption of Payment.
4. Limit of Less than Twenty Years
5. Effect of Outlaw of Debt on Right to Foreclose Mortgage.
6. Exceptions to the General Rule—Special Statutes.
7. Effect of Covenant to Apply Debt on Right to Foreclosure.
8. Effect of Statute of Limitations where Mortgage Executed by Surety.
9. Delay in Foreclosing Presumption.
10. Statute Contracts.

1. *Limitation of Actions to Foreclosure.*—The New York Code of Civil Procedure,¹ and all codes modeled after it, provide that all actions upon sealed instruments must be commenced within twenty years after the cause of action accrued.² An action to foreclose a mortgage is an action upon a sealed instrument, within the meaning of the code, and will not be barred until twenty years have elapsed from the time the mortgage became due and payable, or from the date of the last payment made upon it. Where the mortgagor has made payments upon the mortgage within twenty years from the time it became due, the presumption of payment, declared by the statute to arise after the lapse of twenty years from the date when the right of action accrued, is not available as a defense in an action of foreclosure.³ But independent of written law there is a period after which, upon the common law principles, from which the statutes of limitation have been deduced, a demand founded upon a note, bond or judgment, becomes irrecoverable. It is a general rule that forbearance for twenty years unexplained, unaccounted for, and un-

rebutted, will extinguish a judgment as well as all other pecuniary demands.⁴

2. *Limitations in Equity.*—While statutes of limitation are, as a general rule, applicable as such only in proceedings at law, yet courts of equity, acting by analogy, will, in proceedings where they have concurrent jurisdiction with courts of law, apply statutes of limitation and refuse to grant relief where it appears that the statutory period, within which an action might have been maintained at law, has elapsed.⁵ This has been the settled rule of decision in the English courts of chancery for the last century and a half.⁶ But in some of the American States it is held that in equity the lapse of time operates only by way of evidence, as affording a presumption of payment,⁷ while other States hold that courts of equity are bound by the statutes of limitation as much as the courts of law.⁸ In

⁴ *Gulick v. Loder*, 13 N. J. L. (1 J. S. Gr.) 68; s. c., 23 Am. Dec. 711. See also *Boardman v. DeFoster*, 5 Conn. 1; *Buchanan v. Rowland*, 5 N. J. L. (2. South.) 72; *Cohen v. Thomson*, 2 Mills (S. C. Const.), 146; *Wells v. Washington*, 6 Munf. (Va.) 532; *Ross v. Darby*, 4 Munf. (Va.) 428; *Willaume v. Gorges*, 1 Campb. 217; *Flower v. Bolingbroke*, 1 Str. 639.

⁵ See *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90; s. c., 11 Am. Dec. 417; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 287; s. c., 8 Am. Dec. 562; *Morgan v. Morgan*, 10 Ga. 297; *Sloan v. Graham*, 85 Ill. 26; *Castner v. Walrod*, 83 Ill. 171; *Kane v. Herrington*, 50 Ill. 239; *Manning v. Warren*, 17 Ill. 267; *Clay v. Clay*, 7 Bush (Ky.), 95; *Bank of United States v. Dallam*, 4 Dana (Ky.), 574; *Fenwick v. Macey*, 1 Dana (Ky.), 276; *Thomas v. White*, 3 Litt. (Ky.) 177; *Smith v. Carney*, 1 Litt. (Ky.) 295; *Ashley v. Denton*, 1 Litt. (Ky.) 86; *Frame v. Kenny*, 2 A. K. Marsh. (Ky.) 145; s. c., 12 Am. Dec. 367; *Breckenridge v. Churchill*, 3 J. J. Marsh. (Ky.) 12; *Brunk v. Means*, 11 B. Mon. (Ky.) 214; *Rogers v. Moore*, 9 B. Mon. (Ky.) 401; *Ayres v. Waite*, 64 Mass. (10 Cush.) 72; *Ayer v. Stewart*, 14 Minn. 97; *McCleane v. Shepherd*, 21 N. J. Eq. (6 C. E. Gr.) 76; *Neely's Appeal*, 85 Pa. St. 387; *Shelby v. Shelby*, *Cooke* (Tenn.), 179; s. c., 5 Am. Dec. 686; *Cooke v. McGinnis*, 1 Mart. & Yerg. (Tenn.) 361; s. c., 17 Am. Dec. 809; *Pitzer v. Burns*, 7 W. Va. 63, 69; *Carroll v. Green*, 92 U. S. (2 Otto) 509; bk. 23, L. ed. 738; *Wagner v. Baird*, 48 U. S. (7 How.) 258; bk. 12, L. ed. 681; *Badger v. Badger*, 2 Cliff. C. C. 187; *Willis v. Robinson*, 4 Bligh, 119.

⁶ See *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90; s. c., 11 Am. Dec. 417; *Cooke v. McGinnis*, 1 Mart. & Yerg. (Tenn.), 361; s. c., 17 Am. Dec. 809; *Sturt v. Mellish*, 2 Atk. 610; *Lockey v. Lockey*, *Pres. Ch.* 518; *Hovenden v. Annesley*, 2 Sch. & Lef. 607, a leading case, in which all the American and English cases are distinguished; overruling *Ooster v. Murray*, 5 Johns. Ch. (N. Y.) 522; *Love v. Watkins*, 40 Cal. 547.

⁷ See *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 287; s. c., 8 Am. Dec. 562.

⁸ See *Shelby v. Shelby*, *Cooke* (Tenn.), 179; s. c., 5 Am. Dec. 686.

¹ N. Y. Code Civil Procedure, §§ 380, 381.

² *Id.* 381.

³ *New York Life Ins. & Trust Co. v. Covert*, 3 Abb. Ct. App. Dec. (N. Y.) 350; s. c., 3 Trans. App. 24; 6 Abb. (N. Y.) Pr. N. S. 154, reversing s. c., 29 Barb. (N. Y.) 435.

California,⁹ Missouri,¹⁰ Nevada¹¹ and Oregon,¹² the statutes of limitations are expressly made applicable to all suits and actions.

In actions to foreclose mortgages, courts of equity, following the analogy of the statute of limitations,¹³ regard suits as barred after the lapse of twenty years, where the mortgagor has been permitted to remain in possession without accounting, without any payment of interest, or promise to pay, or acknowledgment that the mortgage is still existing.¹⁴ Payment being presumed after the lapse of twenty years,¹⁵ it must be accepted as conclusive by the court and the jury. In the absence of any evidence to explain the delay or rebut the presumption,^{15a} the lapse of twenty years constitutes a complete defense to a foreclosure proceeding.¹⁶

The grantee of a mortgagor may avail him-

⁹ Love v. Watkins, 40 Cal. 517; Boyd v. Blankman, 29 Cal. 19; Lord v. Morris, 18 Cal. 484.

¹⁰ Kelly v. Hurt, 61 Mo. 463.

¹¹ White v. Sheldon, 4 Nev. 280.

¹² Anderson v. Baxter, 4 Ore. 103; Ore. Code Civ. Proc. § 878.

¹³ McDonald v. Sims, 3 Ga. 383.

¹⁴ Harrington v. Slade, 22 Barb. (N. Y.) 151; Bailey v. Jackson, 16 Johns. (N. Y.) 210; Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287; s. c., 8 Am. Dec. 562; Swart v. Service, 21 Wend. (N. Y.) 36; Perkins v. Cartnell, 4 Harr. (Del.) 270, 275; s. c., 43 Am. Dec. 753; Records v. Melson, 1 Houst. (Del.) 139; Van Duyn v. Hepner, 45 Ind. 589; Jarvis v. Albro, 67 Me. 310; Sheafe v. Gerry, 18 N. H. 245; Howard v. Hildreth, 18 N. H. 105; Downs v. Sooy, 28 N. J. Eq. (1 Stew.) 55; Ludlow v. Van Camp, 6 N. J. Eq. (2 Halst.) 113; s. c., 11 Am. Dec. 529; Wanmaker v. Van Buskirk, 1 N. J. Eq. (1 Saxt.) 685; s. c., 23 Am. Dec. 748; Gulick v. Loder, 3 N. J. L. (1 J. S. Gr.) 68; s. c., 23 Am. Dec. 711; Todd's Appeal, 24 Pa. St. 429; Bank of United States v. Biddle, 2 Pars. Cas. (Pa.) 31; Henderson v. Lewis, 9 Serg. & R. (Pa.) 379; s. c., 11 Am. Dec. 733; Ordinary v. Steedman, Harp. L. (S. C.) 287; s. c., 18 Am. Dec. 632; Yarnell v. Moore, 8 Coldw. (Tenn.) 176; Carter v. Wolfe, 1 Helsk. (Tenn.) 700; Anderson v. Settle, 5 Sneed (Tenn.), 203; Atkinson v. Dance, 9 Yerg. (Tenn.), 424; s. c., 30 Am. Dec. 422; Rogers v. Judd, 5 Vt. 236; s. c., 26 Am. Dec. 301; Booker v. Booker, 29 Gratt. (Va.) 605; s. c., 26 Am. Rep. 401; Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6, L. ed. 142. See also *ante*, § 55, *et seq.*

¹⁵ See Giles v. Barremore, 5 Johns. Ch. (N. Y.) 545; Dunham v. Minard, 4 Paige Ch. (N. Y.) 441; Borst v. Boyd, 3 Sandf. Ch. (N. Y.) 501; Jarvis v. Albro, 67 Me. 310; Downs v. Sooy, 28 N. J. Eq. (1 Stew.) 55.

¹⁶ Brock v. Savage, 31 Pa. St. 422; King's Ex'rs v. Coulter's Ex'rs, 2 Grant Cas. (Pa.) 80; Cope v. Humphreys, 14 Serg. & R. (Pa.) 21; Lesley v. Nones, 7 Serg. & R. (Pa.) 410; Tilghman v. Fisher, 9 Watts (Pa.), 422; Bellas v. Lavan, 4 Watts (Pa.), 297.

^{15a} Goodwyn v. Baldwin, 59 Ala. 127; Castner v. Walrod, 83 Ill. 171; s. c., 25 Am. Dec. 369; Downs v. Sooy, 28 N. J. Eq. (1 Stew.) 55.

self of the bar of the statute of limitations as a defense to an action to foreclose whenever the mortgagor could have set up such defense.¹⁷ But the possession must be conclusive and adverse,¹⁸ for until the possession of the mortgagor is shown to be adverse, the right to foreclosure is not barred by twenty years of such possession.¹⁹

The general rule is, that where an action upon a legal title to land would be barred by the statute of limitations, courts of equity will apply like limitations to suits founded upon equitable rights to the same property.²⁰

3. *Rebuttal of Presumption of Payment.*—The presumption of payment after the lapse of twenty years may be rebutted²¹ by showing payment of interest, a promise to pay, or an acknowledgment by the mortgagor,²² and the like.²³ But where relationship is shown between the parties, this may rebut the presumption of payment by the lapse of time. Thus, where the holder of a mortgage permitted his mother, who was the mortgagor, and his sister, to whom the mother conveyed the equity, to occupy the premises for more than twenty years, and he testified, without contradiction that the mortgage debt had not been paid, and that he permitted such occupancy by his mother and sister because of the relationship, it was held that the proof to rebut the presumption of payment was ample and explicit.²⁴

When the statute of limitations is complete, any act of the mortgagor which revives the debt also revives the lien of the mortgage, unless the parties agree otherwise,

¹⁷ Baldwin v. Boyd, 18 Neb. 449.

¹⁸ Moore v. Cable, 1 Johns. Ch. (N. Y.) 386; Crook v. Glenn, 30 Md. 55.

¹⁹ Sheafe v. Gerry, 18 N. H. 245.

²⁰ Askew v. Hooper, 28 Ala. 634; Haskell v. Bailey, 22 Conn. 569; Sloan v. Graham, 85 Ill. 27; Kane Co. v. Herrington, 50 Ill. 232, 239; Crook v. Glenn, 30 Md. 55; Cheever v. Perley, 93 Mass. (11 Allen) 584; Elmendorf v. Taylor, 23 U. S. (10 Wheat.) 152, 168; bk. 6 L. ed. 280.

²¹ Jarvis v. Albro, 67 Me. 310; Cheever v. Perley, 93 Mass. (11 Allen) 584; Hendrickson v. Decon, 1 N. J. Eq. (1 Saxt.) 685; Booker v. Booker, 29 Gratt. (Va.) 605; s. c., 26 Am. Rep. 401.

²² See Kernett v. Portfield, 56 Ia. 412; Day v. Baldwin, 34 Ia. 380.

²³ Cook v. Parham, 63 Ala. 456; Coldbaugh v. Johnson, 34 Ark. 312; Butler v. Hagadone, 45 Mich. 390; Howard v. Hildreth, 18 N. H. 105; Murphy v. Coates, 33 N. J. Eq. (6 Stew.) 424; Suavely v. Pickle, 29 Gratt. (Va.) 27; Pears v. Laing, L. R. 12 Eq. 41.

²⁴ Philbrook v. Clark, 77 Me. 176.

or unless such revivor affects the rights of purchasers and mortgagees acquiring title after the bar is complete, and before the act of revivor.²⁵ Where a mortgagor conveys the equity of redemption, and ceases to pay interest on the mortgage note, the regular payment of interest by the grantee does not operate to prevent the running of the statute of limitations against the liability of the mortgagor on the note.²⁶

4. *Limit of Less than Twenty Years.*—It has been held that the lapse of even a less number of years than twenty will be sufficient to raise a presumption of payment. Thus, it was said, in *Henderson v. Lewis*,²⁷ that a presumption of the payment of a bond may be raised by a lapse of less than the statutory period of twenty years, when taken in connection with other evidence, but that in the absence of other circumstances the full statutory period must expire to raise the presumption.²⁸ And in another case²⁹ the court say that, "as to what amount of time alone, divested of other circumstances, shall be of weight sufficient to authorize a jury to presume payment, unless the presumption be rebutted, is necessarily arbitrary as a rule, and based upon grounds of public policy. Sixteen years having, in the case referred to,³⁰ been adopted, and society having acted on it for many years, it would be improper, we think, to question the correctness of the rule."³¹

5. *Effect of Outlaw of Debt on Right to Foreclose Mortgage.*—It is a prevailing doctrine of the courts that, where a mortgage has been given to secure the payment of a simple contract debt, a statute limiting the time within which to commence an action for the recovery of such debt is no bar to an action for the foreclosure of the mortgage,³²

²⁵ *Johnson v. Johnson*, 81 Mo. 331.

²⁶ *Trustees of Almhouse Farm v. Smith*, 52 Conn. 434.

²⁷ 9 Serg. & R. (Pa.) 379; s. c., 11 Am. Dec. 733.

²⁸ See also *Lesley v. Nones*, 7 Serg. & R. (Pa.) 410; *Husky v. Maples*, 2 Coldw. (Tenn.) 25; *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97; *Freeman on Judgments*, §§ 464, 465; 2 Greenl. Ev. § 528.

²⁹ *Atkins v. Dance*, 9 Yerg. (Tenn.) 424; s. c., 30 Am. Dec. 422.

³⁰ *Blackburne v. Squibb*, Peck (Tenn.), 64.

³¹ See also, *Yarnell v. Moore*, 3 Coldw. (Tenn.) 178; *Carter v. Wolfe*, 1 Helsk. (Tenn.) 700; *Anderson v. Settle*, 5 Sneed (Tenn.), 203.

³² *Gillette v. Smith*, 18 Hun (N. Y.), 110; *Heyer v. Pruyn*, 7 Paige Ch. (N. Y.) 465; s. c., 34 Am. Dec. 355; *Pratt v. Higgins*, 29 Barb. (N. Y.) 277; *Ware*

because the mortgage remains in full force until the debt is paid which it was given to secure.³³ The statute of limitations simply takes away the remedy but does not otherwise affect the parties.³⁴

v. Curry, 67 Ala. 274; *Scott v. Ware*, 64 Ala. 174; *Blizzell v. Nix*, 60 Ala. 281; s. c., 31 Am. Rep. 38; *Blrnie v. Main*, 29 Ark. 591; *Hough v. Bailey*, 32 Conn. 288; *Haskell v. Bailey*, 22 Conn. 573; *Belknap v. Gleason*, 11 Conn. 160; s. c., 27 Am. Dec. 721; *Baldwin v. Norton*, 2 Conn. 163; *Browne v. Browne*, 17 Fla. 607; *Elkins v. Edwards*, 8 Ga. 325; *Ætna Life Ins. Co. v. Finch*, 84 Ind. 301; *Crooker v. Holmes*, 65 Me. 195; s. c., 20 Am. Rep. 687; *Joy v. Adams*, 26 Me. 330; *Lingan v. Henderson*, 1 Bland Ch. (Md.) 236, 282; *Balch v. Onion*, 58 Mass. (4 Cush.) 559; *Eastman v. Foster*, 49 Mass. (8 Metc.) 19, 24; *Thayer v. Mann*, 36 Mass. (19 Pick.) 537; *Webber v. Ryan*, 54 Mich. 70; *Powell v. Smith*, 30 Mich. 451; *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Wilkinson v. Flowers*, 37 Miss. 312; s. c., 66 Am. Dec. 609; *Trotter v. Erwin*, 27 Miss. 772; *Bush v. Cooper*, 26 Miss. 599, 611; *Trustees of Jefferson College v. Dickson*, 13 Miss. (5 Smed. & M.) 650; *Miller v. Helm*, 10 Miss. (2 Smed. & M.) 687, 688; *Wood v. Augustine*, 61 Mo. 46; *Cookes v. Culbertson*, 9 Nev. 199, 208; *Mackie v. Lansing*, 2 Nev. 302; *Read v. Edwards*, 2 Nev. 265; *Henry v. Confidence Gold Mining Co.*, 1 Nev. 319; *Cathart v. Detrick*, 91 N. C. 344; *Myer v. Beal*, 5 Oreg. 130; *Fisher v. Mosman*, 11 Ohio St. 42, 46; *Ballou v. Taylor*, 14 R. I. 277; *Richmond v. Aiken*, 25 Vt. 324; *Cerney v. Pawlot*, 66 Wis. 262; *Knox v. Galligan*, 21 Wis. 470; *Wiswell v. Baxter*, 20 Wis. 680; *Bank of Metropolitan v. Gutschlick*, 39 U. S. (14 Pet.) 19; bk. 10 L. ed. 335; *Sparks v. Pico*, 1 McAl. C. C. 497; *Toplis v. Baker*, 2 Cox C. C. 118, 123; *Spears v. Hartley*, 8 Esp. 81. In an early New York case, however, it was intimated by Justice Sutherland that a mortgage to secure a simple contract debt, was presumed to be paid in six years, because the statute of limitations, at the expiration of that time, might be pleaded to a suit upon a note. See *Jackson v. Sackett*, 7 Wend. (N. Y.) 94. But this was clearly *obiter dicta*, and has since been denied in several New York cases. In *Heyer v. Pruyn*, 7 Paige Ch. (N. Y.) 465; s. c., 34 Am. Dec. 355, Chancellor Walworth says that it "certainly cannot be law." At least, that such a principle cannot apply in a case where the real security upon the land is separated from the personal responsibility of the mortgagor by a sale of the equity of redemption upon execution. In the case of *Pratt v. Higgins*, 29 Barb. (N. Y.) 277, the general term of the third district flatly overruled the doctrine implied in Judge Sutherland's remarks in *Jackson v. Sackett*, and held, in regard to the precise facts, that the debt secured be a sealed mortgage, and an unsealed note, instead of a bond, may be enforced by a foreclosure of the mortgage after the expiration of six, but before the expiration of twenty years from the time when the debt become due. The court say: "The debt is the principal thing, and the note is one form of the surety for, or evidence of, the debt, and the mortgage another." See also, *Borst v. Corey*, 15 N. Y. 505, 510; *Jones v. Merchants' Bank of Albany*, 4 Robt. (N. Y.) 221; *Belknap v. Gleason*, 11 Conn. 160; s. c., 27 Am. Dec. 721; *Baldwin v. Norton*, 2 Conn. 163; *Thayer v. Mann*, 36 Mass. (19 Pick.) 537; *Toplis v. Baker*, 2 Cox C. C. 123; *Spears v. Hartley*, 8 Esp. 81.

³³ *Joy v. Adams*, 26 Me. 330.

³⁴ *Waltermire v. Westover*, 14 N. Y. 16. See *Borst*

The remedy on a mortgage is not lost because a personal action upon the note is barred by the statute of limitations. The remedy on the mortgage is generally available until the payment of the note is shown, or may be presumed, or until the mortgagor has remained in possession for twenty years without recognizing the mortgage.³⁵ But it is held that the right to enforce the lien of an equitable mortgage is barred by the statute of limitations applicable to the debt secured.³⁶

6. *Exceptions to General Rule — Special Statutes.*—In California, Illinois, Iowa, Kansas, Nebraska and Texas, it is held that where an action on the note secured by a mortgage is barred, the remedy on the mortgage is gone. The courts of these States hold that separate remedies may be pursued but that the same limitations apply to both.³⁷ And in these States it is held that the purchaser from a mortgagor subsequent to the execution of the mortgage may plead the statute of limitations as a defense to an action commenced after the statute has run against the debt secured.³⁸ In these States the debt is not discharged by the statute or the right or obligation taken away; the statute simply takes away the remedy;³⁹ the debt remaining unsatisfied and unextinguished and is a sufficient consideration to support a new promise.⁴⁰

The present English statute of limitations, it is said, however, not only bars the right but destroys the remedy also; does not simply exclude the recovery, but transfers the estate.⁴¹

v. Corey, 15 N. Y. 505, 510; Pratt v. Higgins, 29 Barb. (N. Y.) 277; Jones v. Merchants' Bank of Albany, 4 Robt. (N. Y.) 221; Baldwin v. Norton, 2 Conn. 163; Thayer v. Mann, 36 Mass. (19 Pick.) 537; Myer v. Bell, 5 Oreg. 13.

³⁵ Ballou v. Taylor, 14 R. I. 277.

³⁶ Borst v. Corey, 15 N. Y. 505; Wayt v. Carwithen, 21 W. Va. 516.

³⁷ Lent v. Morrill, 25 Cal. 492; Coster v. Brown, 23 Cal. 142; Keelin v. Castro, 22 Cal. 100; McCarthy v. White, 21 Cal. 495; Lord v. Morris, 18 Cal. 482; Emery v. Kelgan, 94 Ill. 543; Brown v. Rockhold, 49 Ia. 282; Clinton Co. v. Cox, 37 Ia. 570; Hubbard v. Missouri Valley Life Ins. Co., 25 Kan. 172; City of Fort Scott v. Schulenberg, 22 Kan. 649; Schmucker v. Sibert, 18 Kan. 104. But see Cheney v. Woodruff, 20 Neb. 124; Hurley v. Cox, 9 Neb. 230; Blackwell v. Barnett, 52 Tex. 328; Daggs v. Ewell, 3 Wood C. C. 344.

³⁸ Lent v. Shear, 26 Cal. 361; Grattan v. Wiggins, 23 Cal. 17; McCarthy v. White, 21 Cal. 495.

³⁹ Grant v. Burr, 54 Cal. 298; Sichel v. Carrillo, 42 Cal. 493.

⁴⁰ Sichel v. Carrillo, 42 Cal. 497, 498.

7. *Effect of Covenant to Pay Debt on Right to Foreclose.*—As affected by the running of the statute of limitations against the debt, there is a distinction to be observed between those mortgages which do and those which do not covenant for the payment of the debt. A suit to foreclose a mortgage not containing a covenant to pay the debt is barred when the debt secured by it is barred.⁴² Thus a suit to foreclose a mortgage, given to indemnify the mortgagee on account of liability as a surety for the mortgagor, but containing no covenant to pay, is barred by the same lapse of time, from the date a cause of action accrues, that bars the debt it was given to secure.⁴³ But, except as it is affected by the statute of limitations, a mortgage has the same effect as any other security for a debt, whether it does or does not contain an express promise to pay.⁴⁴

8. *Effect of Statute of Limitations where Mortgage Executed by Surety.*—In those cases where the consideration upon which a mortgage is given is to secure certain notes, upon which the owner of the mortgaged premises is in no way liable, the general rule is that to entitle the mortgagee to enforce such mortgage obligation it is essential that the obligation against the principal must be subsisting. The extinguishment of the direct agreement of the principal, no matter how accomplished, extinguishes the collateral liability of the surety.⁴⁵

In such a case, when the statute of limitations runs against the debt of the principal, there being no longer any subsisting obligation to which the mortgage is collateral, the office of the mortgage is performed, "unless," as remarked in a recent case, "it can be maintained on foot as an independent security."⁴⁶ In a recent Indiana case the court says that "if from the lapse of time the presumption is to be indulged that the notes secured by the mortgage had been paid, then

⁴¹ Fearnside v. Flint, 48 L. T. (N. S.) 154; Harver v. Dugall, 1 McQueen, 321.

⁴² Lilly v. Dunn, 96 Ind. 220.

⁴³ Lilly v. Dunn, 96 Ind. 220.

⁴⁴ Jouchert v. Johnson, 108 Ind. 436.

⁴⁵ Bridges v. Blake, 106 Ind. 332; s. c., 4 West. Rep. 486; Baker v. Merriam, 97 Ind. 539; State v. Blake, 2 Ohio St. 147. See Mount Pleasant Bank v. Conway, 18 Ohio, 234.

⁴⁶ Bridges v. Blake, 106 Ind. 332; s. c., 4 West. Rep. 486. See Roschert v. Brown, 72 Pa. St. 372; Sage v. Story, 40 Wis. 575.

although the mortgage itself may have been barred by the statute of limitations, it becomes *functus officio* as completely as though the notes had actually been paid."⁴⁷ Where suit was brought on the bond of a public officer, given to secure faithful performance of his official duties, it was held that such bond was merely a collateral obligation and could exist no longer than the liability it was created to secure,⁴⁸ because it is of the essence of a contract of suretyship that there be a subsisting valid obligation of the principal debtor, for without a principal there can be no accessory; and by the extinction of the liability of the former the latter becomes extinct.⁴⁹

9. *Delay in Foreclosing—Presumption.*—A mortgage is not necessarily presumed paid from lapse of time, if the mortgagee asserted his right to foreclose in due season, and there does not appear to be any adverse holding under the mortgagor.⁵⁰ And a mortgage will not be presumed to be satisfied merely from the lapse of twenty years, before filing a complaint in foreclosure, where partial payments of principal or interest were made on the debt before the lapse of twenty years.⁵¹ And where the presumption that the mortgage has been paid is raised by the lapse of time, it may be rebutted by circumstances.⁵²

While a mortgage will be presumed to be satisfied after the lapse of twenty years, where nothing appears to the contrary,⁵³ yet, in the absence of a statute fixing a less period, the conclusive presumption of payment does not arise at an earlier date than twenty years after the last payment of principal or interest;⁵⁴ but it has been said by the Supreme Court of Illinois, that a court of equity will often treat a less period of time

than twenty years as a presumptive bar to the recovery.⁵⁵

Payment of a mortgage debt is not conclusively presumed from the lapse of many years, but there must be decisive proof that it is an existing lien to warrant a decree of foreclosure.⁵⁶ And no conclusive presumption of payment will arise from mere lapse of a time less than that prescribed by the statute of limitations; yet the fact that a mortgagee has neglected to assert his rights for any considerable period will be evidence, together with other circumstances, that payment has been made. Thus, in a case where the mortgagee had taken no steps to enforce his lien, and made no demand for nineteen years previous to the trial, it was said that the jury would have been warranted to presume the debt satisfied.⁵⁷

There is held to be a manifest distinction between those cases where length of time operates as a bar to an action, and those in which it can be used only as matter of evidence. In the first class it may be pleaded in bar and is conclusive though the debt be not paid, but when relied upon as mere evidence of payment it only raises a presumptive fact which may be repelled by other circumstances to be considered in arriving at the truth.⁵⁸

The mortgagee will not lose his right to foreclose the mortgage by lapse of time where there has been a payment of interest,⁵⁹ an acknowledgment of the indebtedness,⁶⁰ or a promise sufficient to take the case out of the statute of limitations,⁶¹ or where the statute

⁴⁷ *Castner v. Walrod*, 83 Ill. 171.

⁴⁸ *Cowie v. Fisher*, 45 Mich. 629.

⁴⁹ *Jackson v. Pratt*, 10 Johns. (N. Y.) 381, 387.

⁵⁰ *Bailey v. Jackson*, 16 Johns. (N. Y.) 210; *Jackson v. People*, 12 Johns. (N. Y.) 242; *Jackson v. Pratt*, 10 Johns. (N. Y.) 392; *Shields v. Pringle*, 2 Bibb (Ky.), 389; *Howland v. Shurtleff*, 43 Mass. (2 Mete.) 26; s. c., 35 Am. Dec. 384; *Inches v. Leonard*, 12 Mass. 379; *Allen v. Everly*, 24 Ohio St. 97; *Bissell v. Jandon*, 16 Ohio St. 498; *Brobst v. Brock*, 77 U. S. (10 Wall.) 519; bk. 19, L. ed. 1002.

⁵¹ *Haight v. Avery*, 16 Hun (N. Y.), 252; *Pears v. Laing*, L. R., 12 Eq. 41.

⁵² *Chase v. Higgins*, 1 T. & C. (N. Y.) 229; *Howard v. Hildreth*, 18 N. H. 105.

⁵³ N. Y. Code Civ. Proc., § 395. See *Kincade v. Archibald*, 73 N. Y. 189, affirming s. c., 10 Hun (N. Y.), 9; *Fiske v. Hibbard*, 45 N. Y. Sup. Ct. (18 J. & S.) 331; *Shipley v. Abbott*, 42 N. Y. 443; *Winchell v. Hicks*, 18 N. Y. 559; *Murray v. Coster*, 20 Johns. (N. Y.) 576; s. c., 11 Am. Dec. 333; *Fletcher v. Updike*, 5 T. & C. (N. Y.) 513; s. c., 67 Barb. (N. Y.)

⁴⁷ *Bridges v. Blake*, 106 Ind. 332; s. c., 4 West. Rep. 486.

⁴⁸ See *State v. Black*, 2 Ohio St. 147; *Walton v. United States*, 22 U. S. (9 Wheat.) 651; bk. 6, L. ed. 182.

⁴⁹ See *State v. Blake*, 2 Ohio St. 147; *Russell v. Fallor*, 1 Ohio St. 329.

⁵⁰ *Baldwin v. Cullen*, 51 Mich. 33.

⁵¹ *Cook v. Parkham*, 63 Ala. 456.

⁵² *Philbrook v. Clark*, 77 Me. 176; *Baent v. Kemer-cutt*, 57 Mich. 268.

⁵³ *Wilson v. Albert*, 89 Mo. 537.

⁵⁴ *Peck v. Williams*, 10 N. Y. 509; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 386; *Lock v. Caldwell*, 91 Ill. 417; *Boone v. Pierrepont*, 28 N. J. Eq. (1 Stew.) 7; *Hutsonpillar v. Stover*, 12 Gratt. (Va.) 579, 588; *Sadler v. nney*, 11 W. Va. 187.

of limitations has been prevented from running by the existence of statutory disability.

Where a judgment of foreclosure and sale has been entered this is not a merger of the debt, it is simply a means of enforcing the lien of the mortgage, which remains until the debt is paid or discharged; and the lien, notwithstanding the decree, is subject to be defeated by the presumption of payment founded upon a lapse of time the same as if no decree had been entered.⁶³ If, however, it be held that by virtue of the decree a new security is given, the same presumption of payment arises after the lapse of twenty years without an attempt to enforce the decree by a sale.⁶³ Upon this principle it has been held that where there has been a foreclosure and sale but no conveyance to the purchaser or any recognition of the mortgage by the mortgage debtor, that it will be presumed after the lapse of twenty years that the land has been redeemed from such sale.⁶⁴

10. *Statute Controls.*—The principle of the statute of limitations applies in those States where the period of limitation has by statute been reduced to less, or increased to more than twenty years the same as in those States, which, following the statute of James I., fix the period at twenty years.⁶⁵ The different States have fixed various periods of limitation for bringing of actions upon sealed instruments, including mortgages; thus the California code fixes the period at four years;⁶⁶ in Connecticut, fifteen years;⁶⁷ Florida, seven years;⁶⁸ Iowa, ten years;⁶⁹ Montana Territory, three years;⁷⁰ Oregon, ten years;⁷¹ 364; 3 Hun (N. Y.), 450. Under the provisions of codes generally, a new promise, in order to take the deed out of the statute of limitations, must be in writing, signed by the party to be charged. See N. Y. Code Civ. Proc., § 395; Scott v. Ware, 64 Ala. 174; Alabama Code, § 3220.

⁶³ Barnard v. Onderdout, 98 N. Y. 158; Brown v. Frost, 10 Paige Ch. (N. Y.) 243.

⁶⁴ Barnard v. Onderdout, 98 N. Y. 158; Reynolds v. Dishon, 3 Ill. App. 178.

⁶⁵ Reynolds v. Dishon, 3 Ill. App. 178.

⁶⁶ Haskell v. Bailey, 22 Conn. 569; Newman v. DeLorimer, 19 Ia. 244; Martin v. Bowker, 19 Vt. 528; Richmond v. Alken, 25 Vt. 824.

⁶⁷ N. Y. Code Civ. Proc., § 337.

⁶⁸ Haskell v. Bailey, 22 Conn. 569.

⁶⁹ Laws of Florida, § 10, ch. 1869; Browne v. Browne, 17 Fla. 607.

⁷⁰ Newman v. DeLorimer, 19 Ia. 244; Crawford v. Taylor, 42 Ia. 260; Iowa Rev. Code, § 2740.

⁷¹ National Mining Co. v. Powers, 3 Mont. 344; Laws of 1872, p. 516; Montana Code 514, §§ 3, 4.

⁷² Eurbanks v. Leveridge, 4 Sawy. C. C. 274; Oregon Civ. Code, § 5.

Pennsylvania, twenty-one years;⁷² South Carolina, twenty years;⁷³ Wyoming Territory, twenty-one years.⁷⁴

In New York and States with similar codes the statute of limitations differs from the statute of James I., and the statute of limitations in those States which follow it, in this, that the statute of James I., and of those other States apply in their terms, only to particular remedies and are enforceable in law only; courts of equity are said not to be bound by them except in cases of concurrent jurisdiction and when they do enforce such statutes are said to act merely in analogy to the statutes of limitation, and not in obedience to them.⁷⁵ In New York, and those States where the distinction between actions at law and suits in equity, and the forms of those actions and suits have been abolished, the statute controls those actions which have heretofore been denominated legal or equitable. The New York statute is pre-emptory, and requires that suits on sealed instruments shall be commenced within twenty years.⁷⁶ This statute bars an action to enforce the lien of a mortgage as much as it bars an action on the note or bond, and no help can be given by the court to the plaintiff, unless facts are alleged in the complaint and shown by the proof which bring his case within the exceptions prescribed by the statute itself. No presumption of payment can control, for presumptions may be rebutted; the court must refuse to enforce a lien after twenty years whether the debt has been paid or not.

In this respect the rule in New York and other code States differs from that in those States proceeding upon a different principle. Thus, in Maine, where a presumption of payment of the mortgage debt arises from the possession of the mortgaged premises by the mortgagor or his assign for more than twenty years after the maturity of the debt, where the holder of a mortgage permitted his mother, the mortgagor, and his sister, to

⁷² 10 Serg. & R. (Pa.) 147; McCoy v. Trustees, etc., 4 Serg. & R. (Pa.) 302; Act of March 26, 1785; 2 Sm. L. 299. The statute of 21 Jac. 1, ch. 16, was not extended to Pennsylvania, so that prior to the act of March 26, 1785, the period of limitation in that State was sixty years.

⁷³ Nichols v. Briggs, 18 S. C. 478; S. C. act of 1860, amending code.

⁷⁴ Compiled Laws of 1876, ch. 13, § 8.

⁷⁵ Lord v. Norris, 18 Cal. 482.

⁷⁶ N. Y. Code Civ. Proc., §§ 380, 381.

whom the mother had conveyed the equity, to occupy the premises for more than twenty years, without payment of the debt or of the interest, and he had refrained from asking for the interest or enforcing the mortgage because the mortgagor was his mother, it was held to rebut the presumption of payment, and that the mortgage could be enforced."⁷

⁷ *Philbrook v. Clark*, 77 Me. 176.

MUNICIPAL CORPORATIONS—TELEPHONES—CHARGES—PUBLIC USE—STATE CONTROL.

CITY OF ST. LOUIS V. BELL TELEPHONE CO. OF MISSOURI

Supreme Court of Missouri, December 30, 1888.

1. *Municipal Corporations—Telephones—Charges.* A city has not the right to fix the annual charge for the use of telephones therein, unless such power is found in a reasonable and fair construction of its charter.

2. *Telephones—Public Use—State Control.*—The property of a telephone company is devoted to a public use, and the company exercises special franchises and privileges, and the State can prescribe a maximum rate for the telephone service.

BLACK, J., delivered the opinion of the court:

This was a prosecution against the Bell Telephone Company of Missouri for the violation of an ordinance which provides that "the annual charge for the use of the telephone in the city of St. Louis shall not exceed \$50."

A violation of the ordinance is made a misdemeanor, and subjects the offender to a fine of not less than \$50 nor more than \$500. The defendant appealed from a judgment assessing a fine of \$300 against it. The defendant is a corporation organized under article 5 of chapter 21 of the Revised Statutes of this State, and hence has all the powers therein conferred upon such corporations. Among others they have the power to own and operate lines of telephone, to make such reasonable charges for the use of the same as they may establish, to erect their poles along and across public roads and streets, to condemn private property for a right of way, and they are charged with the duty of receiving and transmitting messages with impartiality and good faith. The defendant neither affirms nor denies the power of the State itself to fix a maximum rate of charges, but does contend that no such power has been delegated to the city of St. Louis. The defendant's property, consisting of poles, wires, fixtures and the like, is, of course, private property; but the property is devoted to public use, and since the defendant has conferred upon it special fran-

chises and privileges, including the right of eminent domain, the corporation is subject to public regulations; and we shall take it for granted that the State has the power to fix and prescribe a maximum rate for telephone service. That this power could be delegated to municipal corporations is equally clear. The ordinances of the city of St. Louis must not be in conflict with the general laws of the State. If the city has had this power to fix rates conferred upon it, then an ordinance which fixes reasonable maximum rates would not be in conflict with the law under and by virtue of which the defendant is organized, and which law constitutes its charter.

A telephone company, when once its poles are planted and wires stretched on or over the streets of a city, becomes in effect a monopoly, and the company must submit to such reasonable regulations as the municipal corporation has power to prescribe. The important question, then, is whether the city of St. Louis has the power to enact the ordinance in question, the power to fix reasonable maximum charges for telephone service, and nothing to the contrary being shown in this case, it is assumed that the rate fixed is reasonable, so that the question is narrowed down to one of power on the part of the city to fix telephone rates at all. If the city has such power it must be found in a reasonable and fair construction of its charter. Judge Dillon makes this full and comprehensive statement of the rule as to municipal powers: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words. (2) Those necessarily or fairly implied in or incident to the powers expressly granted. (3) Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 *Dillon Municipal Corporations*, (3d ed.) § 89. See also *St. Louis v. McLaughlin*, 49 Mo. 562. The rule, as before stated, is in accord with what we said in the *City of St. Louis v. Herthel*, 88 Mo. 128. The city places some reliance on its general power to regulate the use of streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. *Ferrenbach v. Turner*, 86 Mo. 416. The erection and maintenance of telephone poles is one of new uses; such use is a proper use of the streets. *Julia Building Association v. Bell Telephone Company*, 88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like is obvious. Such regulations have been obeyed by this defendant. Conceding all this we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix tele-

phone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground. By the fifth subdivision of section 26, article 3 of the charter of St. Louis, the mayor and assembly have power "to license, tax and regulate lawyers, doctors, etc., etc., telegraph companies as corporation, etc., etc., and all other business, trades, avocations or professions whatever." Telephone companies are not mentioned, though a vast number of trades, professions and avocations are specified. They are not mentioned in all probability because not existing at the date of the charter. In construing this paragraph of the charter we held in the case of *City of St. Louis v. Herthel*, *supra*, that architects were, for purposes of construction, *ejusdem generis* with lawyers, doctors, dentists and artists, and therefore included by the general concluding words. So in this case it may with equal propriety be said that telephone companies are *ejusdem generis* with telegraph companies, and therefore included in the words of the general concluding clause.

It can make no sort of difference that these telephone companies were not in existence at the date of the charter. One of the objects had in view by the use of the general clause was to provide for just such cases. As aptly observed in that case, "we are to construe it (the charter) according to the intent of the framers, and that intent must be gathered from the language and objects of the charter provisions, and giving that language and interpretation neither strict nor strained." Does then the power to regulate telephone companies, when that term is coupled with the powers to license and tax, give the city the power to regulate the charges for telephone service? By the general statutes of Massachusetts of 1860, page 167, it is provided that the mayor and aldermen of any city may make rules and orders for the regulations of carriages, and may receive \$1 annually for each license granted to a person to use a carriage in the city. Under this power it was held, in *Commonwealth v. Gage*, 114 Mass. 328, that a city might fix the compensation to be charged by hackney coachman. This case would at first seem to furnish some authority for the claim made by the city in this case. Turning to other provisions of the charter we find that express power is given to establish ferry rates; to fix the rates for carriage of persons, and of wagonage, drayage and cartage of property; to regulate the price of gas, and to regulate and control railways within the city as to their fares, hours and frequency of trips. These express powers to fix prices, fares and charges, in these specified cases, are followed by no general words. With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears, that such a power was not intended to be given in other cases. This conclusion presents itself with more force when we see that by the clause before quoted the city has power to

license, tax and regulate private carriages, omnibuses, carts, drays and other vehicles; so that the framers of the charter did not regard the power to license, tax and regulate sufficient to give the power to fix rates and charges. The power to regulate, it may be conceded, gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised. 1 Dillon on Municipal Corporations, § 358. But taking these charter provisions together we think it would be going to an extreme length to say that they confer upon the city the power to fix telephone rates. If it has power to do this, it may also fix the charges for telegraph services and for the other designated services which are of a public character. We conclude that the city has no power to pass the ordinances in question by reason of any of the charter powers before considered. This brings in the general welfare clause, which is in these words: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the State, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines," etc. Sometimes the power to enact ordinances is given in general terms, and in other cases there is a specific enumeration of the powers. "This difference," says Dillon, "is essential to be observed, for the power which the corporation would possess under what may be termed the welfare clause, if it stood alone, may be qualified, or where such intent is manifest, impliedly take away by provisions specifying the particular purposes for which by-laws may be made." 1 Dillon, Municipal Corporations, (3d ed.) § 315. Under a general power like the one now in question this court has held that the city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, and prohibiting cruelty to dumb animals. *St. Louis v. Schoenbush*, 95 Mo. 618, and cases cited. These matters are all within police regulations, strictly speaking, and naturally fall within the domain of municipal legislation and regulation. To say that under this general power the city may fix rates for telephone services would be going entirely too far. This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges. What has been said in respect of the power to license, tax and regulate applies with equal force here. We are not cited to, nor have we found, any adjudicated case which will support the ordinance now under consideration under the present charter powers of the city of St. Louis. The judgment in this case is therefore reversed.

NOTE.—In this decision the court has confined itself to an interpretation of the charter of the city of St. Louis, reviewing the law applicable to city charters very thoroughly. There are other questions in such cases which should not be ignored.

Obligation of Contracts.—Often the action of a legislature is hampered by the provision in the United States constitution against impairing the obligation of contracts.¹ Such contracts may arise in favor of a corporation under the provisions of its charter, whether it is created under a special act or under a general incorporation law.² In order to present such an impediment, the power is often reserved to alter, repeal or amend such incorporation act. In such cases it is difficult to define the power of the State. It cannot take away or destroy rights which have become vested in the corporation by a legitimate use of its powers. But it may exercise its power to almost any extent to carry into effect the original purposes of the grant and to secure the due administration of its affairs, or which will not defeat nor substantially impair the object of the grant or any rights vested under it, as the legislature may deem expedient to secure that object or any other public or private rights.³

Legislative Control.—The legislature is only authorized to regulate the charges for the use of telephones because telephones are devoted to a public use. "Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but as long as he maintains the use, he must submit to the control."⁴ Other authorities hold that only when some privilege in the bestowal of the government is enjoyed in connection with the property, is it affected with a public interest in any proper sense.⁵ Such power of regulation is not a power to destroy. Under pretense of regulating, a legislature cannot require a railroad corporation to carry persons or property without reward.⁶ The privilege of charging the rates which the railroad deems proper is a franchise, which may be taken away under the reserved power of amending or altering its charter; but the right to charge a reasonable compensation would remain as a right under the general law governing natural persons, and not as a special franchise or privilege.⁷ If the legislature can regulate, it has the right to establish the maximum charge. It is not a matter for judicial determination.⁸ If the law is unjust or inexpedient, the remedy is in legislation, and not in the courts.⁹ Where, however, the legislature has not regulated the matter, it is for the courts to determine what are reasonable rates.¹⁰ The right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by

its legislature, unless by words of positive grant or words equivalent in law.¹¹

The right to fix, regulate and receive tolls does not take away the State power to act upon the reasonableness of such charges.¹² In case of doubt, whether by grant or otherwise the State has bargained away its power to regulate the charges of a railroad, the right is construed to remain in the State.¹³

Telephones.—The State has a right to prescribe the maximum price which a telephone company shall charge for the use of its telephones.¹⁴ Such companies must serve all persons alike, and may be compelled to place their instruments in any place of business upon a tender of their charges.¹⁵

The patent of the telephone gives the exclusive right to make, use and vend the tangible property brought into existence by a practical application of the discovery covered by the letters patent for a limited time; but the right must be exercised in subordination to the local regulations established by the State. All the instruments and appliances used by a telephone company in its business are in legal contemplation devoted to a public use.¹⁶ However, it has been held, that if the telephone company is dissatisfied with such regulations and withdraws its instruments from the State, that the citizens of such State may be debarred the use of telephones, since such use is an infringement of the company's patent.¹⁷

S. S. MERRILL.

¹¹ *Stone v. Farmer's, etc. Co.*, 116 U. S. 307; *Chicago, etc. R. Co. v. Iowa*, *supra*.

¹² *Stone v. Farmer's, etc. Co.*, *supra*.

¹³ *Railroad Commission Cases*, 116 U. S. 307.

¹⁴ *Hockett v. State*, *supra*.

¹⁵ *State v. Telephone Co.*, 17 Neb. 126; *State v. Telephone Co.*, 36 Ohio St. 296.

¹⁶ *Hockett v. State*, *supra*.

¹⁷ *American, etc. Co. v. Cushman, etc. Co.*, 36 Fed. Rep. 488.

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¹ U. S. Const. art. 1, § 10.

² *Miller v. State*, 15 Wall. 478.

³ *Holyoke Company v. Lyman*, 15 Wall. 500; *New Orleans v. Great S., etc. Co.*, 26 Cent. L. J. 233, and note.

⁴ *Munn v. Illinois*, 94 U. S. 126.

⁵ *Ladd v. Southern, etc. Co.*, 53 Tex. 172; *Cooley's Const. Limit.* (5th ed.) 739; dissenting opinion, *Munn v. Illinois*, *supra*.

⁶ *Railroad Commission Cases*, 116 U. S. 331.

⁷ *Peik v. Chicago, etc. R. Co.*, 94 U. S. 164.

⁸ *Munn v. Illinois*, *supra*.

⁹ *Hockett v. State*, 105 Ind. 250.

¹⁰ *Chicago, etc. R. Co. v. Iowa*, 94 U. S. 155.

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1. ADMIRALITY—State Courts.— Jurisdiction of State courts of a suit, in case for damages caused by fires from a burning scow, is clearly preserved by the judiciary act. — *Chappell v. Bradshaw*, U. S. S. C., Oct. 29, 1888; 9 S. W. Rep. 40.

2. APPEAL— Assignment of Error. — Where, in the assignment of errors, only errors occurring at the trial are complained of for which a new trial is prayed, but the action of the court below in overruling the motion is not assigned for error, no question is properly raised in the appellate court. — *First N. Bank v. Jaffrey*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 628.

3. APPEAL—Bill of Exceptions—Signing.— Where a bill of exceptions is meager, inaccurate and partial, omitting important evidence, and condensing into four and one half pages of manuscript over 100 pages of type-writing, the judge will not be required to sign or amend the bill. — *Sansone v. Myres*, S. C. Cal., Nov. 19, 1888; 19 Pac. Rep. 577.

4. APPEAL — Findings by Judge — Review. — The findings of a judge on questions of fact, where the evidence is conflicting, are conclusive on appeal. — *Missouri P. R. R. v. Colquitt*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 608.

5. APPEAL—Forcible Entry and Detainer. — An appeal lies to this court from the municipal court of Minneapolis, in actions of forcible entry and unlawful detainer. — *Boston B. Co. v. Buffington*, S. C. Minn., Nov. 13, 1888; 40 N. W. Rep. 361.

6. APPEAL—Justices — District Court. — No appeal lies from a judgment of a district court in a case appealed from a justice, under Texas laws, where the fine imposed is less than \$100. — *Johnson v. State*, Tex. Ct. App., Nov. 14, 1888; 9 S. W. Rep. 611.

7. APPEAL—Matters not of Record.— On appeal the court cannot notice affidavits showing the circumstances under which the action was dismissed below, when it is not shown that said affidavits were used in that court. — *Pardy v. Montgomery*, S. C. Cal., Nov. 2, 1888; 19 Pac. Rep. 530.

8. APPEAL—New Trial—Discretion. — The granting of a new trial will not be reversed on appeal, unless there appears to have been an abuse of the discretion of the trial court, — *Smith v. Champagne*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 836.

9. APPEAL—New Trial—Discretion. — Where a new trial was granted, but the grounds on which the court granted it do not appear in the record, but errors sufficient for such action do appear therein, such order granting the new trial will not be disturbed. — *Barney v. Dudley*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 550.

10. APPEAL—Orders at Chambers. — Under Dakota law, an appeal direct from an order at chambers cannot be sustained. — *Bostwick v. Knight*, S. C. Dak., Oct. 1, 1888; 40 N. W. Rep. 844.

11. APPEAL—Orders — Record. — Upon an appeal from an order error is not disclosed from the fact that the moving papers, upon which the order was made, do not contain averments of prior proceedings in the same cause, of which the court will take judicial notice. — *Rees v. Lowenstein*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 870.

12. APPEAL— Order — Vacating Arrest. — An order refusing to vacate an order of arrest does not come within the law providing for the review, on appeal from final judgment, of any intermediate order involv-

ing the merits. — *Hurst v. Samuels*, S. C. S. Car., Oct. 29, 1888; 7 S. E. Rep. 822.

13. APPEAL—Record— Errors. — Instructions given and refused, but not incorporated in the bill of exceptions, will not be considered on appeal. — *Witcher v. Watkins*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 540.

14. APPEAL—Record—Correction. — The rule of the supreme court allowing the correction of errors in the transcript by the clerk's certificate of so much of the record as may be necessary, does not apply to the case of failure to procure from the trial judge a sufficiently full statement of the case. — *Fagan v. Carty*, S. C. Cal., Nov. 19, 1888; 19 Pac. Rep. 584.

15. APPEAL—Remanding—Court of Appeals. — The amount involved not exceeding \$2,500, and title to real estate not being involved, nor any question conferring jurisdiction on the supreme court, the case is transferred to the court of appeals. — *Schultz v. Tatum*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 633.

16. APPEAL—Review—Objections not Raised. — The question, whether the defendant was a resident of the county where suit was brought, not having been raised in the county court, will be considered waived. — *Colorado C. R. R. v. Caldwell*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 542.

17. APPEAL—Review — Weight of Evidence. — This court will not interfere with a verdict for the defendant on the ground that it is against the evidence, unless it satisfactorily appears that the verdict was the result of corruption, prejudice or passion. — *Caruth v. Richeson*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 633.

18. APPEAL— Waiver of Objections. — One who reserves exceptions to an order directing him to answer an amended complaint within a specified time, and also complies with the order, thereby waives the right of exception. — *Barber v. Briscoe*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 589.

19. APPEAL — Weight of Evidence. — The evidence sustains the judgment, which is affirmed. — *Parker v. Freeman*, S. C. Colo., Oct. 31, 1888; 19 Pac. Rep. 601.

20. APPEAL — Weight of Evidence. — The evidence warranted the finding of the jury and the verdict will not be disturbed. — *Gross v. Watkins*, S. C. Colo., Oct. 26, 1888; 19 Pac. Rep. 539.

21. APPEAL—Weight of Evidence. — Where a question of fact is submitted to a jury, and there is competent evidence tending to establish such fact, the verdict of the jury is conclusive. — *Cavender v. Fair*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 638.

22. APPEAL—Weight of Evidence. — Where the defense is a counterclaim, which is supported by one witness and denied by the plaintiff, a finding for plaintiff cannot be disturbed on appeal. — *Denver F. B. Co. v. Platt*, S. C. Colo., Oct. 16, 1888; 19 Pac. Rep. 536.

23. ARREST—Slander of Title—Discharge.— An order of arrest, under Code N. C. § 291, upon a complaint alleging slander of title, should be vacated, when the facts are vaguely alleged in the complaint. — *Harris v. Sweeney*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 801.

24. ASSIGNMENT FOR CREDITORS—Notice—Debtors.— If a debtor without actual notice of an assignment for the benefit of creditors, though it has been duly published, pays the assignor, he will be discharged from the debt. — *Graham v. Evans*, S. C. Minn., Nov. 13, 1888; 40 N. W. Rep. 368.

25. ASSIGNMENT FOR CREDITORS — Fraudulent Preferences. — Under Michigan law, a bill which alleges that the assignee in an assignment for the benefit of creditors advised a fraudulent mortgage of the assignor's property, may be maintained to set it aside and prevent its payment, without previously obtaining an order of court requiring the assignee to institute the proceedings. — *Burnham v. Haskins*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 827.

26. ASSIGNMENT FOR CREDITORS— Preferences.— A, while in New York, executed a mortgage on his stock of goods in South Carolina to his wife for money ad-

vanced, and two days later two mortgages to a former partner to secure demanded notes, which were substituted for notes not due. All parties returned to South Carolina and in a few days A surrendered the property to the mortgagees and left the State: *Held*, that the mortgages amounted to a general assignment, under South Carolina law, and were void as giving preferences.—*Meinhard v. Strickland*, S. C. S. Car., Oct. 29, 1888; 7 S. E. Rep. 83d.

27. **ASSUMPSIT—Work and Labor—Evidence.**—A was working under B, a contractor, and fearing he would not be paid, was about to leave when the agent of the railroad induced him to continue to work under promise to pay him. The greater part of the work was then done: *Held*, that a verdict against the railroad, for an amount nearly equal to plaintiff's whole claim for work done before as well as after the promise, should be set aside.—*Galveston etc. R. R. v. Howrin*, S. C. Tex., Nov. 13, 1888; 9 S. W. Rep. 661.

28. **BANKS—National—Attachment.**—The federal statutes prohibit the issuance of writs of attachment by the State courts before final judgment against national banks or their property.—*First N. Bank v. La Due*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 367.

29. **BANKRUPTCY—Fraudulent Conveyances.**—An assignee in bankruptcy may bring suit to set aside an assignment made by the bankrupt, which though not declared void by the provisions of the bankrupt law, has been made with intent to hinder and delay creditors.—*Means v. Dowd*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 65.

30. **BASTARDY—Legitimacy—Witness.**—The presumption of the legitimacy of the child of a married woman may be rebutted in bastardy proceedings by facts showing the non access of the husband, and, under North Carolina law, the wife may testify thereto.—*State v. McDowell*, S. O. N. Car., Nov. 12, 1888; 7 S. E. Rep. 78d.

31. **BILLS AND NOTES—Consideration—Usury.**—A note given for a sum agreed to be paid for procuring a loan, and not shown to be unreasonable in amount or a cover for usury, is presumptively valid.—*Thomas v. Miller*, S. C. Minn., Nov. 8, 1888; 40 N. W. Rep. 358.

32. **BILLS AND NOTES—Contract—Parol Evidence.**—The true relation of parties to a negotiable instrument may, as between themselves, be proven by parol, whenever it is necessary to a correct determination of the right or liability of either of them thereon, and this may be done to enable a party to seek an instrument to maintain an action thereon in the United States court.—*Goldsmith v. Holmes*, U. S. C. O. (Oreg.), Nov. 5, 1888; 36 Fed. Rep. 484.

33. **BILLS AND NOTES—Indorsers—Liability.**—Where the second indorser of a note writes his name before instead of after that of a prior indorser, he cannot recover of the latter the amount paid in taking up the note after its dishonor.—*Sweet v. Powers*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 471.

34. **BONDS—Subcontractor—Liability.**—C contracted to erect a building, and he sublet a portion of his contract to B, who gave a bond to C "for the use of all persons who may do work or furnish material pursuant" to C's contract. B failed to pay for materials and C was by law compelled so to do: *Held*, that a cause of action accrued to C on the bond.—*Cassan v. Maxwell*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 357.

35. **BOUNDARIES—Evidence.**—B, who purchased land from A, saw A at that time run his boundary line, which constituted the boundary line, the location whereof was in dispute: *Held*, that B was not incompetent to testify as to its location, it not being shown that A was the surveyor who originally located it, nor that A was dead.—*Alexander v. Gossett*, S. C. S. Car., Oct. 12, 1888; 7 S. E. Rep. 814.

36. **BROKERS—Real Estate—Commission.**—The plaintiff under the evidence failed to procure a purchaser for the defendant's property and, was not en-

titled to a commission.—*Sloman v. Bodwell*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 321.

37. **CARRIERS—Connecting Lines—Damages.**—Defendant issued round trip tickets to a point on a connecting line; its train was taken over the connecting line by the engineer of the latter and in charge of its employees: *Held*, that defendant was liable for injuries to passenger caused by the negligence of such employees.—*Washington v. Raleigh & G. R.*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 789.

38. **CARRIERS—Delay in Shipment—Evidence.**—In a suit for damages caused by delay in carrying potatoes, which were shipped at a season when it was turning cold, it is error to exclude evidence as to what was said, when the contract of carriage was made, about the length of time it would require to reach the destination.—*Blodgett v. Abbott*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 491.

39. **CARRIERS—Passengers—Regulations.**—A railroad company may adopt a rule, that no passenger shall be allowed on a through freight train without a written permit from the superintendent.—*Thomas v. Chicago, etc. R. R.*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 463.

40. **CARRIERS—Use of Depot—Agency.**—When a railroad regularly enters and departs from the depot of another company, intrusting to the latter the handling and checking of the baggage of its passengers, furnishing its own checks therefor, the latter company must be deemed the agent of the former relative to such business.—*Ahlbeck v. St. Paul, etc. R. R.*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 364.

41. **CARRIERS—Warehouseman—Liability.**—Where goods upon their arrival are allowed to remain till the railroad becomes liable only as a warehouseman, and the owner is informed by the railroad agent that they have not arrived, and they are destroyed by fire, the railroad is liable for the value of the goods.—*Union P. R. R. v. Moyer*, S. O. Kan., Nov. 10, 1888; 19 Pac. Rep. 639.

42. **CERTIORARI—School-district—Establishment.**—The action of the board of county commissioners in forming a new school-district cannot be reviewed on certiorari.—*Lemont v. County Commrs.*, S. C. Minn., Nov. 18, 1888; 40 N. W. Rep. 359.

43. **CHATTEL MORTGAGE—Description of Property.**—A mortgage held to be a chattel mortgage on growing crops, where the description created a doubt whether the land was not covered thereby.—*Stroberg v. Brandenberg*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 356.

44. **CHATTEL MORTGAGE—Trove—Evidence.**—In trover for property taken by defendant under a chattel mortgage, by which he was empowered to take possession when he should deem himself insecure, the mortgage is inadmissible in evidence without producing the note it was given to secure.—*Hill v. Merriman*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 399.

45. **COLLISION—Loss of Charter—Damages.**—If an existing charter is lost in consequence of a collision, and a charter at lower rates is necessarily taken for the residue of the charter period, the shipper is entitled to the difference in value of the two charters and also for the crew, who are necessarily under pay on contract during the detention.—*The Belgenland*, U. S. D. C. (N. Y.), Oct. 4, 1888; 36 Fed. Rep. 504.

46. **COMMISSIONERS—Fees—Court of Claims.**—When a United States commissioner has complied with the law so far as is in his power by transmitting his account to the district attorney, who presents it to the court, and he is refused a hearing thereon, and no order is entered of approval or disapproval, he may maintain an action for his services in the court of claims.—*United States v. Knox*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 63.

47. **CONTRACTS—Conditions Implied.**—When a person undertakes any employment, trust or duty, he impliedly contracts to act with integrity, diligence and skill.—*Hart v. Barnes*, S. C. Neb., Nov. 14, 1888; 40 N. W. Rep. 323.

48. CONTEMPT—Habeas Corpus—Commitment. — Upon an original application to the Supreme Court of the United States for a writ of *habeas corpus* in favor of one committed for contempt by a circuit court, the facts as set forth in the order of the commitment must be regarded as true and cannot be reviewed. — *In re Terry*, U. S. S. C., Nov. 12, 1888; 9 S. C. Rep. 77.

49. CONTRACT—Sale of Realty—Damages. — A complaint against B for failure to convey property, which he contradicted to sell as agent of C, alleging that before the time fixed for the last payment the land had greatly appreciated in value, and praying judgment for its value, is bad on demurrer, since B did not profess to bind himself personally, and there was nothing to show that plaintiff was injured. — *Senter v. Monroe*, S. C. Cal., Nov. 16, 1888; 19 Pac. Rep. 580.

50. COPYRIGHT—Judicial Opinions. — A State cannot be called a citizen under the copyright law, nor can a judge who officially prepares the head-notes, statement of the case, and opinion, be regarded as an author or proprietor, so as to allow another to obtain a copyright as his assignee. — *Banks v. Manchester*, U. S. S. C., Nov. 19, 1888; 9 S. W. Rep. 86.

51. CORPORATIONS—Agents—Authority. — Before the president and manager of a milling company, incorporated for the purpose of conversion and sale of agricultural products, can bind the company by the purchase of flour, it must be shown that such purchase came within the scope of its corporate powers, was authorized by it, was rendered necessary for the protection and interest of its milling business, or that some benefit resulted to it. — *Getty v. Barnes M. Co.*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 617.

52. CORPORATIONS—Consolidation—Action. — When a railroad is consolidated with other railroad companies under a new name, an action brought by or against it cannot be prosecuted by or against it in its original name. — *Kansas, etc. R. v. Smith*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 686.

53. COVENANTS—Incumbrance—Drainage. — Under Michigan law, a lien attaches to land as soon as the assessment is made of the ditch tax imposed on lands benefited by drainage. — *Lindsay v. Eastwood*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 455.

54. CRIMINAL LAW—Appeal—Errors. — On an appeal in a criminal case, where no errors are assigned, and there is no brief nor argument, and no error appears from the record, the judgment will be affirmed. — *Ter. v. Money*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 595.

55. CRIMINAL LAW—Alibi—Instructions. — An instruction upon the trial of two defendants for murder, that an alibi was very often resorted to by guilty persons, as well as innocent ones, and one in which perjury, mistake, and deception are often committed. — *State v. Chee Gong*, S. C. Oreg., Nov. 13, 1888; 19 Pac. Rep. 607.

56. CRIMINAL LAW—Appeal—Objections to Evidence. — Unless the record affirmatively shows that the motion to rule out testimony was made before the jury was charged, the action of the trial court therein cannot be reviewed on appeal. — *Wright v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 806.

57. CRIMINAL LAW—Bigamy—Evidence. — In a prosecution for bigamy a marriage may be shown by the testimony of an eye-witness, that a marriage ceremony was performed by one acting in the character of a clergyman or magistrate, in the absence of a statute of the place of marriage requiring greater proof. — *People v. Perriman*, S. C. Mich., Oct. 26, 1888; 40 N. W. Rep. 425.

58. CRIMINAL LAW—Burglary—Jury. — Under the constitution of Texas, a conviction for burglary upon a trial in the district court before a jury of six must be set aside. — *Jester v. State*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 616.

59. CRIMINAL LAW—Burglary—Rape—Evidence. — Upon examination the evidence does not warrant a conviction for burglary with intent to commit rape. —

Coleman v. State, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 609.

60. CRIMINAL LAW—Change of Venue. — Under Missouri law, only one change of venue is allowable in a criminal case. — *State v. Anderson*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 633.

61. CRIMINAL LAW—Conspiracy—Evidence. — Evidence that defendant and others met in a secluded place in the night, armed and masked, that they discussed the propriety of whipping persons, that they went two miles to a house and killed one of the inmates, and that in defendant's presence instructions were given by one to the others as to their testimony in case they were prosecuted, sufficiently establishes a conspiracy. — *State v. Walker*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 646.

62. CRIMINAL LAW—Experts—Experience. — On a trial for murder by poisoning, a physician, whose only knowledge of poisoning is from books or medical instruction, is not competent to give an opinion relative to the symptoms of the last sickness of the deceased with regard to poison. — *Sequet v. State*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 391.

63. CRIMINAL LAW—Homicide—Ball. — Under the evidence the homicide was not a capital offense, and the accused was entitled to ball. — *Ex parte Rice*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 615.

64. CRIMINAL LAW—Homicide—Malice. — On a trial for murder, evidence of a previous difficulty between defendant and deceased is admissible to show express malice. — *Starke v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 807.

65. CRIMINAL LAW—Indictment—Duplicitly. — An indictment charging the crime of forgery, under Montana law, in separate counts, the first by falsely making and forgery, the second by falsely uttering and publishing, is bad for duplicity, when there is nothing in the second count to show that the instrument there set out is the same as the one declared on in the first count. — *Ter. v. Poulter*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 594.

66. CRIMINAL LAW—Lost Depositions—Proving Contents. — Where it is shown that certain absent witnesses do not reside in the State, and that their testimony at the examining trial is lost, other persons may testify as to what they swore at the examination. — *Gibbreath v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 618.

67. CRIMINAL LAW—Manslaughter. — If a person, seeing his friend shot down, becomes so aroused by sudden rage and resentment that his mind is not capable of cool reflection, and if, under the immediate influence of his passion, he shoots and kills the offender, the offense is manslaughter. — *Moore v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 610.

68. CRIMINAL LAW—Murder—Insult to Female. — Though it is claimed the defendant killed the deceased for insulting a female relative, yet the jury may find him guilty of murder in the second degree, since the jury may determine from the evidence that the killing had another cause. — *Norman v. State*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 616.

69. CRIMINAL LAW—Murder—Malice—Presumption. — On a trial for murder in the second degree, malice can be implied only in cases where the killing alone is shown. — *Vollmer v. State*, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 420.

70. CRIMINAL LAW—Objections—Waiver. — An objection that there was a variance where the indictment charged an intent to kill the deceased and that the charge that the jury might find the defendant guilty of murder, was erroneous, comes too late in a motion for a new trial. — *Ter. v. Rowand*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 595.

71. CRIMINAL LAW—Perjury—Grand Jury. — A person may be convicted of perjury in testifying before a grand jury, when neither the indictment nor the evidence shows that he made such false statement while testifying under compulsion to facts tending to crimina-

ate himself.—*Pipes v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 614.

72. CRIMINAL LAW—Rape—Fabricated Story.—On trial of a man accused of rape upon his daughter, who is the only witness for the people, respondent may show by the evidence of other witnesses, that the daughter has made similar charges falsely against other men, even though the daughter has denied on cross-examination that she made such charges.—*People v. Evans*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 473.

73. CRIMINAL LAW—Rejection of Juror—New Trial.—An objection in a criminal case, that a qualified juror was excused or excluded from serving without any legal reason, appearing for the first time in a motion for a new trial, there being no pretense that the jurors who tried the cause were not qualified, comes too late.—*State v. Jackson*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 624.

74. CRIMINAL LAW—Self-defense—Evidence.—On trial for murder, an omission to charge as to the law of self-defense is not prejudicial error, where the proof shows that defendant shot deceased because the latter would not return his clothes, which deceased had stolen, and that, though deceased had a knife in his hand, he did not attack defendant, nor did defendant shoot because he feared an attack.—*Combo v. Com.*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 655.

75. CRIMINAL LAW—Threats—Confessions.—Confessions extorted by personal violence are admissible on a trial for burglary, under Texas law, when defendant at the same time tells where the goods stolen are secreted, which information leads to their discovery.—*Brown v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 613.

76. CRIMINAL LAW—Trial—Introduction of Evidence.—In a criminal case the State cannot be permitted to withhold a part of its evidence in chief, and then introduced it in rebuttal after the defendant has rested his case.—*State v. Hunsaker*, S. C. Oreg., Oct. 30, 1888; 19 Pac. Rep. 605.

77. DAMAGES—Proximate—Contract.—The party injured by breach of a contract may recover losses sustained and gains prevented, provided such damages may fairly be supposed to have been within the contemplation of the parties, and are certain in their nature and in respect to the cause from which they proceed.—*Hunt v. Oregon P. R. Co.*, U. S. C. C. (Oreg.), Oct. 29, 1888; 36 Fed. Rep. 481.

78. DEDICATION—Plat.—A town plat of unsurveyed government land, which fails to comply with the requisites of such plats according to law, does not affect a dedication of the streets to public use.—*Diamond M. Co. v. Village of Ontonagon*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 448.

79. DEDICATION—Revocation.—Where the owner of land lays it off in blocks, lots and streets, platting it as an addition to a city, and causes the plat to be recorded, though it is not acknowledged so as to entitle it to record, and conveys any part of it by reference to such plat, he thereby irrevocably dedicates to the public the streets therein named.—*Meier v. Portland C. R. Co.*, S. C. Oreg., Nov. 5, 1888; 19 Pac. Rep. 610.

80. DEED—Appurtenances.—A conveyance of land, with its appurtenances is, by implication, a conveyance of the grantor's interest in a ditch and water-right necessary to the use and enjoyment of the land.—*Tucker v. Jones*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 571.

81. DEED—Condition Subsequent.—A grant of a right of way to a railroad stated that the agreement was made for the location and maintenance of said railroad, and this license shall cease with the non-use of the same for such purpose: Held, that such grant is not upon condition subsequent to construct the whole line of road upon the same location as that shown by the survey made and filled by the grantee.—*Morrill v. Wabash, etc. R. Co.*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 657.

82. DEED—Consideration—Power of Attorney.—

Under a power of attorney to sell and convey land, a conveyance without any consideration given, or agreed to be given, is a nullity.—*Randall v. Duff*, S. C. Cal., Oct. 23, 1888; 19 Pac. Rep. 532.

83. DEED—Delivery—Presumption.—A deed properly executed, in the possession of the grantee, is presumed to have been delivered.—*Flint v. Phipps*, S. C. Oreg., July 2, 1888; 19 Pac. Rep. 543.

84. DEED—Description—Uncertainty.—A deed describing the land as all that certain tract of land lying on J creek, and bounded on the west by L's survey, and on the north by B's pre-emption survey, is void for uncertainty.—*Coker v. Roberts*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 685.

85. DEED—Escrow—Delivery.—A deed having been put in escrow till certain things were done, which were done within a reasonably time, and in the usual course of business, an attempt by the depository to detain the deed will not prevent it from taking effect.—*Hughes v. Thistlewood*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 629.

86. DEPOSITIONS—Objections—Time.—Objections to a deposition, going only to the formalities of its execution, must be noted when the deposition is taken, or be raised by a motion to suppress before this trial is begun, otherwise they are waived.—*Murray v. Larabee*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 574.

87. DIVORCE—Trial—Contempt.—A court may, in its discretion, allow a trial for divorce to proceed, although one of the parties may be in contempt for non-obedience of an order of court.—*Wagner v. Wagner*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 360.

88. DEED—Warranty—Quitclaim.—A grantee in a warranty deed, whose grantor has a warranty deed, and who acts in good faith and without actual notice, is entitled to protection as a bona fide purchaser, notwithstanding the existence of a quitclaim deed in the chain of title.—*Sherwood v. Moelle*, U. S. C. C. (Neb.), Oct. 29, 1888; 36 Fed. Rep. 478.

89. DOWER—Renunciation—Vested Estate.—A widow is not barred of dower, even in equity, by renouncing her right of dower in a mortgage given by her husband's executors, such a renunciation being insufficient to pass her completed title.—*Jefries v. Allen*, S. C. S. Car., Oct. 30, 1888; 7 S. E. Rep. 328.

90. EMINENT DOMAIN—Public Use—Railroads.—When a railroad company cannot reach a large portion of its freighting business with its main line, and is compelled to construct branches to enable it to operate its road, the taking of property necessary therefor is a public use.—*Toledo, etc. R. Co. v. East S., etc. R. Co.*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 426.

91. EQUITY—Cancellation of Contract—Injunction.—Since the parol evidence shows that the contract was signed with no intention of making a contract or binding obligation on the part of either party, equity will decree its cancellation and enjoin its enforcement.—*Olmstead v. Michels*, U. S. C. C. (Mo.), Nov. 5, 1888; 36 Fed. Rep. 455.

92. EQUITY—Cancellation of Lease—Coverture of Lessee.—Equity will not cancel a lease executed on valuable consideration, solely on the ground that a part of the consideration consisted of covenants to be performed by the lessee during the term, for failure to perform which she could not be held personally liable by reason of her coverture, of which fact the lessor had knowledge.—*Dickson v. Kempinsky*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 618.

93. ERROR—Writ of—Parties.—Where it appears that a writ of error is not joined in by all the parties against whom judgment was rendered without a proper summons and severance, the writ will be dismissed by the court of its own motion.—*Estis v. Trabue*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 53.

94. EVIDENCE—Best and Secondary.—Secondary evidence of an instrument is improperly admitted when it is not shown that it once existed, nor that its produc-

tion is out of the party's power.—*Stocking v. St. Paul T. Co.*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 865.

95. EVIDENCE—Declarations—Eminent Domain.—In an action for damages for the appropriation of a right of way through his farm, declarations of plaintiff, made at the time of the appropriation, are competent without first calling plaintiff's attention to them.—*Le Roy & W. R. Co. v. Butts*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 625.

96. EVIDENCE—Deed—Harmless Error.—Where defendant in ejectment admits that the land was then owned by the plaintiff, the admission of a record copy of plaintiff's deed, the original being in his possession elsewhere, is harmless error.—*West v. Cameron*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 616.

97. EVIDENCE—Pleading.—Where the original answer is superseded by an amended answer, the former is improperly admitted in evidence.—*Stern v. Lowenthal*, S. C. Cal., Nov. 16, 1888; 19 Pac. Rep. 579.

98. EXEMPTIONS—Homestead—Crops.—Cotton grown upon a homestead is not subject to levy and sale under execution until it is severed from the land by gathering.—*Bailey v. Oliver*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 606.

99. EXECUTION—Sale—Land in Another County.—An execution sale by the sheriff of one county of land situated in another county passes no title.—*Terry v. O'Neal*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 673.

100. EXEMPTIONS—Unmarried Man.—The horse, wagon and harness of an unmarried man, engaged in the business of assaying and sampling ores, are exempt from execution to the extent of \$300, under Colorado law.—*Watson v. Lederer*, S. C. Colo., Oct. 31, 1888; 19 Pac. Rep. 602.

101. FRAUDULENT CONVEYANCES—Husband and Wife.—A husband, while solvent, conveyed land to his wife of the value of money belonging to her, which he had used in his own business, with the express agreement that he would return it in land: Held, that his creditors could not attack the deed.—*Hackworth v. Johns*, Ky. Ct. App., Nov. 19, 1888; 9 S. W. Rep. 656.

102. FRAUDULENT CONVEYANCE—Husband and Wife.—The deed in question between husband and wife was held not to be void as to creditors.—*Wooden v. Wooden*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 460.

103. FRAUDULENT CONVEYANCE—Knowledge of Purchaser.—Under the evidence the sale of the stock of goods was fraudulent as to creditors, and the purchaser had knowledge thereof.—*Blum v. Simpson*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 662.

104. FRAUDULENT CONVEYANCES—Regularity.—Where all parties testify that the sale of chattels under a lien and a mortgage were fair, and the sheriff made the sale, and it was regularly advertised, it may be sustained, though it was made hastily and without proper attention to detail, and the goods were not at once removed.—*Magneder v. Clayton*, S. C. S. Car., Oct. 12, 1888; 7 S. E. Rep. 844.

105. FRAUDULENT CONVEYANCE—Trespass.—Under Texas law, a voluntary conveyance of all the property owned by one, who has commenced to trespass on land by cutting timber thereon with intent to continue, is fraudulent as to a judgment recovered, as well for the trespasses before, as after, the conveyance.—*Cole v. Terrell*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 668.

106. GUARDIAN AND WARD—Settlement.—A release, given after maintaining his majority, by a ward to his guardian with a full knowledge of all the facts, will not be set aside.—*Davis v. Hagler*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 628.

107. GARNISHMENT—City—Second-class.—A city of the second-class cannot be garnished.—*Switzer v. City of Wellington*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 620.

108. HOMESTEAD—Execution—Allotment.—Judgment was entered in 1864, and a sale thereunder was made in 1879: Held, that the creditor could satisfy his

judgment out of the exempt property if there was not sufficient other property, but the debtor was entitled to have his homestead exemption set off, and to enjoy the part remaining after the satisfaction of the debt, and without such allotment the execution sale was void.—*Morrison v. Watson*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 705.

109. HUSBAND AND WIFE—Covenants—Estoppel.—In Dakota a married woman who, with her husband, executes a mortgage upon her land, with covenants of seizin, quiet possession and warranty as security for a loan, is estopped from setting up title acquired after a foreclosure sale thereunder, though the mortgage is a mere lien.—*Yerkes v. Hadley*, S. C. Dak. Oct. 5, 1888; 40 N. W. Rep. 840.

110. HUSBAND AND WIFE—Public Land—Community Property.—A and his wife occupied public land from 1847 to 1856, when she died. He continued to occupy it, and received a deed for it in 1871 from the town under act of congress of 1866: Held, that the land was not community property, and the wife was vested with no ownership therein.—*Labish v. Hardy*, S. C. Cal., Nov. 8, 1888; 19 Pac. Rep. 531.

111. HUSBAND AND WIFE—Separate Estate—Mortgage.—Georgia law does not prevent a wife from joining with her husband in mortgaging, for her husband's debts, property conveyed by the husband to a trustee for the wife's sole benefit, the trustee being authorized in the deed to mortgage the property on request of the of the husband and wife.—*Brodnax v. Aina Ins. Co.*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 61.

112. HUSBAND AND WIFE—Separate Property—Mortgage.—When a wife has recorded in the county where she lives a list of her property, according to Montana law she will not, as against her husband's mortgagee, be estopped from claiming it merely by allowing her husband to have possession and control of it, during which possession he executed the mortgage.—*Palmer v. Murray*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 553.

113. INFANT—Guardian's Contract—Rescission.—Where an infant promptly rescinds his guardian's contract on attaining his majority, offering to reconvey on repayment of the money advanced, and sues therefor within three months thereafter, his retention of the property in the meantime is not a ratification of the purchase.—*Scott v. Scott*, S. C. S. Car., Oct. 12, 1888; 7 S. E. Rep. 811.

114. INJUNCTION—Review—Finding.—An injunction restraining the unlawful erection of a building across a public alley, will not be disturbed on the sole ground that the chancellor erred in finding that complainant had made out a case of special damage.—*Cohen v. Bank of Georgia*, S. C. Ga., Oct. 24, 1888; 7 S. E. Rep. 811.

115. INJUNCTION—Temporary—Wrongs Prevented.—Where a corporation had contracted with another to build its road for certain stock and bonds, but the latter corporation did not build the road in the time appointed, and the stock and bonds were not tendered, and by stratagem and surprise at an adjourned meeting of the first corporation new directors were elected and the road was placed in the hands of others: Held, that a temporary injunction would issue against any action of the latter parties.—*New York & B. R. T. Co. v. Parrott*, U. S. C. C. (Conn.), Oct. 23, 1888; 36 Fed. Rep. 462.

116. INSURANCE—Apportionment—Equity.—Where there is a claim against several insurance companies for the same loss upon different policies, a court of equity has jurisdiction to apportion the loss among the respective companies, and require payment from each of the amount for which it is liable.—*Fuller v. Detroit F. & M. Ins. Co.*, U. S. C. O. (Ill.), Oct. 29, 1888; 36 Fed. Rep. 469.

117. INSURANCE—Application—Filling Out.—Where an agent of an insurance company fills out the application, presenting it to the applicant for his signature, but not acquainting him with the contents, the repre-

sentations therein made are conclusive against the company.—*Dunbar v. Phoenix Ins. Co.*, S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 886.

118. **INSURANCE—Life—Application by Agent.**—Where a life insurance agent assumes the responsibility of filling out a blank application, and the applicant, presuming that he has acted honestly, signs it without any knowledge of its contents, a recovery may be had on the policy, though certain representations be materially false.—*Temminck v. Metropolitan L. Ins. Co.*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 469.

119. **INSURANCE—Life—Rights of Creditors.**—Insurance on the life of a husband, taken out by the wife, or by him for the benefit of herself and children, in a State whose statutes make the proceeds payable to the wife or children, free from the claims of the husband's creditors, cannot be recovered by such creditors, though the husband was insolvent when the policies were issued and the premiums were paid out of his money.—*Central N. Bank v. Hume*, U. S. S. C., Nov. 12, 1888; 9 S. O. Rep. 41.

120. **INSURANCE—Limitations—Minors.**—A stipulation in an accident insurance policy, limiting the time within which suit shall be brought, is valid, and runs during the minority of the beneficiaries, there being no exception in their favor.—*Suggs v. Travelers' Ins. Co.*, S. O. Tex., Oct. 28, 1888; 9 S. W. Rep. 876.

121. **INTOXICATING LIQUORS—Questions for Jury.**—Under a trial for pursuing the occupation of selling liquor without a license, a charge that different sales at different times, near each other, to different parties, could constitute the occupation of selling, under Texas law, states an incorrect rule, and is a charge on the weight of the evidence.—*McReynolds v. State*, Tex. Ct. App., Nov. 8, 1888; 9 S. W. Rep. 617.

122. **INVENTIONS—Infringement—Injunction.**—A telephone patentee, who has put his device into extensive use and is receiving an income therefrom, is entitled to an injunction against its infringement, though he has withdrawn it from a particular State because of legislative interference limiting the rate of charges.—*American, etc. Co. v. Cushman, etc. Co.*, U. S. C. O. (Ind.), Oct. 29, 1888; 36 Fed. Rep. 488.

123. **INVENTIONS—Patents—Cancellation.**—The United States can maintain a bill in equity to cancel a patent for an invention obtained through fraud.—*United States v. American B. T. Co.*, U. S. S. C., Nov. 12, 1888; 9 S. O. Rep. 90.

124. **INVENTIONS—Pitching Barrels.**—Claim No. 1 of patent 42,580, to Holbeck and Gottfried, for pitching barrels is invalid. Claim No. 2 is not infringed by the use of an irremovable conductor in an apparatus for pitching barrels by means of a hot air blast.—*Crescent B. Co. v. Gottfried*, U. S. S. C., Nov. 5, 1888; 9 S. O. Rep. 83.

125. **JUDGMENT—Equitable Relief—Injunction.**—A borrowed money from a guardian through B, who acted as agent, and to whom as trustee a deed of trust was executed as security. C purchased part of the property, and B agreed to release such part from the deed of trust upon payment of the purchase money to him or to the guardian; it was paid to the guardian: *Held*, that equity would enjoin a judgment in ejectment recovered by the ward after coming of age on a title acquired by purchase under the deed of trust.—*Johnson v. Christian*, U. S. S. C., Nov. 8, 1888; 9 S. O. Rep. 87.

126. **JUDGMENT—Motion to Set Aside—Venue.**—A motion to set aside a judgment can only be heard in the county where the action is pending, unless consent appears from written stipulation, or a recital in the order, or by implication from presence at the hearing without objection, and the objection may be taken in the supreme court without objection or assignment of error.—*Goodwin v. Monds*, S. O. N. Car., Nov. 12, 1888; 7 S. E. Rep. 793.

127. **JUDGMENT—Non-resident—Service.**—A judgment against a non-resident, who did not appear, on a return not found, no affidavit nor order of publication

being found in the record, is a nullity.—*Palmer v. McMaster*, S. O. Mont., Sept. 15, 1888; 19 Pac. Rep. 585.

128. **JURY—Payment of Jury Fee.**—The Texas law, directing that a demand for a jury shall be made and the jury fee paid upon the first day of the term, is not strictly mandatory.—*Allen v. Plummer*, S. O. Tex., Oct. 28, 1888; 9 S. W. Rep. 672.

129. **JURISDICTION—Administratrix.**—The administratrix of A, appointed in Nebraska, may sue in Nebraska for damages for the killing of A in Kansas.—*Mo. P. R. Co. v. Lewis*, S. O. Neb., Nov. 23, 1888; 40 N. W. Rep. 401.

130. **JURISDICTION—Courts—Military Reservation.**—In Montana, a district court of the Territory has jurisdiction to try an indictment for murder committed on a military reservation.—*Burgess v. Territory*, S. O. Mont., Sept. 15, 1888; 19 Pac. Rep. 558.

131. **JURISDICTION—Federal—Crimes.**—The courts of the United States have no common law jurisdiction in criminal cases, nor of an assault with a dangerous weapon on the high seas, unless committed on board of an American vessel.—*United States v. Lewis*, U. S. D. C. (Oreg.), Nov. 10, 1888; 36 Fed. Rep. 449.

132. **JUSTICE OF THE PEACE—Jury—Findings.**—Where a judgment is based on a verdict of the jury, it is unnecessary for the justice to make findings of fact.—*Dye v. Russell*, S. O. Neb., Nov. 21, 1888; 40 N. W. Rep. 416.

133. **LANDLORD AND TENANT—Lease—Surrender.**—A stipulation in a lease that the lessee will surrender to the lessor when he desires to proceed with contemplated improvements is but a covenant, the breach of which only gives the lessor a right of action for damages.—*Bergland v. Frawley*, S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 873.

134. **LIMITATIONS—Adverse Possession.**—A valid sheriff's sale of land breaks the chain of title of defendant in execution, remaining in possession after the sale and claiming title under the statute of limitations of three years and against the holder of the title, which passed by the sheriff's sale.—*Blum v. Rogers*, S. O. Tex., Nov. 9, 1888; 9 S. W. Rep. 595.

135. **LIMITATIONS—Lands—Indians.**—Under Nebraska and federal laws, an Indian may come into the courts and litigate his title to land, and, when he is not shown to be uneducated or unfamiliar with the laws, the statute of limitations will not run against him.—*Feltz v. Patrick*, U. S. C. O. (Neb.), Oct. 29, 1888; 36 Fed. Rep. 457.

136. **LIMITATIONS—Notes—Payment.**—The maker of a note agreed in writing to send to the payee certain harrows. The payee was to pay the freight and credit \$50 on the notes: *Held*, that the indorsement, as affecting the limitation of an action on the notes, was to be made when the freight reached its destination.—*Sutton v. Lamb*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 457.

137. **LIMITATIONS—Payment—Presumption.**—The statute providing that a presumption of payment shall arise within ten years after the right of action shall have accrued, only raises a presumption, which may be rebutted.—*Currie v. Clark*, S. O. N. Car., Nov. 12, 1888; 7 S. E. Rep. 805.

138. **LIMITATIONS—Real Estate—Burning of Statute.**—A recovered land by ejectment from B in 1876. B subsequently discovered that A's deed was a forgery, and sued A, but A relied on the former owner's outstanding title, and B could not prove the forgery. In 1882 B sued in equity, setting out the former suits and the facts concerning the forgery: *Held*, that the action is not barred, under Missouri law.—*Dunn v. Miller*, S. O. Mo., Nov. 12, 1888; 9 S. W. Rep. 640.

139. **MANDAMUS—Bridge.**—The necessary means to rebuild a bridge over a navigable river, which the county is charged with the duty of maintaining, not being in the treasury, and the county board not having been authorized in the manner prescribed by law to levy a tax or issue bonds to raise the same, the board cannot be compelled by *mandamus* to rebuild the bridge.

—*State v. Wood County*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 381.

140. MARITIME LIENS—Goods—Speculation. — There is no lien for salt purchased by the owners of a steamer to be taken to another port and sold upon execution, the same not having been furnished as supplies.—*The Wyoming*, U. S. D. C. (Mo.), Oct. 20, 1888; 36 Fed. Rep. 493.

141. MARITIME LIENS—Mortgage—Priority. — The lien of a material man for supplies and repairs furnished in a home port, given by a State statute, is entitled to priority over a mortgage on the vessel repaired, although such mortgage had been duly recorded before such supplies and repairs were furnished.—*Clyde v. Steam T. Co.*, U. S. C. O. (N. Car.), Aug. 18, 1888; 36 Fed. Rep. 501.

142. MARITIME LIEN—Repairs—Personal Credit. — A shipwright in Jersey City solicited work at the office of the ship owner's representative in New York. The boat was sent to him to be repaired. He took a note on account and afterwards renewed it. He made no claim against the boat for eight or nine months, and after it been mortgaged: *Held* that, under the circumstances, the repairs must be done on personal credit only.—*The James Farrell*, U. S. D. C. (N. Y.), Nov. 1, 1888; 36 Fed. Rep. 500.

143. MARITIME LIEN—Supplies—Presumption. — Material men furnished supplies in New York to a vessel registered in New Jersey, but whose business home was in New York city, upon the order of the charterers, who did business in New York, and who had no authority from the owner to pledge the vessel for supplies: *Held* that, in the absence of any evidence of a common intent to charge the ship, no maritime lien arose for the supplies.—*The Aeronaut*, U. S. D. C. (N. Y.), Oct. 11, 1888; 36 Fed. Rep. 497.

144. MARRIAGE—License—Inquiry. — A, as register of B county, issued a marriage license for two persons in an adjoining county on the application of C. C told A that that the woman's parents were living, that she was eighteen or nineteen years old, and that all the parties lived in the adjoining county: *Held*, that the license was issued without reasonable inquiry, under North Carolina law.—*Williams v. Hodges*, S. C. N. Car., Nov. 5, 1888; 7 S. E. Rep. 786.

145. MASTER AND SERVANT—Negligence—Contributory. — Defendant had ordered the unloading of a mill from a wagon near a railroad. The driver of the wagon left the horses without unhitching them or blocking the wheels. While the mill was being unloaded the horses were frightened by a passing train, and the mill fell on the plaintiff's foot: *Held*, that the master was not liable.—*Steffen v. Mayer*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 630.

146. MECHANIC'S LIENS—Subcontractor—Notice. — Under Dakota law, in a mechanic's lien case, where the only evidence on the part of the subcontractor is, that the principal part of the materials was furnished before the notice was given to the owner, no foundation is laid for the introduction of the notice of lien filed with the clerk of the district court, and it is properly excluded.—*McMillan v. Phillips*, S. C. Dak., Oct. 1, 1888; 40 N. W. Rep. 349.

147. MORTGAGE—Foreclosure—Marshalling Assets. — One of two joint mortgagors of an \$8,000 mortgage, who sells land to the mortgagee and takes in payment an assignment of a \$4,800 interest in the mortgage bond, is entitled, on foreclosure, to have his interest in the mortgage first satisfied.—*Quinn v. Brown* S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 336.

148. MORTGAGES—Recording. — In Louisiana, since the act of 1855, an unrecorded mortgage is invalid as to third persons, though they have full knowledge of it.—*Ridings v. Johnson*, U. S. S. C., Nov. 12, 1888; 9 S. S. C. Rep. 72.

149. MORTGAGE—Release—Penalty. — Where a mortgagor has fully paid the note secured by mortgage without notice that the note had been assigned, the assignment not being recorded, and the mortgagee has

failed to release the mortgage within a reasonable time after demand to do so, the mortgagee is liable for the penalty prescribed by law in such cases. — *Perkins v. Matteson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 633.

150. MUNICIPAL CORPORATIONS—Control of Streets—Changing Grade. — The act of 1883 did not authorize the city of Detroit to bridge railroad tracks for a street crossing, nor to construct an ascending grade of the street to the bridge, and the depreciation of the property fronting on the street, caused by such grading, is a taking of private property for public use, which is authorized only by proceedings to condemn. — *Schneider v. City of Detroit*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 329.

151. MUNICIPAL CORPORATIONS—Debts—Constitution. — The provision of the constitution of Texas, that no debt shall ever be created by any city unless at the same time provision be made for taxation for its payment, applies to all cities alike. — *City of Terrell v. Disaint*, S. C. Tex., Nov. 16, 1888; 9 S. W. Rep. 593.

152. MUNICIPAL CORPORATIONS—Fire—Liability. — A city is not liable for damages caused by fire originating in a wooden building erected contrary to its ordinance creating fire limits, though it took no steps to prevent its erection. — *Hines v. City of Charlotte*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 333.

153. MUNICIPAL CORPORATIONS—Street Railroads—Forfeiture. — An ordinance of a city requiring a street railway company to construct its road in a certain manner and on certain streets, under Wisconsin law becomes a part of its charter, and upon non-compliance it may be required to surrender its charter by *quo warranto*. — *State v. Madison S. R. R.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 487.

154. NEGLIGENCE—Contributory—Jury. — Where the plaintiff knew of the excavation across the sidewalk, and passing by on a dark night attempted to go around it, but misjudged the distance and fell in and was injured, it was *held* that the question of contributory negligence was for the jury. — *Village of Orleans v. Perry*, S. C. Neb., Nov. 22, 1888; 40 N. W. Rep. 417.

155. PAYMENT—Check. — Payment by check is not absolute, but conditional, unless expressly so agreed.—*Good v. Singleton*, S. C. Minn., Nov. 8, 1888; 40 N. W. Rep. 359.

156. PLEADING—Complaint—Demurrer. — A complaint alleging, that through the default in the payment of interest plaintiff, under an option given in the note, has declared the whole principal and interest immediately due and payable, a demurrer on the ground that the action is prematurely brought, does not present the question whether or not the option has been properly exercised.—*Pacific M. L. Co. v. Shepardson*, S. C. Cal., Nov. 16, 1888; 19 Pac. Rep. 583.

157. PLEADINGS—Defects—Verdict. — Where plaintiff sues a city for damages for injuries sustained by reason of the defective condition of the sidewalk, and does not allege that the city had notice thereof, and the defendant does not demur or move relative thereto, such defect is cured by verdict, though defendant objected to the introduction of any evidence, on the ground that by reason thereof the petition did not state a cause of action. — *Hurst v. City of Ash Grove*, S. C. Mo., Nov. 12, 1888; 9 S. W. Rep. 631.

158. PLEADING—Fraud. — A party charging fraud and misrepresentation must plead the facts, and a mere allegation thereof is not sufficient. — *Tepoe v. Saunders* C. N. Bank, S. C. Neb., Nov. 21, 1888; 40 N. W. Rep. 415.

159. PLEADING—Mortgage—Foreclosure. — Where a suit is brought upon certain promissory notes, and to foreclose the mortgage given to secure them, the contents and conditions of the mortgage being alleged and the answer is not verified, and the petition is not attacked by motion, exceptions, or otherwise, the mortgage is to be taken by the court as true and the foreclosure may be decreed.—*Case v. Edson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 635.

160. PLEADING—Replevin—Mortgages. — A mortgagee of chattels, who brings an action of replevin against

another mortgagee, without showing the conditions of his mortgage or breach thereof, fails to make out a cause of action. — *Maddon N. Bank v. Farmer*, S. O. Dak. Oct. 1, 1888; 40 N. W. Rep. 345.

161. PLEADING — Verification — Clerk. — A notary public, who is clerk of an attorney, may administer an oath to verify a pleading prepared by such attorney. — *Schuyler N. Bank v. Bollong*, S. O. Neb., Nov. 21, 1888; 40 N. W. Rep. 411.

162. POST-OFFICE — Mail — Fraud. — A person changed the mailing stamp on a letter so as to deceive an insurance company and prevent a forfeiture: Held, that the case was not within U. S. Rev. St. § 5480, relative to opening correspondence by mail for purposes of defrauding. — *United States v. Mitchell*, U. S. D. C. (Pa.), Oct. 24, 1888; 36 Fed. Rep. 492.

163. PRACTICE — Fraud — Instructions. — In an action for false representations it is proper to charge that fraud will not be presumed under slight circumstances. — *Sweeney v. Devens*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 454.

164. PRACTICE — Jury — Summoning. — The court can call in talesmen to supply a deficiency in the panel, and when there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall by order of the court return jurymen from the bystanders sufficient to complete the panel, under the acts of congress. — *Lovejoy v. United States*, U. S. S. C., Nov. 8, 1888; 9 S. O. Rep. 57.

165. PRACTICE — New Trial — Newly-discovered Evidence. — When in a petition for a new trial it appears that the petitioner has discovered new evidence which, in connection with that given at the trial would entitle him to a judgment, ordinarily a new trial should be granted. — *McDonald v. Early*, S. O. Neb., Nov. 21, 1888; 40 N. W. Rep. 410.

166. PRACTICE — Trial — Exclusion of Evidence. — A court may admit apparently irrelevant testimony upon the promise and theory that evidence will be introduced making it material; if such evidence is not introduced it is the duty of the court upon request to exclude such testimony from the consideration of the jury. — *Martin v. Williams*, S. O. Kan., Nov. 10, 1888; 19 Pac. Rep. 551.

167. PRACTICE — Trial — Instructions. — The instructions given should be applicable to the issues and facts presented by the evidence. — *Western H. I. Co. v. Throp*, S. O. Kan., Nov. 10, 1888; 19 Pac. Rep. 631.

168. PRACTICE — Trial — Reception of Evidence. — In an action against a railroad for causing the death of A, after plaintiff has shown that A's death was not caused by his own negligence, and the defendant has confined itself to proving that it was not negligent, the plaintiff can introduce evidence to rebut defendant's evidence as to its negligence. — *Central R. R. & B. Co. v. Nash*, S. O. Ga., Oct. 17, 1888; 7 S. E. Rep. 808.

169. PROHIBITION — Writ of — Remedy at Law. — That a district court has overruled an objection to its jurisdiction and is about to adjudicate the cause on its merits, will not authorize a writ of prohibition. — *People v. District Court*, S. O. Colo., Oct. 31, 1888; 19 Pac. Rep. 541.

170. PRINCIPAL AND AGENT — Notice to Agent. — A company which employs an agent to sell machinery, stipulating that the notes taken in payment shall be made payable to the company and guaranteed by the agent, is chargeable in an action against the maker with the agent's knowledge in taking a note to it, though not given in payment of a machine. — *Johnston H. Co. v. Miller*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 429.

171. PUBLIC LANDS — Inclosing — Indictment. — An indictment for unlawfully inclosing a portion of the public lands must show that the defendant is not within any of the exceptions permitting such inclosure. — *United States v. Felderward*, U. S. O. C. (Oreg.), Oct. 29, 1888; 36 Fed. Rep. 490.

172. RAILROADS — Contracts — Regulating Rates. — Its charter gave a railroad the exclusive right of transportation of persons and property over its road, provided that the charge of transportation or conveyance

should not exceed certain rates: Held, that the company was subject to subsequent legislation establishing a commission to regulate tariffs. — *Georgia R. & B. Co. v. Smith*, U. S. S. C., Oct. 29, 1888; 9 S. C. Rep. 47.

173. RAILROADS — Crossing — Negligence. — A party approaching a railroad crossing is not bound to look and listen for the approach of a train, when the train has just passed, while the deceased was in a few rods of the crossing and was driving upon a trot, and such train has passed out of his sight in such manner as to induce the belief that it would not immediately return. — *Duname v. Chicago, etc. R. R.*, S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 394.

174. RAILROADS — Leases — Liabilities. — A railroad company cannot lease its road to another so as to absolve itself from its duties to the public. — *East Line & R. R. v. Lee*, S. C. Tex., Oct. 23, 1888; 9 S. W. Rep. 606.

175. RECEIVERS — Action by Stockholders — Jurisdiction. — Where stockholders of a corporation sue former directors for losses to the corporation caused by their acts, and the State court which appointed a receiver for the corporation refuses leave to make him a party defendant, the jurisdiction of the federal court falls. — *Porter v. Sabin*, U. S. C. C. (Minn.), Oct. 27, 1888; 36 Fed. Rep. 475.

176. RELIGIOUS SOCIETY — Real Estate — Trust. — When real estate is purchased by an unincorporated church organization and occupied and improved by it, and the deed is made to one person for the benefit of the organization, a trust is created, which may be enforced, although not in writing, though such person is a bishop of the denomination of which the church is a part. — *Fink v. Umscheid*, S. O. Kan., Nov. 10, 1888; 19 Pac. Rep. 623.

177. REMOVAL OF CAUSES — Local Prejudice. — Act Congress 1887, relative to the renewal of causes for local prejudice, repeals by implication the act of 1867 on the same subject. Such application must be made to the federal court and be supported by sufficient proof to satisfy the court of the truth of such allegations. — *Southworth v. Reid*, U. S. C. C. (Wis.), 1888; 36 Fed. Rep. 451.

178. SALE — Rescission — Latent Defect. — One who purchases by sample a chattel intended for a particular purpose, known to the seller, may even after acceptance rescind the sale on discovering a latent defect. — *Hudson v. Roos*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 467.

179. SEAMEN — Discharge — Fishing Vessel. — A master and crew wrongfully discharged by the owner of a fishing vessel from employment under a contract for the entire season, wages to be in the ratio of the quantity of fish caught, may recover damages, based upon the amount they would have received as wages on the catch of the whole season, less the amount paid them, and any wages earned during the season after their discharge. — *Fee v. Orient F. Co.*, U. S. D. C. (N. Y.), Sept. 24, 1888; 36 Fed. Rep. 509.

180. SEAMAN — Discharge — Waiver. — Where a seaman has been wrongfully discharged, and on the same day the master offers to take him back and carry him on the return voyage, a refusal to accept such offer is a waiver of all damages which might be recovered for the wrongful discharge. — *Dary v. The Caroline Miller*, U. S. D. C. (Ala.), Oct. 15, 1888; 36 Fed. Rep. 507.

181. SHIPPING — Charter Party — Performance. — Under the evidence in this case the shippers were held to have complied with their guarantee in a reasonable time, and were not liable for damages. — *Cullford v. Vinet*, U. S. S. C., Oct. 29, 1888; 9 S. C. Rep. 50.

182. SHERIFF — Receiptor — Liability. — Where a sheriff delivers property, which he has attached, to a bailee, taking a receipt therefor from him, such bailee will not be permitted to question the judgment obtained in the action, in which the property was so attached. — *Holcomb v. Nelson L. Co.*, S. C. Minn., Nov. 9, 1888; 40 N. W. Rep. 354.

183. SPECIFIC PERFORMANCE — Contracts — Certainty

— A contract, whereby a vendee of land agrees to lay out a town, and reconvey a block to the vendor, including the land on which his house stands, of the average size of the other blocks, not to exceed a certain number of feet square, is too indefinite to be enforced, and the continuance of the vendor in possession is not such part performance as cures the defect. — *Hollenbeck v. Prior*, S. O. Dak., Oct. 1, 1888; 40 N. W. Rep. 847.

184. SPECIFIC PERFORMANCE—Purchase of Land. — An agreement by the vendee of land in another State to give his note for the purchase price, and secure it by mortgage on the land, may be enforced in equity. — *Hicks v. Turck*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 839.

185. STATUTES—Amendment. — An act, amending another act, which provides that section 17 of said act is hereby amended so as to read as follows, then setting out the whole section as amended, does not violate the constitution of Missouri. — *Morrison v. St. Louis, etc. R. R.*, S. O. Mo., Nov. 12, 1888; 9 S. W. Rep. 626.

186. STATUTES—Ex Post Facto—Bribery. — Penal Code N. Y. § 72, increasing the penalty for bribery, is void as to such offenses committed in New York city before it took effect, but valid as to such offenses arising after April 1, 1883. — *Jacobs v. People*, U. S. S. C., Nov. 12, 1888; 9 S. O. Rep. 70.

187. STATUTES—Titles—Public Buildings. — Act Mich. 1883, as amended in 1885, requiring contractors on public buildings to give bond to pay their laborers, is constitutionally enacted as to title. — *Plummer v. Kennedy*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 453.

188. TAXATION—Personal Tax—Sale of Realty. — The Colorado law, authorizing the sale of lands for taxes on personality, is not contrary to public policy nor to the constitution. — *Lurmer Co. v. National S. Bank*, S. O. Colo., Oct. 26, 1888; 19 Pac. Rep. 537.

189. TAXATION—Retrospective Law. — A sale under Michigan law of 1885, for taxes of previous years is void, nor can the act of 1887 validate such sales previously made. — *Hall v. Perry*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 324.

190. TAXATION—Sale—Statutes. — A sale made under the Michigan tax law of 1885, for delinquent taxes assessed under the law of 1882, is void. — *McNaughton v. Martin*, S. O. Mich., Nov. 1, 1888; 40 N. W. Rep. 326.

191. TELEGRAMS—Delay—Damages—Party. — In an action against a telegraph company for failing to deliver a message sent to plaintiff's family physician, calling him to attend plaintiff's wife in her confinement, injury to the wife's feelings is an element of actual damages. The husband is a proper party to bring the suit for such injuries to his wife, and she is not a necessary party. — *Western U. T. Co. v. Cooper*, S. O. Tex., Oct. 28, 1888; 9 S. W. Rep. 598.

192. TOWAGE—Negligence—Hoisting Sale on Tow. — A schooner, lashed on the side of the tug, hoisted her foresail which obscured the view of the pilot of the tug. Subsequently the schooner struck on a reef: Held, that the schooner and the tug were both in fault, and the damages should be divided. — *The W. A. Levering*, U. S. D. C. (N. Y.), Oct. 22, 1888; 86 Fed. Rep. 511.

193. TOWNS—Special Legislation. — The provision in the act, allowing towns to exercise the powers conferred on villages, making it applicable to towns containing villages of a certain population, is not unconstitutional. — *Land L. & L. Co. v. Brown*, S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 492.

194. TRADE-MARK—Infringement. — A marked his plug tobacco with a tin star. B marked his tobacco, which differed in size and weight, with a round piece of glazed paper, and there were other differences. There was no evidence of actual deception: Held, that B did not infringe A's trade-mark. — *Liggett & M. T. Co. v. Finner*, U. S. S. C., Nov. 8, 1888; 9 S. O. Rep. 60.

195. TRESPASS—Cutting Timber—Personal Representations. — In an action against the administrator of one who had cut and removed logs from plaintiff's land, only the value of such logs on the stump can be

recovered, under Wisconsin law. — *Cotter v. Plumer*, S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 379.

196. TRESPASS—Cutting Timber—Tax-deed. — A tax-title claimant, who never acquired the actual possession of land cannot recover the penalty of Rev. St. Wis. § 4269, where defendant, the former owner, had no notice when he took the timber, of the recording of the tax deed. — *Fleming v. Sherry*, S. O. Wis., Nov. 8, 1888; 40 N. W. Rep. 375.

197. TRESPASS—Injury—Gaming Materials. — Defendant fastened a wire to plaintiff's house to secure a telegraph pole, which caused a part of the wall to fall, and a heavy rain flooded his carpets and gaming tables and implements: Held, there being no proof that at that time the property was being used for illegal purposes that the plaintiff was entitled to his damages. — *Gulf, etc. R. R. v. Johnson*, S. O. Tex., Oct. 30, 1888; 9 S. W. Rep. 602.

198. TROVER AND CONVERSION—Certificates of Deposit—Damages. — In an action for the conversion of certificates of deposit, evidence is admissible, that at the time of the alleged conversion payment had been demanded and refused, tending to show their depreciation in value. — *First N. Bank v. Dickson*, S. O. Dak., Oct. 1, 1888; 40 N. W. Rep. 351.

199. USURY—National Bank—Jurisdiction. — A suit, under United States law against a national bank for knowingly taking usury, may be brought in a State court. — *Schwytler N. Bank v. Bollong*, S. O. Neb., Nov. 21, 1888; 40 N. W. Rep. 413.

200. VENDOR AND VENDEE—Fraud—Damages. — Where one contracts to convey realty, knowing that he has no title and cannot perform his part, the damages may be measured by the rule of compensation for the injury suffered, and may include reimbursement for improvements put upon the estate. — *Erickson v. Bennett*, S. C. Minn., Nov. 7, 1888; 40 N. W. Rep. 157.

201. WAYS—Stakes—Trespass. — A party, having a right of way over the land of another, has a right to drive stakes along the line thereof to define its limits, if he does no unnecessary damage thereby. — *Joyce v. Conlin*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 212.

202. WIDOW—Allowance—Widow's Allowance—Appeal. — The order of a probate court refusing to review the former order relative to the widow's allowance of a year's support is a final adjudication, unless an appeal is taken from such order. — *Moore v. Moore's Admr.*, S. C. Ohio, Nov. 13, 1888; 18 N. E. Rep. 489.

203. WIDOW—Release—Fraud—Mistake. — Where a widow releases to an executor, either by his fraud or her mistake, all her interest in the estate for a consideration less than half her interest in the personality, such release will not preclude her from demanding her full share of the property of the estate. — *Appeal of Cunningham*, S. O. Penn., Oct. 22, 1888; 15 Alt. Rep. 868.

204. WILL—Construction. — A will, by which the testator devises his house and lot, and "all the rest and residue" of his estate, to his wife, "to have and to hold for and during the term of her natural life," gives her only a life estate, though testator died childless, and the wife is spoken of elsewhere in the will as the residuary legatee. — *Mixer v. Woodcock*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 573.

205. WILL—Construction—Curtesy. — Where by the terms of a will a life estate was given to the husband of the testatrix, and upon his death a certain portion was to be given to E. The husband survived E: Held, that husband of E took no estate by the curtesy. — *Webster v. Ellsworth*, S. J. C. Mass., Nov. 26, 1888; 18 N. E. Rep. 569.

206. WILLS—Construction—Devisees. — A devised land to his five grandsons and to the survivor, and if they died without heirs of their own bodies to their sisters, and each should receive his part when he became 25 years old: Held, that the devise to the sisters failed on the arrival of the grandsons at the age of 25 and the division among them. — *Fields v. Whitefield*, S. O. N. Car., Nov. 18, 1888; 7 S. E. Rep. 780.

207. **WILL—Construction—Fee-simple—Shelley's Case.** A devise of land to "J and to his heirs during his natural life, and to him and to his heirs forever after his decease," vests J with the fee-simple under the "rule in Shelley's case." — *Henderson v. Walthorn*, S. O. Penn., Oct. 29, 1888; 15 Atl. Rep. 898.

208. **WILL—Construction—Uncertainty.** — Where a testator devises land to a township which is both a civil and school township and directs the proceeds of the land to be devoted to the support of schools his intention to devise to the school township is clear, and the devise cannot be held void for uncertainty. — *Skinner v. Harrison*, S. O. Ind., Nov. 14, 1888; 18 N. E. Rep. 529.

209. **WILLS—Contract to Make—Part Performance.** — Where by parol agreement a husband and wife bind themselves to make a particular disposition of their real estate by will, and such contract is fully performed by the husband and benefits received and accepted by the wife, equity will prevent the wife from violating her part of the contract in fraud of parties interested. — *Carmichael v. Carmichael*, S. O. Mich., Oct. 26, 1888; 40 N. W. Rep. 178.

210. **WILLS—Estate Devised — Charges.** — Though the testator charged his wife with the raising and education of his children, yet the estate conveyed was held to be a fee-simple. — *Howze v. Barber*, S. C. S. Car., Oct. 23, 1888; 7 S. E. Rep. 817.

211. **WILL—Probate—Estoppel.** — A widow is not estopped to elect to take under the law rather than under her husband's will by causing the will to be probated and becoming the executrix thereof. — *In re Givin's Estate*, S. C. Cal., Nov. 1, 1888; 19 Pac. Rep. 527.

212. **WITNESS—Cross-examination.** — Refusal to allow defendant to cross-examine plaintiff, to show that the note sued on is without consideration, it is not error, where the plaintiff has given no testimony on the point in chief. — *Brady v. Henry*, S. O. Cal., Nov. 2, 1888; 19 Pac. Rep. 529.

213. **WITNESS—Fees.** — No fees can be taxed for the previous attendance of a witness, regularly summoned, who was not present on the day of the trial owing to the sickness of his wife. — *Davis v. Mills*, S. O. Tenn., Jan. 13, 1888; 9 S. W. Rep. 691.

214. **WITNESS—Impeachment—Declarations.** — Where a witness has been interrogated relative to certain statements contradictory of his testimony, evidence of such statements is admissible, though made after the occurrence which is the subject-matter of the suit. — *Welch v. Abbott*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 223.

215. **WITNESS—Party—Cross-examination.** — A defendant in a criminal case sworn as a witness on his own behalf may on cross-examination be asked if he has been convicted of crime. — *State v. Curtis*, S. O. Minn., Nov. 12, 1888; 40 N. W. Rep. 263.

216. **Witness—Privilege.** — Where an employee testifies for the State in the trial of his employer for selling intoxicating liquors, without any promise, expressed or implied, of immunity, he is not protected from prosecution for the same offense. — *Commonwealth v. Plummer*, S. J. O. Mass., Nov. 23, 1888; 18 N. E. Rep. 567.

217. **WRIT—Process—Witness—Privilege.** — A party who attends an application for an injunction in a case in which he is interested is privileged as a witness from the service of process while going to and returning from the place of hearing. — *Andrews v. Lernbeck*, S. O. Ohio, Oct. 16, 1888; 18 N. E. Rep. 483.

218. **WRITS—Return—Presumption.** — In the absence of proof to the contrary, the presumption of diligence obtains in favor of an officer charged with the service of process, and his return of not found must be regarded as sufficient. — *Liver v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 552.

219. **WRIT—Secular Newspaper—Publication—Statute.** — Construction of Illinois statutes relative to notice by publication of legal process in a secular newspaper. Publication in a journal partly devoted to legal information and partly to general news: Held, to be suf-

ficient notice under the statute. — *Railton v. Lander*, S. O. Ill., Nov. 15, 1888; 18 N. E. Rep. 555.

220. **WRITS—Service— Ramsey County.** — The general laws on the subject of service of summons took effect in Ramsey county on repeal of section 2, ch. 135, Sp. Laws 1877. — *Miller v. Miller*, S. O. Minn., Nov. 12, 1888; 40 N. W. Rep. 261.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERY No. 1.

A mortgage to B, with power of sale, by deed of warranty, either at public or private sale on default made. A dies after default, B assigns mortgage to C, who conveys to D with covenants of warranty *bona fide*, and for a valuable consideration. The heirs of A file bill to redeem on the ground that it was a naked power, unaccompanied with an interest. The power is not recited in the deed from C to D. Will the bill lie? Is it not a power coupled with an interest, and therefore, not necessary to be recited? The bill is brought by a non-resident to make the other heirs defendants. Motion to dismiss is made because plaintiff failed to give bond, but before it is acted on a second heir, on his motion, is made a party plaintiff. Cause is dismissed as to first party, and proceeds in name of second heir. When this is done the seven years' adverse possession has elapsed. Is the cause barred by the statute of limitations? Was not this in reality the bringing of a new suit, or did it refer back to bringing of original suit, which was in apt time? INQUIRER.

QUERY No. 2.

Has a divorced wife a legal right to continue the use of her late husband's name. Cite authorities. X.

QUERY No. 3.

H obtained a judgment in May, 1872, against V, in the justice's court. On June 1, 1872, a transcript of the judgment was recorded in the county recorder's office, and under the statute became a lien on all the real estate owned by V, which lien continues for two years. In July, 1872, H commenced an action in the district court against V on the justice's judgment, and in August, 1872, obtained another, or second judgment, which was docketed, and the lien thereof, under the statutes, continues for two years. Execution was issued on the district court judgment, the land sold and sheriff's deed executed. All this was done within two years from June 1, 1872. But V had, on June 15, 1872, duly executed a deed for the land to C, which deed was then recorded. We have no statutory provisions providing for the merger of the lien of the first in the second judgment, and no writ of *scire facias*. Did the lien of the second judgment relate back to the 1st of June, 1872, or was there any merger so as to give it that effect? In short, which of the two grantees own the land? Please give authorities. LEX.

RECENT PUBLICATIONS.

REPORTS OF CASES Adjudged and Determined in the Court of Chancery of the State of New York. Book III., Copiously Annotated by Robert Desty. Rochester, New York: The Lawyer's Co-Operative Publishing Company, Law Publishers. 1888.

We do not consider it necessary to say much of this volume of Reports, as the profession, and particularly equity practitioners, will readily understand its great value upon being informed that it is substantially volumes 3, 4, 5 and 6, of Paige's Chancery Reports, supplemented by very able and profuse notes appended to each case, prepared by Robert Desty, Esq., whose ability in that direction is unquestioned.

DIGEST OF INSURANCE CASES, Embracing the Decisions of the Supreme and Circuit Courts of the United States, of the Supreme and Appellate Courts of the Various States and Foreign Countries upon Disputed Points in Fire, Life, Marine, Accident and Assessment Insurance, and Affecting, Fraternal and Benefit Orders, and Containing also a Reference to Annotated Insurance Cases in Editorials in Law Journals, for the Year Ending October 31, 1888, by John A. Finch, of the Indianapolis Bar. Indianapolis: The Rough Notes Company, Publishers. 1888.

Beyond the statement of its title page, little can or need be said, by way of review, of a digest, for to determine its accuracy and scope, upon which its value chiefly depends, more than cursory examination is necessary. But it seems to us that a digest like this would be of great value, not only to lawyers whose practice is chiefly, or at all, in the line of insurance, but also to those outside the profession whose business and interest lies in that direction. As to its matter we can only say that it seems to be well and carefully prepared.

JETSAM AND FLOTSAM.

A LONDON attorney recently tendered a bill in which the last item was thus stated: "To dining with you after the case was lost."

A SUGGESTION to our legislature in the way of a new cause for divorce.—"Boss," inquired a darkey yesterday of a lawyer in the city court room, "kin I git a divorce here?"

"I don't know," replied the lawyer. "Has your wife been untrue to you?"

"Deed she has, boss."

"Well, what did she do?"

"Well, sah, me an' her married in February, an' in less'n a month I was jes bleeged to quit her."

"What was the matter?"

"She jes wouldn't s'port me, dat's w'ats de matter. I wants a divorce."

A WARD statesman, whose testimony was needed in an election fraud case, was put on the witness stand. "Raise your right hand," said the court; "do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so——" "Hold up, judge," interrupted the witness, "can't you mitigate that sentence just a little? You know I've been in politice for a good long while."

VISITOR: "What is the matter with that man?"

Superintendent: "Softening of the brain, we be-

lieve; can't tell. He appears to be as wise as any one, but his personal history shows that his memory is liable to such bad lapses that it is not safe for him to be at large. He was a city official once, but when called on to testify against other officials in some boddler cases, it was suddenly discovered that he could not remember anything at all. The court ordered him to be sent to the asylum for treatment, and he'll stay here until he recovers."

AN INCORRIGIBLE WITNESS.—It was a horse case. Horse cases are difficult to deal with, and in the course of the trial a horsey-looking witness was put in the box. Counsel asked him what happened.

Witness: "I sez, sez I: 'How about the hoss?' and he zaid he'd give me 10 shillings to zay nothing about un."

Counsel: "He did not say he would give you 10 shillings."

Witness: "Yes a did; that's exactly what a did zay."

Counsel: "He could not have said 'he;' he must have spoken in the first person."

Witness: "No, I was the first person that spoke. I zez, zez I, 'How about the hoss?'"

Counsel: "But did he not speak in the third person?"

Witness: "There was no third person present, only he and me."

The judge (interposing): "Listen to me, witness. He could not have said, 'He would give you 10 shillings to say nothing about it,' but 'I will give you 10 shillings.'"

Witness: "He zaid nothing about your lordship. If a zaid anything about your lordship I never heerd un. And if there was a third person present I never zeed un."

Point given up.

FROM QUAIN T NANTUCKET.—A *propos* of Nantucket, one hears some rather odd sayings and of some quaint happenings there. "You see, we are somewhat out of the way," said one of the islanders; "so tramps seldom trouble us, and it is only when our summer visitors come that we think of locking our doors at night." Last fall a man was tried for petty larceny, and sentenced by the judge to three months in gaol. A few days after the trial, the judge, accompanied by the sheriff, was on his way to the Boston boat when they passed a man sawing wood. The sawer stopped his work, touched his hat, and said, "Good morning, judge." The judge looked at him a moment, passed on a short distance, then turned to glance backward, with the question, "Why, sheriff, isn't that the man I sentenced to three months in gaol?" "Yes," replied the sheriff, hesitatingly; "yes, that's the man; but you— you see, judge, we—we haven't anyone in gaol now, and we thought it a useless expense to hire somebody to keep the gaol for three months just for this one man; so I gave him the gaol key, and told him that if he'd sleep there nights it would be all right."

BOBBY had eaten part of the preserves on the shelf, and so his mother shut him up in the closet. On letting him out she discovered that he had eaten the rest of the preserves. Much displeased, she asked him why he had done so. Because, ma, he replied, I heard pa tell one of his clients that a person couldn't be punished twice for the same offense.

The Central Law Journal.

ST. LOUIS, JANUARY 18, 1889.

CURRENT EVENTS.

FOLLOWING upon the heels of the public discussion, as to the legality of "trusts," to which we called attention, in our last issue, comes a decision by Judge Barrett, of the Supreme Court of New York, bearing upon the sugar "trust." The popular mind, ignorant of the technical meaning of the decisions of courts, and grasping simply at the shadow of things, has proclaimed this case as a direct and substantial blow at "trusts," and interpreted it to mean the complete and immediate overthrow of that gigantic partnership. Nothing, however, could be further from the facts, though the decision, of course, has a tendency in that direction. The facts, succinctly stated, are these: The "trust" rests upon a written agreement styled the trust deed. Under this deed, all the corporations which are to enter the combination, agree that all the shares, of the capital stock of all the corporations, shall be transferred to a board, consisting of eleven persons as trustees, joint tenants, subject to the purposes set forth in the deed, viz: To promote economy and reduce cost of manufactured article, to give to all the use of appliances used by the others, to furnish protection against unlawful combinations of labor, to protect against lowering standard of manufactured articles, and generally to promote the interests of all parties in all lawful ways. This board was in effect to manage the allied and combined interests. The stock, held in each individual corporation, was to be transferred to this board, who were to issue to each corporation in lieu of said stock, trust certificates, in value equal to the appraised net assets of each corporation. Thereafter the original corporate shareholder ceases to hold any further relations with his particular corporation, and thenceforward he is treated, as a shareholder, in the trust board. All profits arising from the business of each corporation, is to be paid to the trust board, who blend all the profits,

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received from all the corporations, into one grand mass, and from that aggregation declare such dividends as may seem appropriate. Thus, we have a series of corporations, existing and transacting business, under the forms of law, without real membership, or genuinely qualified direction—mere abstract figments of statutory creation, as Judge Barrett says, without life in the concrete, or underlying association.

This suit was a *quo warranto* against one of these corporations, asking for its forfeiture and dissolution. The court, in awarding the writ and declaring judgment of forfeiture, proceeds upon the ground that the corporation has entered into a combination and exercised privileges and franchises not conferred upon it by law; that any act of a corporation which is forbidden by its charter or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize is unlawful. This was the gist of the decision, and so far as that case was concerned, it was sufficient. But the court thereafter, entered into an extended consideration of the question, whether such combination into which the corporation unlawfully entered, is an injury to the public, and unlawful in itself. This question was decided in the affirmative. Judge Barrett and Prof. Dwight are thus at issue on the latter question, and we are frank to admit that a study of the arguments of both, leaves the student much in doubt.

THE profession will find much to interest and instruct them in the new book written by Prof. James Bryce, of England, entitled "The American Commonwealth." The object of the book is to tell the truth about us and our institutions, and it appears that he qualified himself for the task by thorough personal investigation. It is a rare thing to find a foreigner who is able to understand the relations of the judiciary to the other departments of our government. Its absolute independence of the executive and legislative branches, for one educated in a country where there is no clearly defined line of separation between them, and no written constitution, is difficult to grasp. Prof. Bryce seems to have succeeded in this undertaking beyond the

measure of most foreign writers. He clearly shows that the judicial judgment, in determining what is the law of the case at bar, necessarily includes the determination of the prevailing law, if the constitution and a statute are in conflict. A prominent critic, however, says that he yielded too much to the tendency to assume that the judgment of the court of last resort in effect repeals a law declared unconstitutional. It cannot be too explicitly understood that in the United States the judgment is strictly limited to the decisions of the issue between a plaintiff and a defendant; the authoritative thing is the judgment for the plaintiff or the judgment for defendant. The grounds for the court's opinion form a precedent, by which lawyers will advise their clients, as to the probable result in a like case; but there is nothing to prevent the lower courts, whether federal or State, from deciding contrary to the precedent, and sending up fresh cases to give the supreme court the opportunity to overrule the former decision.

In this connection a good story is told of the late Senator Wade, of Ohio. When on the circuit bench of that State a case arose before him of considerable difficulty. He gave it full consideration and decided it. It was taken to the supreme court and there reversed. On mandate it came up before him. He disregarded the mandate and followed his own first decision, and such was his judgment. "But, your honor, the supreme court reversed your former judgment!" exclaimed the now re-beaten counsel. "Yes; so I have heard. I will give them a chance to get right," was the quiet reply. It was again taken to the supreme court and re-presented there, and this time with Judge Wade's reported opinion. On reconsideration, this was found to be the better rule. The court, instead of attaching him for contempt, reversed itself and affirmed his last judgment.

NOTES OF RECENT DECISIONS.

As APPEARS by a recent decision of the Supreme Court of Kansas—Anderson v. City of Wellington, 19 Pac. Rep. 719—the organ-

ization known as "The Salvation Army" has achieved a legal victory in that State. An ordinance, especially directed at that body, was lately enacted by the city of Wellington, declaring it unlawful for any persons, society, association or organization, under whatsoever name, to parade any public street, avenue or alley of the city, shouting, singing or beating drums or tamborines, or playing upon any other musical instrument, or doing any other act, calculated to attract an unusual crowd of people, without first having obtained in writing the consent of the mayor, was held illegal and void, upon the ground that it was unreasonable and oppressive, and not within the delegated power of the city council. The court say that public parades are not *mala in se*, and that a proper and reasonable regulation, and not a practical prohibition thereof, is the extent of a city's power (citing Frazee's Case, 30 N. W. Rep. 72), and that it is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission under the ordinance.

In Haws v. St. Paul Fire & Marine Ins. Co., 15 Atl. Rep. 915, the Supreme Court of Pennsylvania decide a rather novel question of insurance. A policy on plaintiff's barn and its contents, specifically included horses, and as a part of the general description of the property, it was added in writing "all contained in above described barn." The policy covered loss by lightning, and contained a printed clause in the following words: "This policy does not cover or insure personal property of any kind while removed from the particular building herein described or kept or used in any other place or location, unless otherwise specified in the policy." This suit was brought upon the policy to recover for the loss of a colt killed by lightning while in the field at pasture. The company contended that, as the colt was not in the barn at the time of the casualty, it was not embraced within the terms and conditions of the policy. The plaintiff maintains, however, that the clause last quoted was inconsistent with the manifest purpose of the policy in respect of the insurance of horses. The court says:

We cannot adopt the plaintiff's view of his case. The manifest and obvious purpose of the parties, we think, was to place the insurance on the barn and its

contents, as specified in policy. In *Haws v. Association*, 114 Pa. St. 431, 7 Atl. Rep. 159, which is much relied upon by the plaintiff in error, there was no such clause in the policy as quoted above, and the insurance was upon horses alone. The horses, it is true, were described as "contained in his new two-story frame barn," etc., but this was held to be mere matter of description, and that such a description did not constitute a condition which would relieve the company from obligation the moment the horse left the barn. In this case, the restrictive clause is not a mere matter of description. It is a plain, direct provision, applicable alike to all the personal property embraced in the policy, and consistent with the obvious general purpose of the parties to insure the barn and its contents.

Three of the judges dissent from this opinion in the following language:

The only season of the year when horses are exposed to lightning is in the summer, when it is well known that farmer's horses are in the field for a considerable portion of the time. Hence it is not reasonable to suppose that the parties to the contract intended that a printed form in a fire policy, intended to apply to a different matter, should be applied to defeat the insurance. In the case in hand the insurance was of personal property contained in a barn, with lightning clause added. The policy was in the usual form, with a clause that the policy should not cover any of the property while removed from the barn. This was all well enough for the inanimate property in the barn. But the lightning clause was intended for the horses. No one insures hay, grain, and farming implements from lightning. I concede the clause against removal technically covers the horses; but I still think that, as to the horses insured against lightning, it was never intended to apply, and was not and could not have been in the contemplation of the parties at the time of the making of the contract, assuming them to have been reasonable beings, capable of making a contract.

An interesting question was involved in the decision of the case of *Lampert v. Haydel*, 9 S. W. Rep. 789, by the Supreme Court of Missouri. There, a testator devised lands in trust for the use of his three sons, "with power to use and enjoy equally the rents, issues and profits thereof during their natural lives," his object being "to secure to my children a certain annual income * * * and to take from them the power of disposing of the same, or creating any liens thereon, or of making the same liable in any way for their debts." This was a suit by an assignee of the interest of one of the sons, and the only question involved being whether the limitations in the will were void, as being in restraint of alienation. The court, in deciding in favor of the validity of the restriction, says:

But whatever may be the view taken by the English courts in this question, some courts of the highest authority in this country maintain the opposite view, holding that those considerations which apply to legal

estates have no application where property is transferred in trust, as in such instances the trustee takes the whole property, with the usual incidents of alienation, and in the like manner the beneficiary takes the legal title to the income when it is paid over to him, and therefore the point about restraints upon alienation has no foundation either in law or in fact. This is the position taken by the Supreme Court of Massachusetts, in a cause which was twice argued (*Bank v. Adams*, 138 Mass. 170), and the trust in that case, substantially identical with that one before us, held valid. Similar adjudications have been made in Pennsylvania, from an early period in its judicial history (*Thackara v. Mintzer*, 100 Pa. St. 151, and cases cited); and in other States (*Vermont, Barnes v. Dow*, 10 Atl. Rep. 238, and cases cited; *Maryland, Smith v. Towers*, 14 Atl. Rep. 497.) The two cases just cited are quite recent, the former having been decided in 1887, and the latter in June of the present year. The Supreme Court of the United States in *Nichols v. Eaton*, 91 U. S. 716, has affirmed the validity of such trusts, and also in a subsequent case—*Hyde v. Woods*, 94 U. S. 523. The opposite view is taken in several States, and the authority in support of that view will be found in the briefs of counsel. In some States, the validity of such trusts, where the fund proceeds from the bounty of another, is sanctioned by express statutes. This is true of New York, New Jersey, Illinois, and Tennessee. Decisions in those States, therefore, are of no value in the discussion of the question where such statutory provisions are not involved.

THE case of *Bradstreet Co. v. Gill*, 9 S. W. Rep. 753, recently decided by the Supreme Court of Texas, lays down the law, for that State, in reference to publication of reports by mercantile agencies. It was held that a witness, in possession of a key to the report of the agency, may be permitted to testify as to the meaning of a report in blank, though not as to the general effect it would have upon the business standing of the persons so rated. It was also held, relying upon the authority of *Erber v. Dun*, 12 Fed. Rep. 530; *Sunderlin v. Bradstreet*, 46 N. Y. 188, and the more recent case of *King v. Patterson*, 49 N. J. L. 417, that:

A commercial agency is a lawful business, and, when conducted lawfully, is a benefit to society and trade; but no just reason can be given for a rule that would exempt it from liability for false and defamatory publications, when other citizens would not be exempt. If an individual voluntarily or for profit give false and injurious information to persons interested in the trade and commercial standing of another at the time the information is given, such communications would be privileged; but if he furnishes such information to others not so interested to traders and merchants generally, it is not privileged.

THERE will be found in *Anderson v. Bennett*, 19 Pac. Rep. 765, lately decided by the Supreme Court of Oregon, a very exhaustive review and discussion of the authorities bearing upon the question of liability of the

master for injuries caused by the negligence of a fellow-servant. The fact here was that the servant, who was guilty of negligence which caused the injury, was a foreman or superintendent of defendant. The court say that the general doctrine that a master is not liable for injuries caused by the negligence of a fellow-servant in the same common employment is now settled law; that the general rule as declared in *Farwell v. R. Co.*, 4 Metc. 49, and other cases following it, has been the subject of much dispute as to its proper limitations, and in many of the States has been relaxed; that the later current of decisions, as well as legislative action, indicates a marked departure from that rule, as to servants clothed with partial authority only, such as a foreman, and the principle upon which such change is based is that when a master delegates any duty, he is liable for its proper performance. The court says:

Guided by this principle, several tests have been applied in determining the line of demarcation between the representative of the master and the mere servant, and among them is the ruling that the master is chargeable for any act of negligence in so far as the servant is charged with the performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing of a reasonably safe place in which to work, and the observance of such care as will not expose the servant to hazards and perils which may be guarded against by proper diligence, etc.; and to the extent of the discharge of these duties which the master owes to his servant by the middle man or vice principal, the latter stands in the place of master. (Citing *Gunter v. Manufacturing Co.*, 18 S. C. 262; *Flike v. Railroad Co.*, 53 N. Y. 553; *Fuller v. Jewett*, 30 N. Y. 46.)

THE Supreme Court of Michigan, in the case of *Park v. The Detroit Free Press Co.*, 40 N. W. Rep. 731, has declared unconstitutional the libel law of that State, enacted in 1885, providing that in suits brought for the publication of libels, in any newspaper, only such actual damages, as may be proved, can be recovered, if it appear that the publication was made in good faith, and did not involve a criminal charge, and was due to mistake, and that a retraction was published. Section 3 of the act construes "actual damages" to include all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation. The court, in disregarding the act, proceeds upon the ground that it de-

prives persons of any adequate remedy for injuries to reputation caused by the publication of a charge involving disgrace, but not technically criminal, that there are many technical crimes involving no infamy and acts not indictable which are utterly disgraceful. The court concludes:

It purports to confine recovery in certain cases against newspapers to what it calls "actual damages," and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is under this law usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument or business not depending upon his repute could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. * * * There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief; and, on the other hand, it is one where the injury is frequently, and perhaps generally, aggravated by malice.

IN *Louisville Asphalt Varnish Co. v. Lorick*, 8 S. E. Rep. 8, lately decided by the Supreme Court of South Carolina, plaintiff's salesman took defendant's order for goods, reduced it to writing, and mailed it to plaintiff. Upon receipt of this, plaintiff shipped the goods to defendant. Defendant had, in the meantime, written plaintiff not to ship "goods ordered through your salesman," but this was not received until after goods were shipped. Defendant refused to accept the goods, and now defends in a suit by plaintiff, upon the ground that there was no such note or memorandum in writing, as would satisfy the requirements of the statute of frauds. The court says:

It is quite certain that there was no formal agreement in writing, signed by the parties to be charged, for the sale of the goods in question, and we think it equally certain that there was no single instrument or memorandum in writing sufficient to satisfy the requirements of the statute; for the letter of the defendants, copied above, did not specify the necessary particulars as to quantity, nature, and price of the goods which were the subjects of the alleged contract of sale, and the copy of the order sent by the salesman to the plaintiff, which did contain all the necessary particulars, was not signed by the defendants. It is plain, therefore, that neither one of these papers,

standing alone, would be sufficient. But as it is well settled that the whole agreement need not appear in a single writing, but may be made out from several instruments or written *memoranda* referring one to the other, and which, when connected together, are found to contain all the necessary elements, the precise, practical question in this case is whether the letter of defendants can be connected with the written order sent by the salesman, so that the two together may constitute a sufficient note or memorandum in writing to satisfy the requirements of the statute.

After reviewing the authorities (among others, *Drury v. Young*, 58 Md. 546; *Beckwith v. Talbot*, 95 U. S. 289; *Townsend v. Hargroves*, 118 Mass. 325), it is held that the letter of defendant's, taken as it must be, in connection with the order sent to plaintiff by the salesman, to which it expressly referred, and which was in writing, and specified all the necessary particulars, as to price, quantity, quality and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the statute. *Simpson, C. J.*, dissented from this opinion, upon the ground that there was an absence of all testimony connecting defendant's letter distinctly and clearly with the memorandum made by plaintiff's agent and sent by him as an order for the goods, so that the two could constitute one memorandum in writing signed by the defendants.

In *State v. Darcy*, 16 Atl. Rep. 160, the Supreme Court of New Jersey hold that a mortgage owned by a resident of that State, although made upon land situated in another State, where a tax upon such land has been assessed and paid, within the preceding six months, is taxable there. The act concerning taxes in that State, after reciting that all real or personal estate shall be liable to taxation, in a following section construes the term "personal estate" to include goods and chattels of every description, including, among other things, money debts due or owing from solvent debtors, whether on contract, note, bond, mortgage," etc., whether said personal estate be within or without this State. Another section provides that "stock and other personal estate owned by citizens of this State, situate and being out of this State, upon which taxes shall have been actually assessed and paid within twelve months next before the day prescribed by law for commencing the assessment, shall be exempt from taxation." The insistence was that the mortgage was within the ex-

empted words of the last section, and that it represented property situated within the State of Kansas, upon which taxes had been paid. The court, after reviewing the later cases, *King v. Reed*, 43 N. J. L. 186; *State Tax, etc.*, 15 Wall. 300, says:

The result deductible from these cases appears to be that the mortgage taxed in the present case had its *situs* in the city of Newark; that there was no legislative provision changing the rule in this respect; and that the taxation of the land upon which it was secured in the State of Kansas cannot be regarded as a taxation of the mortgage, for if so regarded it would be clearly beyond the power of the legislature of Kansas to accomplish. * * * Again, it is claimed that the legislative policy in this State has been averse to the taxation of both the mortgage and the land upon which the mortgage is a lien. It is therefore urged that it must have been the legislative intent to regard a mortgage, and an interest in the land equal to the amount of the mortgage, as identical subjects of taxation in all cases where the statutes speak of property which has paid a tax within twelve months preceding. But, in the absence of expressed words, I do not regard this as a natural inference. Because either the mortgage or the land is relieved from taxation when both are within this State, it does not follow that the legislature intended to apply the same rule when the land is beyond our jurisdiction. We must remember that the legislature recognized a difference between debts owing to domestic and those owing to foreign creditors. While legislative policy permits the former to be deducted from the ratables of the debtor, it takes no cognizance of the former. The policy which permits a reduction for debts is induced by a desire to avoid double taxation; for if the debtor pays taxes for all his property, and is permitted no deduction for the unpaid price of the same property, while the creditor is also taxed for such price, it is double taxation, as obviously as if the price was secured by pledge or a mortgage upon chattels or a mortgage upon lands. A mortgage, while it has features which will justify exceptional legislative treatment, is but a debt secured by a lien upon land, and, unless the legislative intent is plain to otherwise regard it, the credit is the thing which taxation reaches.

INTOXICATING LIQUORS — SOME CASES OF PLEADING, EVIDENCE AND ASSOCIATIONS.

PLEADING.—The Intent.

- " Negative Averment.
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- “ Detective; Cross-examination.
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- “ Purchaser, When Required to Testify.
- “ Associations and Clubs; Who Liable.

The cases collated in this article elucidate some of the leading principles under the general law relating to intoxicating liquors.

PLEADING—*The Intent* should be averred if an element of the offense created by law, otherwise where the law is silent as to the intent.¹ But where an indictment was brought under a statute prohibiting in the first clause the sale of intoxicating liquors, to minors with certain exceptions and in the latter clause the sale to any person in the habit of getting intoxicated, it was held that it was not necessary to aver a *scienter*. It is enough that the sales were illegally made in violation of the statute whether the seller knew or did not know at the time that the person to whom he sold was or was not a minor or an habitual drunkard. The sale is made at the peril of the licensee.²

Negative Averment.—In Alabama, upon a question of the sufficiency of an indictment for selling to a person of known intemperate habits, it has been decided that it is not necessary to aver that the gift or sale was made without the requisition of a physician, such requisition being a statutory prerequisite for a legal sale to such person.³ But an indictment under a statute making it unlawful for any person to distill grain into spirituous liquor, “unless employed or authorized by the governor so to do,” is fatally defective if it fails to aver that the defendant was not authorized or employed by the governor.⁴ And in Arkansas, the rule prevails that an

indictment under a statute requiring a prescription or recommendation therefor by a regular practicing or graduated physician should have *negatived* a prescription or recommendation by a “graduated physician,” in addition to the words “without a prescription therefor by a regular practicing physician.”⁵

Following the Statute.—Where the indictment although not employing all the terms and language of the statute, yet sets forth the statutory offense so plainly that the jury can understand its nature, it is sufficiently correct; it must conform to the statute but need not pursue it literally.⁶

Special Acts require greater particularity, therefor an indictment for a violation of a special act must be framed with special reference to, and must conform to the letter and substance thereof, or must state the facts which constitute the offense created by it.⁷

License Need Not be Negatived.—Where the statute imposes a penalty for selling without a license, it is not necessary to allege the want of a license.⁸

Name of Person.—In Mississippi, it is held that it is not necessary to allege the name of the person to whom the liquor was sold.⁹

In Arkansas, an indictment under a statute providing that every person who shall on Sunday sell or retail any spirits or wine shall be guilty, etc., was declared insufficient because it failed to set out the names of the persons to whom the liquor was sold, or that they were sold to some person to the jurors unknown.¹⁰ And in Dakota, we have the broad ruling that it is unnecessary to describe the premises, person or the quality, or kind of liquor sold.¹¹

⁵ Thompson v. State, 37 Ark. 408. But see Jefferson v. People, 101 N. Y. 19, cited *post note*, 8.

⁶ Loeb v. State, 75 Ga. 262; Snider v. State, 59 Ala. 65; McPherson v. State, 54 Ala. 221; Espy v. State, 47 Ala. 533. **Place of Sale.**—As to when place of sale must be averred where indictment is for engaging in retailing without a license, see Harris v. State, 50 Ala. 127. As to what is sufficient averment of use of room for illegal sale, see State v. Ruby, 68 Me. 543.

⁷ Camp v. State, 27 Ala. 53.

⁸ Jefferson v. People, 101 N. Y. 19; Com. v. Brusie, (Mass. 1887), 5 N. E. Rep. 119. But see Thompson v. State, 37 Ark. 408, cited *ante note*, 5.

⁹ Lea v. State, 1 South. Rep. 51.

¹⁰ State v. Parnell, 16 Ark. 506, citing State v. Munger, 15 Vt. 290; People v. Adams, 17 Wend. 475; Com. v. Smith, 1 Gratt. 553; Com. v. Dove, 2 Va. Cas. 26; Ellis v. People, 4 Scam. 508.

¹¹ People v. Sweetzer, 1 Dakota, 303, citing United States v. Holliday, and United States v. Haas, 3 Wall

¹ McCutcheon v. People, 69 Ill. 601.

² Mapes v. People, 69 Ill. 523; Barnes v. State, 19 Conn. 397. Upon sufficiency of averment as to “habit of getting intoxicated,” see Wiedeman v. People, 92 Ill. 314.

³ Tatum v. State, 68 Ala. 147.

⁴ Davis v. State, 39 Ala. 521.

But where a *special statute* prohibited the sale within certain specified limits of any spirituous etc., liquors, "in any quantities, large or small, to any person or persons whatsoever," it was declared that the name of the person to whom the liquor was sold must be specified or the person must be otherwise described.¹²

Continuendo.—In an indictment for keeping liquor for sale illegally, the averment may be with a *continuendo*.¹³

Habit of Getting Intoxicated.—It is held in Illinois, that an averment of unlawful sale of intoxicating liquors, "to one C who was in the habit of getting intoxicated," is not sufficiently certain in that it fails to aver that the person to whom the sale was effected was then at the time of the sale in the habit of getting intoxicated.¹⁴

Alternative Averments are not sufficient.¹⁵ So where an offense charged in the alternative that the defendant "did sell or give away whisky," when the statute makes it an offense to sell, lend, or give it away, is bad for uncertainty, though an averment that the defendant "did sell and give away" is good, so also an averment that one sold whisky or brandy is bad, but an averment that one sold whisky and brandy is good.¹⁶

Joint Indictment.—It is held in Alabama, that where two persons are indicted jointly for the same offense, if the proof shows the commission of the offense severally by each, there can be no conviction of either or both.¹⁷

Civil Action Under Statute; Pleadings.—Where an action was brought under a statute to recover for an injury sustained by the appellee by reason of sales made by appellant to her husband, it was held that an allegation of sales made to him causing him to become an habitual drunkard and a consequent injury therefrom was sufficient.¹⁸

407; State v. Adams, 17 Wend. 475; Osgood v. People, 39 N. Y. 449; State v. Gumman, 22 Wis. 422; State v. Rice, 38 Ill. 435; Commr. v. Baird, 4 S. & R. 141.

¹² Dorman v. State, 34 Ala. 216, and cases cited.

¹³ Commr. v. Hersey, (Mass.) 9 N. E. Rep. 337.

¹⁴ Wiedeman v. People, 92 Ill. 314.

¹⁵ Raister v. State, 55 Ala. 64.

¹⁶ Thompson v. State, 37 Ark. 408. When duplicity in complaint is not to be considered, see State v. Dolan, 69 Me. 573.

¹⁷ Johnson v. State, 44 Ala. 414.

¹⁸ Brannon v. Silvermail, 81 Ill. 434. So in an action under a statute for damages caused by one K, an intoxicated person, an averment that the defendants were in the liquor business, the sale to K, K's intoxi-

EVIDENCE—Allegations When to be Proven; Variance.—Material allegations must in general be proved as laid, although there are exceptions to this rule, but a *videlicet* will not avoid variance or dispense with exact proof; and the proof need not precisely conform with the allegations in every particular, it is sufficient if it agrees in substance. Therefore an averment of the sale of whisky is held to be sustained by proof of a sale of spirituous liquors.¹⁹ But where the averment was that the defendant sold whisky without a license, it was held that evidence of the sale of "bitters" was irrelevant, unless shown to be made of whisky.²⁰ Though where the statutory words were "any brandy, rum or other spirituous liquors," it was held that the allegation of a sale of spirituous liquors was sufficiently certain, and that proof of a sale of brandy only would support such an indictment.²¹ Allegations, however, which are immaterial need not be proven.²² And in general, under an averment of "sale," all facts necessary to constitute one may be shown.²³

Intemperate Habits; Knowledge of Seller.—As showing that the defendant knew of the "intemperate habits" of the person to whom he sold liquor, evidence is competent that such person was in the habit of drinking liquors daily, frequently and openly, so as to become intoxicated, in the community where defendant lived, and that he was accustomed to obtain liquors there both of defendant and others,²⁴ although it is held in Illinois that the habit of getting intoxicated may not be implied from the habit of drinking intemperately,²⁵ nor is drunkenness necessarily implied by intemperance.²⁶ But in regard to the "habit of getting intoxicated" it is held that knowledge of such fact on the part of

cation, the assault, and direct infliction of the injury, were held sufficient: King v. Haley, 86 Ill. 106.

¹⁹ Brugulier v. United States, 1 Dakota, 5, citing United States v. Lancaster, 5 Wheat. 434; State v. Davidson, 12 Vt. 300; State v. Bugbee, 22 Vt. 32.

²⁰ Williams v. State, 35 Ark. 430.

²¹ Commonwealth v. Odlin, 23 Pick. 275. And see Commonwealth v. White, 10 Met. 14.

²² Schroeder v. Crawford, 94 Ill. 357.

²³ People v. Sweetzer, 1 Dakota, 308, citing Divine v. State, 4 Ind. 240; Clare v. State, 5 Iowa, 509; Wrocklege v. State, 1 Iowa, 167, and other cases.

²⁴ Atkins v. State, 60 Ala. 45, and see "non-expert evidence" herein, *post*.

²⁵ Mullinix v. People, 76 Ill. 211.

²⁶ *Id.*

the seller is immaterial.²⁷ Again, where the action was brought under a statute for selling to one who was then and there in the habit of getting intoxicated, it was held that it was not necessary that the habit be a "fixed habit," since the statute used simply the word habit, and the definition given by Webster properly applied, that is, "the involuntary tendency to become intoxicated which is acquired by frequent repetition," and inasmuch as the evidence showed that the person to whom the sales were made had been drunk from three to five times within two years prior to the trial, this did not authorize the court to say that the jury did not properly find that the habit of getting intoxicated existed. The court said that "a man having full knowledge of his appetite could hardly be supposed to be guilty of such excess;" and it was further held that the evidence need not show, beyond a reasonable doubt, a constant and usual habit of getting intoxicated, but it was sufficient to prove that involuntary tendency to become intoxicated which is acquired by frequent repetition. It would seem, however, that so much of this decision as determines that the jury might properly find that the habit of getting intoxicated existed in the case of a person who had only been guilty of an excess to the extent of getting drunk from three to five times in two years, is not strictly in keeping with the definition of Webster on which it is based, unless the words of that definition are capable of a much broader and more liberal interpretation, than appears upon their face.²⁸

Selling or Giving Away; Two Offenses; Variance.—Where, under a statute, it is a criminal offense to sell or give away intoxicating liquors to one in the habit of getting intoxicated, it is held in Illinois that these constitute two offenses, in that an indictment for one offense will not be sustained by proof of the other.²⁹

Presumption as to Sale From Course of Dealing.—Evidence that a party obtained liquor at defendant's tippling house on various occasions, without any statement that he bought it, is sufficient to warrant an inference of a sale, from the course of dealing at such places. In this case the court said: "The

presumption is that when liquor is furnished there, it is for a consideration and that whether the customer pays cash or not he becomes liable, at least impliedly for the price of what is ordered and consumed on the spot," and that this presumption is conclusive unless rebutted.³⁰

Evidence as to the Time.—Where an indictment was brought under a statute for maintaining a common nuisance for the illegal keeping and sale of intoxicating liquors on a day stated therein, it was held that the prosecution might show that on a particular day, some eight weeks prior to the day alleged, the defendant had been seen at the house in question, and had then sold liquor at said place, and that thereafter and before the day stated in the indictment the defendant had been seen to go in and out of the place several times.³¹ So where an indictment was brought for keeping and maintaining a place used for illegal sale and illegal keeping of liquors on certain specified days, and on divers other days between said specified times, it was held competent to show that the nuisance was kept during any of the time alleged.³²

Intoxicating Character of Liquors; Judicial Notice.—It is held in Alabama, that the court will take judicial notice of the meaning of the word "malt liquor," found in a statute prohibiting its sale, and that the definition thereof as contained in Webster's Unabridged Dictionary may properly be given in a charge to the jury, or read to them in evidence. The work is such a standard authority as to the meaning of the words as to be among the facts judicially known.³³ And in New York, it is decided that the courts will take judicial notice that whisky, brandy, gin ale or strong beer are intoxicating,³⁴ although it is there said that courts will not take judicial notice that lager beer is intoxicating, but will submit the question upon the evidence to the jury.³⁵

²⁷ Loeb v. State, 75 Ga. 261, 262.

³¹ Commonwealth v. Kelley, 116 Mass. 341, citing Commonwealth v. Stoehr, 109 Mass. 365; Commonwealth v. Dearborn, *id.* 368.

³² Commonwealth v. Hersey, 9 N. Eng. Rep. 838.

³³ Weed v. State, 55 Ala. 16.

³⁴ Rau v. People, 63 N. Y. 279.

³⁵ *Id.* "Strong beer" is held to be "strong and spirituous liquor" in Commissioners of Excise v. Taylor, 21 N. Y. 173. See distinction made as to difference between "fermented beer" and "beer." *Id.* As to lager beer, that court will not judicially notice. See

²⁷ Humpeler v. People, 92 Ill. 401.

²⁸ Murphy v. People, 90 Ill. 59.

²⁹ Humpeler v. People 91 Ill. 401.

Non-expert Evidence.—It is not necessary that one be an expert to enable him to testify that a particular article is gin, it being a matter of common knowledge.³⁶ So a witness who has frequently drank fermented liquors and who can distinguish them by their taste, though he has no special knowledge of chemistry, is competent to express an opinion on the question whether lager beer is or not a fermented liquor.³⁷ And it is held that a person having knowledge of the general character of the person to whom the liquor was sold may testify whether his intemperate habits were generally known or not in the community.³⁸

Chemical Analysis of Beer of Same Name.—It is decided in *Commonwealth v. Goodman*,³⁹ in order to show the intoxicating properties of the beer sold by defendant, that evidence may be given of a chemical analysis of beer of the same name and similar in color, flavor, and strength as that found on the defendant's premises.

Sale; Character and Sufficiency of Evidence.—It was held in *Commonwealth v. Campbell*,⁴⁰ that "the fact that a person sells liquor at a given place may be proved by circumstantial evidence. The manner in which the place was fitted up, the furniture and liquors found there. The number of persons about the premises, the character and condition of the persons so found, are all of them circumstances having a tendency to show that on the occasion in question the defendant was engaged in the sale of liquors."⁴¹ So upon a complaint for search and seizure "bottles, glasses, and measures, identified as found in the defendant's shop," were held to be admissible in evidence, and the court said: "They were or might be implements used in unlawful traffic. They were admissible in evidence, however obtained. Their evidentiary force was for the jury. They are nevertheless articles of evidence, even if procured

by an unauthorized and illegal search."⁴² And evidence is admissible that certain empty jugs found at the defendant's house had recently contained liquor, the indictment being for unlawfully keeping with intent to sell.⁴³ So it may be shown that liquors were found in the bed-room of the defendant which was located in an upper story over the defendant's eating saloon and connected with it by an elevator.⁴⁴ And evidence that liquor was found in outbuildings on the premises of the defendant, and that an attempt had been made by him to deceive the witness in regard to them, is competent on the question of illegal sale and keeping.⁴⁵ But upon a charge of keeping liquors for sale contrary to law, it appeared in evidence that there was found in a cellar of the defendant's house, bottles and demijohns, also a barrel and a bottle of whisky, and a barrel of rum; that the barrel of whisky was standing on the head and there was no evidence that it had been tapped or used. The barrel of rum had a faucet in it, was nearly full and was lying on the side in a frame. In a sink in a room over the basement were found tumblers such as are ordinarily used in a bar room and some orange peel, upon these facts the court held that the "possession and use of intoxicating liquors are not prohibited by statute;" that the "intent to sell contrary to law, in which the whole criminality of the keeping consists must be proved beyond a reasonable doubt;" that the facts were "too scanty to furnish any of the elements of certainty beyond a reasonable doubt," and therefore the evidence was insufficient in itself to warrant a conviction.⁴⁶ In *Pierce v. State*,⁴⁷ the accused kept an hotel to which a saloon was attached. The saloon was devoted exclusively to the bar business. It did not appear that the hotel business necessitated its being kept open on Sunday. The saloon and liquors therein were kept by and were the

note, p. 178, *id.*, citing *Rau v. People*, 63 N. Y. 277; *People v. Zelger*, 6 Park. 355; *People v. Hart*, 24 How. Pr. 289; *Josephdaffer v. State*, 32 Ind. 402.

³⁶ *Commonwealth v. Timothy*, 8 Gray, 480.

Merkle v. State, 37 Ala. 139.

Tatum v. State, 63 Ala. 147. *Contra: Stanley v. State*, 26 Ala. 26.

³⁷ 97 Mass. 119.

³⁸ 116 Mass. 32.

³⁹ Citing *Commonwealth v. Stone*, 97 Mass. 548; *Commonwealth v. Berry*, 109 Mass. 386. And see *Commonwealth v. Cogan*, 107 Mass. 212; *Commonwealth v. Pierce*, *id.* 487.

⁴² *State v. Burrough*, 72 Me. 479, citing *State v. Plunket*, 64 Me. 536; *State v. McGlynn*, 34 N. H. 422; *State v. Flynn*, 36 N. H. 64; *Commonwealth v. Dana*, 3 Met. 329.

⁴³ *Commonwealth v. Timothy*, 8 Gray, 481.

⁴⁴ *Commonwealth v. Kinsley*, 108 Mass. 24.

⁴⁵ *Commonwealth v. Doe*, 108 *id.* 418.

⁴⁶ *Commonwealth v. Intoxicating Liquors*, 105 Mass. 595. But see cases *ante*, and *Commonwealth v. Gaffey*, 122 *id.* 334; *Commonwealth v. Levy*, 126 *id.* 240; *Commonwealth v. Kennedy*, 97 *id.* 224.

⁴⁷ 109 Ind. 535.

defendant's property. The evidence showed that the witness went into the hotel office on Sunday and from there into the saloon, where he found two or three persons, but neither the hotel proprietor nor his clerk were there or in the office. One of the persons in the saloon was a boarder, of whom the witness asked if he had any beer, he replied "there is a bottle why don't you take it." The bottle referred to, together with a glass was on the counter; the witness poured a glass of beer out of the bottle, drank the same, placed five cents on the counter and left. There was no evidence that this occurred with the defendant's consent and knowledge other than as shown by the above facts. The statute made it an offense to sell beer or give away any intoxicating liquor to be drunk on Sunday. It was held that the defendant was properly convicted in the court below. Again, to support an indictment for keeping and maintaining a tenement for illegal sale of intoxicating liquors, a printed card containing the defendant's name, the location of her place of business and the words "dealer in imported wines and liquors," also the words "porter and lager beer" was offered by the prosecutor, coupled with the statement of the witness producing the same, that a few days before the trial in October, 1875, the defendant then told him it was her card and that she had had the same printed the year before. It was permitted to be read as showing that on May 1st, 1875, the day alleged in the complaint, the defendant was the keeper of the house in question. It was held that the evidence was competent and was properly admitted.⁴⁸ And proof of the sale of an article called "pop," shown on the trial to be malt liquor which possessed intoxicating qualities and would intoxicate if a sufficient quantity were taken, and that the same tasted like poor beer and was drawn from beer kegs, is sufficient to warrant the jury in finding the defendant guilty of the sale of intoxicating liquors without a license.⁴⁹ In *Commonwealth v. Dowdican*,⁵⁰ evidence that the witness had seen the defendant "selling whisky" within the time covered by the indictment, and that the contents of a tumbler looked like whisky, was held admissible, and the prosecution was permitted to ask the same

witness "what was in the tumbler" and was also permitted to ask the witness in what condition he had seen people there, and the witness was allowed to answer that he had seen them going in sober and coming out drunk.⁵¹ Again, a certified copy of a record of a deputy collector of the United States internal revenue, showing that the defendants paid a special tax as liquor dealers, during the period covered by the indictment was declared to be competent evidence.⁵²

License; Burden of Proof.—It is decided, in *United States v. Nelson*,⁵³ that the accused is bound to prove a license when the fact is peculiarly within his knowledge, and this is so, although there is no negative averment of his having a license.⁵⁴ So where the acts charged and put in evidence were of sales of intoxicating liquors to be drunk upon the premises where sold, and it appeared that the defendant had a license from the authorities of the town in which his place was located, as a druggist, which expressly prohibited the sale by him or his agents of intoxicating liquors to be drunk on the premises or in his place of business, and the ordinance under which the license was granted provided that the corporation might grant such licenses to drug stores upon the payment of a certain sum; it was held that, in order to avail himself of such license as a defense, the defendant must show that it was broad enough to cover the acts as alleged and proved, that failing in this he was liable.⁵⁵

Private Instructions.—Where the statute provides that whoever by himself, clerk or servant shall sell etc., the evidence being that the defendant kept intoxicating liquors for sale, he may not limit his responsibility for sales made by his clerk by showing what

⁴⁸ 114 Mass. 257.

⁴⁹ So a witness may testify that he has heard parties call for whisky in the defendant's saloon, and that defendant had thereupon poured something into a tumbler, which the person calling for whisky had drunk, and that the color was reddish, the complaint being of keeping a tenement used for the illegal sale of intoxicating liquors. *Commonwealth v. Owens*, 114 Mass. 252. See also *Commonwealth v. O'Donnell*, 9 N. Eng. Rep. 509; *Mason v. Lothrop*, 7 Gray, 354.

⁵⁰ *State v. Wiggins*, 72 Me. 425.

⁵¹ 29 Fed. Rep. 202.

⁵² See also *State v. Back* (Minn.), 30 N. W. Rep. 764; *Commonwealth v. Rafferty*, 133 Mass. 574; *Commonwealth v. Carpenter*, 100 id. 204; *Commonwealth v. Shea*, 115 id. 102; *Commonwealth v. Dean*, 110 id. 357.

⁵³ *Spoke v. People*, 89 Ill. 617; *Prather v. People*, 85 Ill. 36, distinguished.

⁴⁸ *Commonwealth v. Thomley*, 119 Mass. 104.

⁴⁹ *Godfriedson v. People*, 88 Ill. 285.

instructions he had given him in regard to such sales.⁵⁶ So private instructions to a clerk or bar-keeper regarding selling to minors were held irrelevant and properly excluded in *Loeb v. State*.⁵⁷

Detective; Cross-examination.—It was decided, in *State v. Rollins*,⁵⁸ that a witness in a liquor case, having testified that he was employed as a detective, might not be asked upon cross-examination as to who employed him, such question being entirely irrelevant, and one which might properly be excluded.

Reading Standard Works to the Jury.—In Alabama, it has been held no error to permit State to read the jury extracts from a standard medical work on the subjects of vinious and fermented liquors.⁵⁹

Minor; Evidence as to Age.—A minor is a competent witness to his own age, although his only knowledge thereof is obtained from the date of his birth in the family Bible, or his information may have been derived from some other source.⁶⁰ And the uncle of a minor, to whom the sale of liquor was made who had known him from early infancy, may testify that he does not from his knowledge of him believe him to be of age, and such evidence is not open to objection as secondary evidence, although the minor's parents could have been had as witnesses but were not.⁶¹ So a witness who has testified to the dress, manner, and appearance of the person to whom the sale was made may then give his opinion as to the age of that person.⁶²

Purchaser; When Required to Testify.—A purchaser of liquors may be required to testify as to whether the defendant had sold him liquors, since such evidence would not tend to criminate or bring him into disgrace, within the meaning of the law.⁶³

Associations and Clubs; Who Liable.—The Revised Statutes of Illinois 1874, ch. 43, sec. 2 of the "dram-shop" act makes it unlawful for any person not having a license to keep a dram-shop either by himself or another, or

to sell intoxicating liquors of any kind in less quantity than one gallon, or in any quantity to be drank on the premises, or in any adjacent room, etc., providing a penalty for a violation thereof. *Held*, that any person who, without a license to keep a dram-shop, sells or gives away the same in less quantity than one gallon, or in any quantity to be drank on the premises, or in any adjacent room or place, or who resorts to any shift or device to evade the law, is guilty of unlawful selling, and is liable therefor. In this case an association was formed with the declared object of promoting "temperance, friendship and good feelings in the community at large," and had a president, vice president, secretary and treasurer with defined duties, and it also had a capital stock of three hundred dollars. The object and purposes of the association, were not set forth in either its articles of association or by-laws. Prior to its formation the defendant was licensed to and did keep a dram-shop. At the time of the formation of the association it claimed to have purchased the same, together with the liquors, etc., therein, of the defendant, whom they elected as treasurer. Any person could become a member upon the payment of one dollar, for which sum he received a ticket with figures thereon from one to twenty inclusive. With this ticket beer, whisky, cigars etc., could be purchased and certain numbers corresponding to the price of the thing were thereupon punched out of the ticket by the treasurer. The business was continued in this way without any license for about three months, during which time the treasurer had the entire management of the business, purchasing and replenishing the stock when necessary and paying the bills, nor was an account thereof kept with the association nor distribution of profits made to the members. At the time of the prosecution the members numbered about three hundred. It was held to be clearly a shift or device to evade the provisions of the law, and that whatever sales or gifts of liquor were made under the arrangement constituted "unlawful selling," and that the treasurer was liable therefor; and if, as a matter of law, the liquors were owned by the company as partnership property and the liquors so purchased were given or retailed out to the several members by the company, they having no license, this would

⁵⁵ *Moecher v. People*, 91 Ill. 494.

⁵⁷ 75 Ga. 258.

⁵⁸ 77 Me. 380.

⁵⁹ *Merkle v. State*, 37 Ala. 139. See *Weed v. State*, 55 Ala. 16.

⁶⁰ *Pounders v. State*, 37 Ark. 399; *Edgar v. State*, *id.* 219.

⁶¹ *Weed v. State*, 55 Ala. 13. See *Marshall v. State*, 49 *id.* 21.

⁶² *Commonwealth v. O'Brien*, 134 Mass. 200, citing *Commonwealth v. Sturtevant*, 117 *id.* 122, 133.

⁶³ *Commonwealth v. Kimball*, 24 Pick. 369.

be an unlawful enterprise, and all the members would be guilty of a violation of the statute.⁶⁴ In a Massachusetts case, the club was organized with limited and selected members and duly elected officers, the purpose being to furnish refreshments to those who belonged to it. A steward was employed at a monthly salary, and a sum was also paid him for the use of the room where the liquors found were kept. In addition to an admission fee of one dollar, paid by each member, checks were issued to the members, each representing a value of five cents. The income from these sources was used in purchasing liquors which were used in common by the club. The defendant, as steward, was obliged to furnish members checks in such amounts at five cents each as were desired. It was also his duty to take care of and furnish to the members liquors for drinking, in such quantities as were demanded, and to receive payment in checks therefor when delivered. The liquors seized were in the custody of the steward who had formerly held a license to sell, to be drunk on the premises. No license was held by him at the time of the seizure, and the town in which the liquors were found had voted to grant licenses for the sale of intoxicating liquors. The defendant was found guilty, and the case was carried by consent to the supreme court for determination. The court declared that the legislature "prohibited the selling or exposing or keeping for sale spirituous or intoxicating liquor," except in the manner provided by statute, that it had "not undertaken to prohibit the drinking or buying of intoxicating liquors, or the distribution of it in severalty among persons who own it

common. If, therefore, two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial;" and again, "If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any

⁶⁴ Rickart v. People, 79 Ill. 85.

person who offered to buy, and the sale of what might be called a temporary membership in the club with a sale of the liquors would not substantially change the character of the transaction. One inquiry always is, whether the organization is *bona fide* a club with limited membership into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common with the mutual rights and obligations which belong to such common ownership under the constitution and rules of the club, or whether either the form of a club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it."⁶⁵

It is said in this case that "the evasion of the law intended in Commonwealth v. Smith,"⁶⁶ is an evasion by means of a form or device which is apparently legal, while the substance of what is done is within the prohibition of the statute."⁶⁷

JOSEPH A. JOYCE.

⁶⁵ Commonwealth v. Pomphret, 187 Mass. 564.

⁶⁶ 102 Mass. 144.

⁶⁷ *Id.* page 566. Cases cited in support of the main case are: Graff v. Evans, 8 Q. B. Div. 373; Seim v. State, 55 Md. 566; Rickart v. People, 79 Ill. 85, explained; Marmont v. State, 48 Ind. 21, distinguished; State v. Mercer, 82 Iowa, 406, distinguished; Martin v. State, 59 Ala. 34.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LICENSING ENGINEERS — DUE PROCESS OF LAW — CRIMINAL LAW — PLACE OF TRIAL.

NASHVILLE, ETC. R. CO. V. ALABAMA.

United States Supreme Court, October 22, 1888.

1. *Constitutional Law — Interstate Commerce — Licensing Engineers.*—Act Ala., June 1, 1887, providing that engineers and other railroad employees shall be examined by a medical board, to determine whether or not they are "color-blind," imposing the expense thereof on the company employing them, and making their employment penal unless they have certificates of fitness, is not repugnant to the power vested in congress to regulate commerce, as applied to a railway company having its lines, on which the engineer runs, in different States.

2. *Same—Due Process of Law.*—Nor does the provision therein, requiring the company to pay the examination fees, deprive the company of property without due process of law, in violation of Const. U. S., 14th amend.

3. *Same — Criminal Law — Place of Trial.* — The

provision of Const. U. S., art. 3, that trials of all crimes shall be in the State where committed, applies only to trials in the federal courts.

Mr. Justice FIELD, delivered the opinion of the court:

A statute of Alabama which took effect on the 1st of June, 1887, "for the protection of the traveling public against accidents caused by color-blindness and defective vision," declares that all persons afflicted with color-blindness and loss of visual power, to the extent therein defined, are "disqualified from serving on railroad lines within the State in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flag-man, gate-tender, or signal-man, or in any other position which requires the use or discrimination of form or color signals;" and makes it a misdemeanor, punishable by fine of not less than ten nor more than fifty dollars for each offense, for a person to serve in any of the capacities mentioned without having obtained a certificate of fitness for his position in accordance with the provisions of the act. It provides for the appointment by the governor of a suitable number of qualified medical men throughout the State to carry the law into effect, and for the examination by them of persons to be employed in any of the capacities mentioned; prescribes rules to govern the action of the examiners; and allows them a fee of three dollars for the examination of each person. It declares that re-examinations shall be made once in every five years, and whenever sickness, or fever, or accidents calculated to affect the visual organs have occurred to the parties, or a majority of the board may direct; that the examinations and re-examinations shall be made at the expense of the railroad companies; and that it shall be a misdemeanor, punishable by a fine of not less than fifty nor more than five hundred dollars for each offense, for any such company to employ a person, in any of the capacities mentioned, who does not possess a certificate of fitness therefor from the examiners in so far as color-blindness and the visual organs are concerned. The defendant, the Nashville, Chattanooga & St. Louis Railway Company, is a corporation created under the laws of Tennessee, and runs its trains from Nashville, in that State, to various points in other States; 24 miles of its line being in Alabama, 2 miles in Georgia, 7 in Kentucky, and 464 in Tennessee. On the 2d of August, 1887, one James Moore was employed by the company as a train conductor on its road, and acted in that capacity, in the county of Jackson, in Alabama, without having obtained a certificate of his fitness so far as color-blindness and visual powers were concerned, in accordance with the law of that State. For this employment the company was indicted in the circuit court of the State for Jackson county, under the statute mentioned, and on its plea of not guilty was convicted, and fined \$50. On appeal to the supreme court of the State the judgment was affirmed, and to review it the case is brought in error to this court.

It was contended in the court below, among other things, that the statute of Alabama was repugnant to the power vested in congress to regulate commerce among the States, and that it violated the clause of the fifth amendment which declares that no person shall be deprived of his property without due process of law. The same positions are urged in this court, with the further position that the statute is in conflict with the clause in the third article of the constitution which provides that the trials of all crimes shall be held in the State where they were committed. The first question thus presented is covered by the decision of this court rendered at the last term in *Smith v. Alabama*, 124 U. S. 465, 8 S. C. Rep. 584. In that case the law adjudged to be valid required, as a condition for a person to act as an engineer of a railroad train in that State, that he should be examined as to his qualifications by a board appointed for that purpose, and licensed if satisfied as to his qualifications, and made it a misdemeanor for any one to act as engineer who violated its provisions. The act now under consideration only requires an examination and license of parties, to be employed on railroads in certain specific capacities, with reference to one particular qualification, that relating to his visual organs; but this limitation does not affect the application of the decision. If the State could lawfully require an examination as to the general fitness of a person to be employed on a railway, it could of course lawfully require an examination as to his fitness in some one particular. Color-blindness is a defect of a vital character in railway employees in the various capacities mentioned. Ready and accurate perception by them of colors, and discrimination between them, are essential to safety of the trains, and of course of the passengers and property they carry. It is generally by signals of different colors, to each of which a separate and distinct meaning is attached, that the movement of trains is directed. Their starting, their stopping, their speed, the condition of switches, the approach of other trains, and the tracks in such case which each should take, are governed by them. Defects of vision in such cases on the part of any one employed may lead to fatal results. Color-blindness, by which is meant either an imperfect perception of colors, or an inability to recognize them at all, or to distinguish between colors, or between some of them, is a defect much more common than is generally supposed. Medical treatises of recognized merit on the subject represent, as the result of extended examinations, that a fraction over 4 per cent. of males are color-blind. With some the defect is congenital, with others brought on by occupations in which they have been engaged, or by vicious habits in the use of liquors or food in which they have indulged. It presents itself in a great variety of forms, from an imperfect perception of colors to absolute inability to recognize them at all. Such being the proportion of males thus affected, it is a matter of the greatest importance

to safe railroad transportation of persons and property that strict examination be made as to the existence of this defect in persons seeking employment on railroads in any of the capacities mentioned. It is conceded that the power of congress to regulate interstate commerce is plenary; that, as incident to it, congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But, until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains while within their limits. Indeed, it is a principle fully recognized by decisions of State and federal courts that, wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

In *Smith v. Alabama* this court, recognizing previous decisions where it had been held that it was competent for the State to provide redress for wrongs done and injuries committed on its citizens by parties engaged in the business of interstate commerce, notwithstanding the power of congress over those subjects, very pertinently inquired: "What is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employees of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?" Of course, but one answer can be made to these inquiries; for clearly what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent. And the court in that case held that the provisions in the statute of Alabama were not strictly regulations of interstate commerce, but parts of that body of the local law which governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in

conflict with an express enactment of congress in the exercise of its power over commerce; and that, until so displaced, they remain as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the State, or in commerce among the States. The same observations may be made with respect to the provisions of the State law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the constitution, a regulation of commerce. As said in *Sherlock v. Alling*, 93 U. S. 99, 104, legislation by a State of that character, "relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In our judgment the statute of Alabama under consideration falls within this class.

The second position of the plaintiff in error, that the State statute is repugnant to the provision of article 3 of the constitution which declares that the trial of all crimes shall be held in the State where they have been committed, is readily disposed of. The provision has reference only to trials in the federal courts; it has no application to trials in the State courts.

As to the third position of the plaintiff in error, assuming that counsel intended to rely upon the fourteenth instead of the fifth amendment (as the latter only applies a limit to federal authority, not restricting the powers of the State), we do not think it tenable. *Barron v. Baltimore*, 7 Pet. 243; *Livingston v. Moore*, *Id.* 469. Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads in one of the capacities mentioned, is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employees possess the physical qualifications required by law. Judgment affirmed.

NOTE.—The law requiring an examination of engineers, and the procurement by them of a license before entering railway service, is an enactment in the right direction, and the example of Alabama should be followed by every State. There seems to be no doubt of the power as well as of the propriety of such requirements by the State.

The statutes most analogous to the State engineer law in Alabama, are probably those requiring pilots to be licensed. There is no doubt of the validity of such acts, at least until congress has acted in the matter. As to pilot licenses, it is held that they must be signed by all the commissioners, or at least it must be shown that the license was granted at a full meeting of the board.¹ A pilot should have with him his warrant or license.² He must show it to the master in order to

¹ *Wass v. The California*, 18 Int. Rev. Dec. 166.

² *Hammond v. Blake*, 10 Barn. & C. 424; *Commonwealth v. Ricketson*, 5 Metc. 426.

make a valid tender of his services.³ And between third parties it may be conclusive evidence of the pilot's authority.⁴

There are a number of cases supporting the decision in the principal case. A city ordinance exacting a license fee from the owner of tow-boats running on the Mississippi river to and from the Gulf of Mexico, was held not unconstitutional as a regulation of commerce.⁵

The case of *Robbins v. Shelby County Taxing District*⁶ does not conflict with the decision in the principal case, because there the fee required from "drummers" was in the nature of a tax rather than a license. Nor is the case of *Yick Wo v. Hopkins*⁷ opposed to the principal case, because the power to require a laundry license to be taken out was not denied; what was decided was, that such a license could not be arbitrarily refused because the applicant happened to be a Chinaman.

Whether a municipality can require a railway company to take out a license, depends upon the powers conferred upon the municipality by its charter. It has been held that authority granted by charter to the city of L to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to levy such a tax upon a railway company doing business therein.⁸

In Wisconsin, under a State railway license law, it is held that, in ascertaining the basis of the license fee, the earnings for the whole year should be considered, and a computation made upon them, rather than upon the earnings of a fractional part of the year; and when one company commences operating a road early in any given year, and the same was operated by another company during the preceding year, the earnings of the latter company are the proper basis for computing the license fee to be paid by the company first mentioned. In computing the license fee according to the mileage of a road, the spur tracks should be included, and if the road be rented, the license fee should not be computed upon the balance accruing to the lessee road after paying rent, but upon gross earnings.⁹

There are quite a number of authorities sustaining the validity of a license fee of from \$20 to \$50 per car run by street car companies. One of the latest is *Mayor v. Broadway, etc. R. Co.*¹⁰ By defendant's charter, its right to construct and operate a street railroad in the city of New York was made subject "to the payment to the city of the same license fee annually for each car run thereon as is now paid by other city railroads in said city." At the time the charter was granted two railroads in the city paid a license fee of \$50 per car, one paid \$20 per car, and three paid no license. In an action to recover license fees: *Held*, that the city was entitled to collect and receive and defendant must pay \$50 per car, and also that interest was properly allowed.¹¹

³ *The Eldredge*, Deady, 176.

⁴ *The Panama*, Deady, 27.

⁵ *City of New Orleans v. Eclipse Tow-boat Co.*, 33 La. An. 647. And see also *Am. Union Tel. Co. v. W. U. Tel. Co.*, 67 Ala. 26; *Port of Mobile v. Leloup*, 76 Ala. 401.

⁶ 16 Am. & Eng. Corp. Cases.

⁷ 118 U. S. 256.

⁸ *Lynchburg v. Norfolk W. R. Co.*, 9 Va. L. J. 377.

⁹ *State v. McFetridge*, 24 N. W. Rep. 140.

¹⁰ 97 N. Y. 275.

¹¹ See as to street car licenses, further, *Allerton v.*

And a provision in an act of incorporation that the company shall pay such license for each car run "as is now paid by other passenger railway companies" does not import a contract that such license shall never be raised.¹²

ADELBERT HAMILTON.

Chicago, 9 Biss. 552; *Frankford, etc. R. Co. v. Philadelphia*, 58 Pa. St. 119; *State v. Hoboken*, 41 N. J. L. 171.

¹² *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528. And see also *Smith v. Alabama*, 124 U. S. 465.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

A leading article contained in No. 2 of the current (28th) volume of the JOURNAL on the "Statute of Limitations in Mortgage Foreclosures" appears somewhat misleading to the Illinois lawyer, particularly from the general language used, without exception referring to the Illinois statute, the questionable, if not erroneous, conclusion is reached that the familiar rule that a practical payment takes a case out of the statute, applies as well to the statute with regard to the foreclosure of mortgages as to that referring to written evidences of indebtedness, in Illinois. In the latter cases the statute (ch. 88, § 16) expressly provides that payments, etc., shall arrest the running of the statute; but in the 11th section no such exception is made, and by its terms action of foreclosure or sale is absolutely barred unless brought within ten years from the time the right of action on the mortgage accrues. Under these two sections of the Illinois limitation law it would seem that in the case of a note made January 1, 1877, payable one year after date, and secured by real estate mortgage, upon which note a payment had been made in 1880, that while suit might now be brought upon, and judgment obtained for the unpaid balance of the note, still the 11th section would be a complete bar to a foreclosure of the mortgage given to secure the payment of that debt.

JNO. B. FITHIAN.

Joliet, Ill., Jan. 11, 1889.

WEEKLY DIGEST

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1. APPEAL—Order.—An order, refusing a motion to strike out an answer as shown, is not appealable.—*National A. E. Bank v. Cargill*, S. O. Minn., Nov. 30, 1888; 40 N. W. Rep. 570.

2. APPEAL—Filing Bond—Time.—Rule 29 of the civil district court of the parish of Orleans must be so construed, that from the ten days for filing the appeal from the city court must be excluded the day on which the bond has been filed and the day on which the transcript is required to be filed in the appellate court.—*State v. Ellis*, S. C. La., Nov. 19, 1888; 5 South. Rep. 63.

3. APPEAL—Trial Order—Criminal Law.—The judgment of a lower State court in a criminal case may, after denial of a writ of error to the supreme court, be considered final for the purpose of a writ of error to the Supreme Court of the United States.—*Clark v. Pennsylvania*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 113.

4. APPEAL—Injunction—Review.—Upon appeal from an order granting an injunction, the action of the chancellor will not be reversed, unless it is clear that he has committed an error or abused a sound judicial discretion.—*McKinne v. Dickenson*, S. O. Fla., Oct. 9, 1888; 5 South. Rep. 34.

5. APPEAL—Insolvency Proceedings.—Under Oregon law, the review of final decisions of the circuit courts in insolvency proceedings is by appeal.—*Mitchell v. Powers*, S. C. Oreg., Oct. 16, 1888; 19 Pac. Rep. 647.

6. APPEAL—Jurisdiction—Tax suits.—The supreme court has no jurisdiction over tax suits, regardless of the amounts involved, unless the legality or constitutionality of the tax be in contestation.—*Johnson v. Cavanac*, S. C. La., Nov. 19, 1888; 5 South. Rep. 61.

7. APPEAL—Mandate—Counterclaim.—Where the appellate court reverses the action of the trial court in dismissing the case, and orders the land sold to satisfy the notes sued on, the defendant can withdraw his counterclaim.—*Gallagher v. Whalen*, Ky. Ct. App., Nov. 24, 1888; 9 S. W. Rep. 701.

8. APPEAL—Review.—Evidence held to justify the findings.—*Wyckoff v. Horan*, S. O. Minn., Nov. 22, 1888; 40 N. W. Rep. 563.

9. APPEAL—Review—Evidence.—Where the evidence is conflicting, the refusal of the trial court to grant a new trial will not be disturbed.—*McGrath v. Village of Bloomer*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 585.

10. APPEAL—Time of Taking.—A final decree was entered in the circuit court on Jan. 22, 1888, and on the same day an appeal was allowed but never prosecuted. On Jan. 22, 1888, a justice of the supreme court allowed an appeal, and the papers were presented to the circuit court Jan. 27, 1888; Held, that the appeal was not taken within the two years allowed.—*Credit Co. v. Arkansas C. R. R.*, Nov. 19, 1888; 9 S. W. Rep. 107.

11. ARMY AND NAVY—Longevity Acts.—Congress intended to give an officer of the navy, under the acts of 1862 and 1863, credit in the grade held by him, after those acts took effect, for all prior services, whether as an

enlisted man or officer, counting such services, however, separated by distinct periods of time, as if they had been continuous, and in the regular navy in the lowest grade having graduated, pay held by him since last entering the service.—*United States v. Foster*, U. S. S. C., Nov. 19, 1887; 9 S. C. Rep. 116.

12. ARMY AND NAVY—Naval Officers—Traveling Expenses.—Compensation to a naval officer for traveling expenses incurred in June and July, 1876, is regulated by the act of June 30, 1876, as to expenses incurred prior thereto.—*United States v. McDonald*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 117.

13. ARMY AND NAVY—Service—Midshipman.—A cadet midshipman is an officer, and his time of service as such should be credited on a claim for additional pay under the act of March 3, 1883.—*United States v. Cook*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 108.

14. ASSIGNMENTS FOR CREDITORS—Conflict of Laws.—A general assignment for the benefit of creditors, executed in New York by a citizen of that State, in conformity with its laws, and intended to take effect whenever the assignor had property, passes title to debts due the assignor from citizens of Georgia, though schedules of debts and assets are not attached to the assignment, as required by the Georgia statutes.—*Birdseye v. Baker*, S. O. Ga., Nov. 5, 1888; 7 S. E. Rep. 863.

15. ASSIGNMENT FOR CREDITORS—Reservations.—A reservation in an assignment for the benefit of creditors of certain specified property, which the assignors claim as their exemptions, and by one of them of a homestead right, does not invalidate the assignment.—*Severson v. Porter*, S. O. Wis., Dec. 4, 1888; 40 N. W. Rep. 577.

16. ATTORNEY—Client's Land—Purchase.—An attorney who is employed to prepare a conveyance and is consulted as to the purpose of it, and who afterwards purchases the land at a sale under execution against the grantor, cannot attack the conveyance as fraudulent.—*Davis v. Kline*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 724.

17. ATTORNEY—Disbarment.—It is sufficient cause for disbarment for an attorney to urge and aid in a prosecution, and then appear for the defense of a person charged with crime, or to encourage the commencement of proceedings which he knows or has reason to know are illegal or unjust.—*In re Stephens*, S. O. Cal., Nov. 21, 1888; 19 Pac. Rep. 646.

18. ADMIRALTY—Practice—General Appearance.—A libel for breach of a charter party was brought against A as sole owner. A not being within the jurisdiction of the court the ship was attached, when his proctors put in a general appearance for him, filed security and had the ship released. A plea in abatement for defect of parties being sustained, libellant was allowed to amend: Held, that it was not necessary to serve A in person with a copy of the order.—*Card v. Hines*, U. S. D. C. (S. Car.), Nov. 10, 1888; 36 Fed. Rep. 573.

19. BAIL—Bond—Conditions.—A bail bond obligating the principal to appear at the next term of the district court, designating a day at which a legal term can be held, is void. If the day was the proper day according to the law then in force, it is valid, though the time for holding court is changed by statute before the specified day.—*Douglas v. State*, Tex. Ct. App., Oct. 10, 1888; 9 S. W. Rep. 733.

20. BILLS AND NOTES—Consideration—Notice.—A purchaser of land, who is informed by the vendor of the true state of the title, and takes a deed with warranty, cannot escape liability on notes given for the price, on the ground of failure of consideration.—*Fagan v. McWhirter*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 677.

21. BONDS—Default—Presentment.—Where coupon bonds contain a condition that, if payment after maturity and demand continues for ninety days, the principal shall be due, presentment and demand on January 2, though premature as to the interest due January 1, is due presentment as to that maturing the July 1 previous.—*Wood v. Consolidated E. L. Co.*, U. S. C. C. (N. Y.), Nov. 8, 1888; 36 Fed. Rep. 538.

22. CARRIERS—Contracts—Limiting Liability.—A contract of carriage by rail of goods from Boston to Atlanta, made in Massachusetts, limiting the carrier's liability, if valid in Massachusetts is valid in Georgia, though it would not be valid if made in Georgia.—*Western & A. R. v. Exposition C. M.*, S. C. Ga., Nov. 5, 1888; 7 S. E. Rep. 916.

23. CARRIERS—Delay in Delivery—Market Price.—A cargo of prunes, which should have been delivered not later than April 28, was delivered by the carrier's delay June 11, and damaged. They were sold July 8, when good prunes were worth six cents per pound, but the damaged prunes brought only five and one-half cents per pound. On April 28, good prunes were worth five cents per pound: *Held*, that libellant was entitled to recover the difference between the market price on the day of delivery and the price for which the prunes sold.—*Morrison v. I. & V. Florio S. S. Co.*, U. S. D. C. (N. Y.), Nov. 5, 1888; 36 Fed. Rep. 569.

24. CHINESE—Exclusion Acts.—The Chinese restriction acts of 1882 and 1884, and the exclusion act of 1888, are not applicable to citizens of the United States, though of Chinese parentage.—*In re Wy Shing*, U. S. C. C. (Cal.), Nov. 8, 1888; 36 Fed. Rep. 553.

25. COLLISION—Steamer and Tug—Rule Starboard.—The steamer T was coming into the North river from sea. The tug T was going down river with a tow and was on the starboard hand of the S; the latter tried to cross the tug's path to make her slip and was struck by the tug: *Held*, that the steamer was in fault.—*Ocean S. S. Co. v. The Tallisman*, U. S. D. C. (N. Y.), Oct. 20, 1888; 36 Fed. Rep. 600.

26. COLLISION—Tide Currents.—A steamer is bound to keep out of the way, must at her own peril shape her course for a safe margin against the contingencies of navigation and the effects of tide-currents.—*The Sammie*, U. S. C. C. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 568.

27. COLLISION—Inevitable Accident.—It is not inevitable accident for an up steamer in the North river to strike a barge, the stern of which projected beyond the end of a pier some ten or twelve feet, even if it could be avoided if the wind and tide were otherwise than they were, as pilots are expected to know and provide for such contingencies.—*Moore v. The Mary Powell*, U. S. C. C. (N. Y.), Oct. 13, 1888; 36 Fed. Rep. 596.

28. CONTRACT—Construction.—A guaranty that the stock of a corporation, whose assets consist of real estate, shall pay dividends at the rate of four per cent. beyond all contingency and net, does not bind the guarantor to pay the salaries of its officers nor the expense of improving its property, but binds him to pay the commission of rental agents.—*Centrall B. B. Ass. v. James*, S. C. Ga., Oct. 22, 1888; 7 S. E. Rep. 862.

29. CONTRACT—Performance.—Facts stated upon which the court holds not a sufficient and substantial performance of a contract for boring a gas well.—*Gilispie Tool Company v. Wilson*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 86.

30. CONTRACTS—Sale—Realty.—A writing acknowledging the receipt of a specified sum as a part of the purchase price of a tract of land, the title to which is to be executed at a future time, and the terms of which are to be ascertained by a reference to another writing, does not transfer the ownership of the property, but is only a promise of sale.—*Thompson v. Duson*, S. C. La., July Term, 1888; 5 South. Rep. 58.

31. COSTS—Criminal Case—Dismissal.—Where the costs in a prosecution before a justice, dismissed as frivolous, have been taxed against the prosecutor, they cannot afterwards upon return of *nulla bona* be taxed to the State.—*Morgan v. Pickard*, S. C. Tenn., Dec. 15, 1887; 9 S. W. Rep. 690.

32. COSTS—Taxation.—Where costs in an attachment case were allowed in the sum of \$190 to the sheriff for care, preservation and custody of attached property, it was not error to sustain the motion to retax his fees, and he should be required to itemize them.—*Reed v. With*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 591.

33. COUNTIES—Treasurer—Fees.—A county treasurer is not allowed to retain out of the fees and money collected by him anything in excess of the annual salary allowed by law.—*Gerken v. County Commrs.*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 508.

34. COURTS—Supreme—Certificate of Division.—The question, whether the court should have instructed the jury to find for the defendant, is not a proper one to be certified to the supreme court.—*Fire I. Ass. v. Wickham*, U. S. S. C. Nov. 26, 1888; 9 S. C. Rep. 113.

35. CRIMINAL LAW—Appeal—Errors.—Where the two defenses of *alibi* and self-defense are interposed to an indictment for assault to murder, the omission to charge specially on the defense of *alibi* is not reviewable, in the absence of a request so to charge and exception to the refusal.—*Rider v. State*, Tex. Ct. App., Oct. 31, 1888; 9 S. W. Rep. 688.

36. CRIMINAL LAW—Assault—Threats.—On trial for assault with intent to murder, evidence of a previous assault and threats by defendant against the injured person is admissible to show the intent with which the last assault was made.—*Lawrence v. State*, S. C. Ala., July 12, 1888; 5 South. Rep. 33.

37. CRIMINAL LAW—Assault and Battery—Jurisdiction.—Where it appears from the evidence in the trial of an assault and battery case before the supreme court, that no deadly weapon was used, no serious damage done, and the offense was committed within six months before the action was begun, the prosecution must be dismissed.—*State v. Porter*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 902.

38. CRIMINAL LAW—Assault and Battery—Threats.—On a trial for assault and battery, threats made a few hours before the alleged assault to commit it may be proved.—*State v. Hemm*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 572.

39. CRIMINAL LAW—Burglary—Indictment.—An indictment for burglary of a railroad car charged that defendant did break and enter a railroad car, occupied and controlled by B, with intent then and there fraudulently to take from said car property therein, being and belonging to said B, without his consent and with intent to deprive, etc.: *Held*, not defective.—*Hamilton v. State*, Tex. Ct. App., Oct. 24, 1888; 9 S. W. Rep. 687.

40. CRIMINAL LAW—Embezzlement—Indictment.—An indictment, alleging that defendant while in service converted money of her master, contrary to the confidence reposed in her, is good under Code North Carolina, § 1014.—*State v. Wilson*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 872.

41. CRIMINAL LAW—Exclusion of Witnesses.—Where, on the trial of a criminal case, the witnesses are separated and excluded during the hearing except the one testifying, it is not error to refuse to exclude two of the witnesses who are attorneys of the court.—*Allen v. Com.*, Ky. Ct. App., Nov. 22, 1888; 9 S. W. Rep. 703.

42. CRIMINAL LAW—False Pretenses.—A false statement by one, that he is sent by another to the person addressed after five dollars in money, is a false pretense, under Code North Carolina § 1025.—*State v. Dixon*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 870.

43. CRIMINAL LAW—Forgery—Writing.—It is sufficient in a prosecution for forgery that the instrument be one by the use of which money or goods can be obtained. It need not purport on its face to be an order for the payment of money or delivery of goods.—*State v. Wingard*, S. C. La., Oct. 8, 1888; 5 South. Rep. 54.

44. CRIMINAL LAW—Gaming—Evidence.—Evidence that defendant had the doors of his sleeping apartment blanketed, invited his friends there at night to drink, and kept in his room besides barrels and bottles a table suitable for gaming, besides cards and boxes of chips, and that some of the guests hid themselves when surprised by the police at a time, when the rattle of chips and money was heard, sustains a conviction for keeping a gaming-house.—*Pacetti v. State*, S. C. Ga., Nov. 6, 1888; 7 S. E. Rep. 867.

45. CRIMINAL LAW—Homicide—Indictment.—An

indictment, which avers that defendant and his co-defendant struck and killed deceased with an axe is sufficient, though the proof shows that defendant held a light while his co-defendant struck the blow. — *Ross v. Com.*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 707.

46. CRIMINAL LAW—Indictment—Duplicity.—If an indictment attempts to charge two offenses, but one of them insufficiently, it is not therefore double; to be so it must set out each sufficiently. — *State v. Henn*, S. C. Minn., Nov. 28, 1888; 40 N. W. Rep. 564.

47. CRIMINAL LAW—Infamous Offense—Indictment.—The president of a national bank can only be held on presentment or indictment by the grand jury for embezzlement or making false entries in violation of Rev. St. United States, § 5209. — *United States v. DeWalt*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 111.

48. CRIMINAL LAW—Jurisdiction—Foreign Arrest.—The courts of Texas have jurisdiction to try one accused of a crime committed in that State, though he was arrested by a Texas sheriff outside the State, and brought into it without lawful authority, and against his will, for the purpose of being tried. — *Brooken v. State*, Tex. Ct. App., Oct. 13, 1888; 9 S. W. Rep. 735.

49. CRIMINAL LAW—Larceny—Circumstantial Evidence.—The circumstantial evidence was held to be sufficient to sustain a conviction of larceny. — *State v. Goleys*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 900.

50. CRIMINAL LAW—Larceny—Fraudulent Intent.—Defendant took away rails, which he had cut on another's land: *Held*, that the evidence introduced did not show a fraudulent intent. — *DeMint v. State*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 738.

51. CRIMINAL LAW—Misconduct of Jury.—It is not misconduct on the part of a jury to procure and read law books after they have decided upon their verdict, although it has not been formally rendered in open court. — *State v. Wilson*, S. C. La., Oct. 6, 1888; 5 South. Rep. 52.

52. CRIMINAL LAW—Murder—Self-defense.—In a murder trial the defendant may justify on the ground of self-defense, though he himself brought on the quarrel, provided that in so doing he was not actuated by a design to kill deceased or to do him great bodily harm. — *State v. Parker*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 728.

53. CRIMINAL LAW—Statutes—Repeal.—The repeal of a federal statute does not under the revised statutes release or extinguish any penalty or liability, unless the repealing act shall so expressly provide. — *United States v. Reisinger*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 99.

54. CRIMINAL LAW—Trespass.—One who goes upon land solely at the invitation of the tenant and not willfully and maliciously, is not indictable, under North Carolina law, for trespassing on land, although the landowner had previously forbidden him to go there. — *State v. Lawson*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 905.

55. CUSTOMS—Carriers of Goods—Liability.—Evidence of customs of a carrier of goods, limiting its liability or care, were rejected in this case, as being unreasonable, or a limitation of its common law liabilities, or that they were not shown to be uniform, reasonable and notorious. — *Missouri P. R. R. v. Fagan*, S. C. Tex., Nov. 27, 1888; 9 S. W. Rep. 749.

56. DAMAGES—Hiring—Discharge.—In an action for breach of contract of employment brought before the contract term had expired, in extending the damages all the facts down to the time of trial may be considered. The discharged servant must use due diligence in seeking other employment, and his income so derived must be deducted from the damages. — *Roberts v. Crowley*, S. C. Ga., Oct. 5, 1888; 7 S. E. Rep. 740.

57. DECREE—Fraud—Silence.—If the seller of a herd of cattle purposely kept silent when he ought to have spoken, or by any language or acts intentionally misled the purchaser about the number of cattle in the herd or the number of calves branded, or by any acts or by silence consciously misled or deceived him, or permitted him to be misled or deceived, the seller made

material misrepresentations. — *Stewart v. Wyoming C. R. Co.*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 101.

58. DEED—Acknowledgment—Record.—Though the language of the certificate of recordation of a deed, under Virginia law, is doubtful, yet when it recites due acknowledgment and shows an order for recordation, the order must be presumed to have been properly made, until the contrary is shown. — *Peyton v. Carr*, S. C. App. Va., Nov. 8, 1888; 7 S. E. Rep. 848.

59. DEDICATION—Alleys.—Where the alleys of a city have been dedicated to the public, no further action is required by the city to open them for public use. — *Osage City v. Larkins*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 668.

60. DOWER—Mortgage—Wife.—While the act of 1875, abolishing dower was in force, it was not necessary for a married woman to join in her husband's mortgage of lands other than the homestead. — *Roach v. Dion*, S. C. Minn., Nov. 23, 1888; 40 N. W. Rep. 512.

61. EJECTMENT—Evidence—Destroyed Deed.—Plaintiff in ejectment may give evidence of a deed destroyed before registration, without first having the same established in an independent action and recorded. — *Jennings v. Reeves*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 897.

62. EJECTMENT—Title—Evidence.—When defendant in ejectment claims under a title bond, but has not claimed the legal title till shortly before suit, findings in favor of plaintiff, who holds under a deed conveying the legal title, executed more than thirty years before the suit, the evidence being conflicting, cannot be disturbed. — *Cox v. Reid*, Ky. Ct. App., Nov. 17, 1888; 9 S. W. Rep. 693.

63. ELECTIONS—Domicile.—A single man, lodging in one precinct in Detroit and boarding in another, shall register and vote in the latter. — *Warren v. Bd. of Registration*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 553.

64. ELECTIONS AND VOTERS—Contests—Recount of Ballots.—Section 100 of "an act to regulate elections" (P. L. 1876, p. 163), confers upon the several circuit courts of this State jurisdiction in cases of contested elections for city officers. An application for a recount of ballots, not offered as part of a party's proofs, must conform to the statutory requirements governing such applications. — *McCoy v. Boyle*, S. C. N. J., Nov. 12, 1888; 16 Atl. Rep. 15.

65. EMINENT DOMAIN—Arbitration and Award—Ejectment.—*Held*, that plaintiff could maintain ejectment for land belonging to him, appropriated and used by a railroad company, where the question of compensation was submitted to arbitration, and the award was made but the amount was never made. — *Wheeling, etc. Co. v. Warrell*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 20.

66. EQUITABLE CONVERSION—Will.—A will directing a sale of land at a time named, but permitting the widow "to detain the sale and possess the land as she sees cause," should she deem a sale prejudicial to her interest and directs a sale of all surplus property remaining at her death, works an equitable conversion. — *Mellon v. Reed*, S. C. Penn., Oct. 23, 1888; 15 Atl. Rep. 906.

67. EQUITY—Decree—Revival.—A clause in a decree providing that any of the parties to this suit have leave to ask any such further order as may be necessary to enforce the same, does not authorize the revival of the suit twenty-eight years after. — *Reily v. Kinzel*, S. C. App. Va., Nov. 15, 1888; 7 S. E. Rep. 907.

68. EQUITY—Reforming Deed—Laches.—Plaintiff, who brought suit to reform a deed granting a right of way, which by mistake described the wrong land, was not guilty of laches, the suit being brought within six years from the time his right to use the way was first denied, though nineteen years had elapsed since the deed was made. — *Grosbach v. Brown*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 494.

69. EQUITY—Trust—Merger.—Where land held under a parol trust to convey on payment of a sum of money is sold under execution against the trustee, and the purchaser conveys to the *cestui que trust*, the equity

merges in the legal title, and one who acquires the land by mortgage from the *cestui que trust* and sale thereunder cannot sue the trustee's grantee, with notice of the trust, to enforce it.—*Peacock v. Stott*, S. C. N. Car., Oct. 29, 1888; 7 S. E. Rep. 885.

70. EVIDENCE—Best and Secondary. — The certified copy of a bill of sale is admissible when it is shown that the holder of the original is in Mexico.—*Fleck v. Holt*, S. O. Tex., Nov. 13, 1888; 9 S. W. Rep. 743.

71. EVIDENCE—Conversations.—Though part of a conversation has been proved, the adverse party is not entitled to introduce the rest, unless in itself relevant or explanatory of the part already in evidence.—*McAulley v. Harris*, S. O. Tex., Oct. 20, 1888; 9 S. W. Rep. 679.

72. EVIDENCE—Will—Record.—An exemplification of the record of a will, duly proved, is admissible in evidence in another county in which lands devised by it are situated, but in the recorder's office of which it is not recorded, though Rev. Stat. Mo. 1879, § 3901, require it to be recorded there.—*Rodney v. McLaughlin*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 726.

73. EVIDENCE—Writings—Proof.—Under Alabama law, the written contract between the parties sued on is admissible in evidence, without proof of execution, in the absence of a verified plea denying it.—*Pollack v. Brush E. Assn.*, U. S. S. C., Nov. 19, 1888; 9 S. O. Rep. 119.

74. EVIDENCE—Written Contract—Parol.—Where a written contract is made and delivered, and nothing remains to complete its execution, parol evidence is inadmissible to prove an understanding that it shall not be operative according to its terms.—*McCormick H. M. Co. v. Wilson*, S. O. Minn., Nov. 30, 1888; 40 N. W. Rep. 571.

75. EXECUTION—Notice—Debtor. — Failure of the sheriff to give the statutory notice of the levy to the execution debtor does not make the execution sale void.—*Cowles v. Hardin*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 896.

76. EXECUTION—Sale—Appraised Value.—When a sheriff levies on real estate under an execution, he must have the real estate itself, and not a mere interest therein appraised, and if he sells it for less than two-thirds of its appraised value the sale is void, but the execution debtor may treat it as valid, and sue the sheriff for damages.—*DeJarnette v. Verner*, S. O. Kan., Nov. 10, 1888; 19 Pac. Rep. 666.

77. EXECUTORS—Expenses.—Expenses of an administrator disallowed, where the record only showed that he bid off the land in his own name under a judgment wherein the estate was not interested, and prosecuted the suit to establish the title in his own name for the benefit of the estate.—*Reeves v. McMullan*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 906.

78. EXECUTORS—Limitations.—Under North Carolina law, an action against an administrator *de bonis non* may be brought within a year after his qualification, if the cause of action was not barred when the executor was removed.—*Smith v. Brown*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 890.

79. EXECUTORS—Limitations—Heir.—A suit brought after seven years subsequent to the death of the debtor to subject lands in the possession of the heir to a judgment recovered within the seven years against the administrator, is not barred by Rev. Code N. C., ch. 65, § 11.—*Lee v. Beaman*, S. C. N. Car., Nov. 12, 1888; 7 S. E. Rep. 887.

80. EXECUTORS—Official Sale—Impeachment.—A party, who has been administrator of an estate, obtained the order of sale under which the property was sold to pay debts, and inaugurated and consummated the proceedings complained of, in an action of nullity cannot be permitted to impeach them by his own testimony.—*Linman v. Riggins*, S. O. La., Oct. 6, 1888; 5 South. Rep. 49.

81. EXECUTORS—Pleading.—One suing an administrator need not prove his administration, unless it is denied in defendant's pleadings.—*Parker v. Bray*, S. O. Ga., Nov. 21, 1888; 7 S. E. Rep. 922.

82. EXECUTORS—Powers—Sale of Realty.—A sale of land, as directed by the testator, by an administrator with the will annexed, passes a good title, under North Carolina law, though the persons entitled to the proceeds of the sale have previously conveyed their interests in the land.—*Orrender v. Call*, S. C. N. Car., Nov. 28, 1888; 7 S. E. Rep. 878.

83. EXEMPTIONS—Appraisers—Constable.—A constable levying an execution from a constable's court must, on demand of defendant, summon appraisers to allot defendant his personal property exemptions, and also administer the required oath.—*McAulay v. Morris*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 883.

84. EXTRADITION—International—Evidence.—Under the treaty of 1852, for extradition made with Germany, it is sufficient that a *prima facie* case be made, such as in the absence of explanation would justify conviction, or such evidence as in case of trial and conviction thereon would sustain the verdict.—*In re Black*, U. S. D. O. (Tex.), 1888; 26 Fed. Rep. 546.

85. FRAUD—Inadequacy of Price—Consideration.—Land worth not over \$200 was sold for \$600 to an ignorant woman, who was unacquainted with its value, by one who had been the friend and physician of her deceased husband, and to whom she was very grateful for kindness: *Held*, that the sale should be rescinded.—*Hunter v. Owen*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 717.

86. FRAUDULENT CONVEYANCES—Injunction—Note.—In Maryland, the holder of a promissory note, which has not been reduced to judgment, cannot enjoin the maker from conveying his property, on the ground that the purpose of the conveyance is to hinder him in the collection of his debt.—*Balls v. Balls*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 18.

87. FRAUDULENT CONVEYANCE—Setting Aside—Administrator.—Under Texas law, an administrator cannot sue to set aside a conveyance made by his intestate, with intent to defraud creditors, though the estate is insolvent.—*Wilson v. Demander*, S. C. Tex., Oct. 30, 1888; 9 S. W. Rep. 678.

88. GAMING—Presumption—Constitutional Law.—The fourth section of the act of 1887, that if any of the implements or devices, commonly used in games of chance usually played in gambling houses, are found in any house, it shall be *prima facie* evidence that said house is kept for the purpose of gambling, is constitutional.—*Wooten v. State*, S. C. Fla., Oct. 8, 1888; 5 South. Rep. 39.

89. GARNISHMENT—Municipal Corporation.—A municipal corporation, invested with power to establish and maintain public schools, is not subject to garnishment, in respect to a debt which it owes for work done on a municipal school house.—*Born v. Williams*, S. O. Ga., Nov. 9, 1888; 7 S. E. Rep. 968.

90. HOMESTEAD—Abandonment.—A moved from his homestead with his family to his wife's land in another State, intending to place the latter in a condition to rent, and to return home in about two years. He returned two or three times a year to purchase supplies and look after his property: *Held*, an abandonment of the homestead.—*Lee v. Moseley*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 874.

91. HUSBAND AND WIFE—Her Land—Lease.—A wife cannot lease without her husband's consent lands held by her otherwise than as a separate estate.—*Ables v. Ables*, S. O. Tenn., Feb. 3, 1889; 9 S. W. Rep. 692.

92. HUSBAND AND WIFE—Mortgage—Foreclosure.—When the property of the husband is sold on mortgage, the wife may purchase it and hold it free from any liability on account of her husband's debts, provided she does so in good faith and with her own money.—*Houston v. Nord*, S. C. Minn., Dec. 10, 1888; 40 N. W. Rep. 568.

93. HUSBAND AND WIFE—Personal Injuries—Suit.—When a married woman is living separate from her husband by reason of his desertion, an action for personal injuries to her is properly brought by her alone,

under California law. — *Baldwin v. Second S. S. Co.*, S. C. Cal., Nov. 22, 1888; 19 Pac. Rep. 644.

94. HUSBAND AND WIFE—Separate Estate—Covenants—Heirs. — A, a married woman, having a separate estate, made a voluntary partition thereof with C, and agreed to warrant and defend the title to the lots set apart to C. Her husband did not join in the deed of partition. The covenant having been broken after the death of B: *Held*, on a bill filed by C against her heirs to recover damages after her death, that the covenant became a charge on the separate estate of B, owned at the time the covenant was made. — *Barlow v. Delany*, U. S. C. C. (Mo.), Nov. 8, 1888; 36 Fed. Rep. 877.

95. HUSBAND AND WIFE—Wife — Mortgage. — The South Carolina married woman act of 1870, though not retroactive, gave married women power to mortgage land acquired before its passage. — *Gleason v. Gibson*, S. C. S. Car., Nov. 5, 1888; 7 S. E. Rep. 883.

96. INJUNCTION—Conflicting Jurisdiction. — Where the State court enters a decree before an order in the federal court to show cause why an injunction should not issue is heard, making the acts sought to be enjoined a contempt of the State court if done, and rendering the federal process merely ancillary, the injunction will be denied. — *Garrett v. New York T. & T. Co.*, U. S. C. C. (N. Y.), Oct. 17, 1888; 36 Fed. Rep. 513.

97. INSURANCE—Acts of Agent—Liability. — Insurance was affected by a person unable to read or write, who was guilty of no fraud or misrepresentations, but trusted to the agent. The latter knew that the applicant had but a part interest in the property but stated that she owned it: *Held*, that her interest was covered by the policy, though the policy stated that the interest must be in fee simple or stated truly in the policy. — *Hartford F. I. Co. v. Haas*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 720.

98. INSURANCE—Mutual Benefit—Action. — Where by the constitution of a mutual benefit society the contract of insurance was complete upon the approval by the supreme lodge and the forwarding of the certificate to the subordinate lodge, a recovery may be had after such forwarding without the production thereof, when the lodge has retained it. — *Lorch v. Supreme L. K. of H.*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 545.

99. INSURANCE—Proof of Loss—Waiver. — Facts upon which court held there was evidence fairly tending to show a waiver of complete proof of loss in an action on insurance policy. — *Snowden v. Kittanning Co.*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 22.

100. INTEREST—Damages. — A jury cannot add interest to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual damages, can be thus increased. — *Western v. A. R. R. v. Young*, S. C. Ga., Nov. 9, 1888; 7 S. E. Rep. 912.

101. INTEREST—Rate—Foreign State. — A note executed in California will not bear any higher rate of interest than a Kentucky note, when sued on in Kentucky, unless the California law allowing a higher rate has been properly pleaded as well as proved. — *Templeton v. Sharp*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 636.

102. INTERSTATE COMMERCE—Regulations. — Transportation between two points in the same State over connecting railroad lines, one of which lies wholly in another State, is interstate commerce, and a State railroad commissioner cannot regulate it. — *Stemberger v. Cape Fear, etc. R. R.*, S. C. S. Car., Oct. 30, 1888; 7 S. E. Rep. 836.

103. INTOXICATING LIQUORS—Former Conviction. — A conviction for selling liquor to a minor without the consent of his parent is no bar to a prosecution for the same act under the law against selling liquor without license. — *Blair v. State*, S. C. Ga., Oct. 17, 1888; 7 S. E. Rep. 855.

104. INTOXICATING LIQUORS—Illegal Sale—Jurisdiction. — The superior court has jurisdiction of offenses for illegal sales of liquor under Code N. C. § 1076, the penalty being in the discretion of the court. — *State v. Deaton*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 865.

105. INTOXICATING LIQUORS—License—Local Option. — An indictment will lie for selling spirituous liquors by small measure without a license, even in places where local option has been adopted. — *State v. Smiley*, S. O. N. Car., Nov. 26, 1888; 7 S. E. Rep. 904.

106. INTOXICATING LIQUORS—License—Revocation. — The Georgia act of 1887, which forbids the sale of intoxicating liquors, without excepting persons holding unexpired licenses, operates as a revocation of such licenses. — *Brown v. State*, S. C. Ga., Nov. 12, 1888; 7 S. E. Rep. 915.

107. INTOXICATING LIQUORS—Local Option. — Under the act of 1886, the general local option law of January of 1874 went into effect in district No. 3 in Garrard county as soon as the election therein provided for was held and resulted in a majority vote therefor. — *Com. v. Lillard*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 710.

108. INTOXICATING LIQUORS—Sale—Local Option. — Upon trial for violation of the Kentucky local option law for Hardin county, it is not necessary to prove that a majority of the qualified voters of the county had voted in favor of adopting the law. — *Neighbors v. Com.*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 718.

109. INTOXICATING LIQUORS—Sales to Minors. — It is no defense to a prosecution for selling intoxicating liquors to a minor without the written consent of his parent or guardian, that his parents were dead and he had no guardian. — *Blair v. State*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 855.

110. INVENTIONS—Drainage System—Infringement. — Letters patent No. 253,754, to C. W. Durham, for a drainage system which supports itself independently of the building is not infringed by the defendant's system which is rested on the ground and did not contain the supports of the complainant's system. — *Durham H. S. Co. v. Armstrong*, U. S. C. C. (N. Y.), Nov. 19, 1888; 36 Fed. Rep. 596.

111. INVENTIONS—Lawn Sprinklers. — The first claim in patent 183,188, to J. W. McGaffey for fountain hose-carriages is void. The second claim must be limited to such a clasp as is there shown. The fourth claim is not infringed by a similar machine, whose locking device is a pawl and ratchet, and not a set-screw. — *Preston v. Manard*, U. S. C. C. (Ill.), Jan. 6, 1889; 36 Fed. Rep. 587.

112. INVENTIONS—Letter Files—Invalidity. — Claim 1, of letters patent No. 254,847, issued March 14, 1882, to J. S. Shannon for paper file, is void for want of patentability. — *Schlict v. Sherwood L. F. Co.*, U. S. C. C. (Ill.), Nov. 5, 1888; 36 Fed. Rep. 587.

113. INVENTIONS—Letter Files—Invalidity—Anticipation. — Claim 1, of letters No. 217,907, to J. S. Shannon for improvement in "temporary binders" is void, being anticipated by the Bussey patent of January 8, 1878. — *Schlict v. Sherwood L. F. Co.*, U. S. C. C. (Ill.), Nov. 5, 1888; 36 Fed. Rep. 590.

114. INVENTIONS—Letter Files—Novelty. — Letters patent No. 217,909, issued July 29, 1879, to F. W. Smith and J. S. Shannon for improvement in paper holders, cover a novel and patentable service, and are valid. — *Schlict v. Chicago L. M. Co.*, U. S. C. C. (Ill.), Nov. 5, 1888; 36 Fed. Rep. 585.

115. INVENTIONS—Novelty—Demurrer. — A demurrer to a bill to enjoin the infringement of patent 17,270 to Leon H. Prentice for ornamenting radiator pipes, for want of novelty in the invention will not be sustained, unless the court from its own knowledge has no doubt that the device is well known and in common use. — *Eclipse M. Co. v. Adkins*, U. S. C. C. (Ill.), Oct. 15, 1888; 36 Fed. Rep. 551.

116. INVENTIONS—Prior Adjudication—Injunction—Infringement. — A restraining order pending suit for infringement of a patent will be granted where the patent has previously been held valid by other courts. — *Schneider v. Mo. Glass Co.*, U. S. C. C. (Mo.), Oct. 31, 1888; 36 Fed. Rep. 582.

117. INVENTIONS—Specifications—Certainty. — Specifications which to the uninitiated might appear to be

vague and indefinite are sufficient, if they appear clear to those skilled in the art to which the invention appertains. — *Am. Ende v. Seabury*, U. S. C. O. (N. Y.), Nov. 15, 1888; 36 Fed. Rep. 598.

118. INVENTIONS—Stone Settings—Novelty. — Patent No. 819,096 to S. Joel June 2, 1886, for improvement in holders for the setting of stones, the object of which was to provide a convenient tool for holding the stone while it was being manipulated by the workman, is void for want of novelty. — *Joel v. Gesswein*, U. S. C. O. (N. Y.), Nov. 10, 1888; 36 Fed. Rep. 592.

119. JUDGMENT—Res Adjudicata—Privies. — An action between adverse claimants to a trade mark is concluded by a judgment in favor of defendant's assignee in a subsequent action by him against the plaintiff in the first action, the question of fact in each case being the same. — *McElwee v. Blackwell*, S. C. N. Car., Nov. 19, 1888; 7 S. E. Rep. 893.

120. JUDICIAL NOTICE—Presumptions. — This court is bound to take judicial cognizance of the principles of the common law as it prevails in other States, but will presume the statutes of other States to agree with our own in the absence of proof to the contrary. — *Sandidge v. Hunt*, S. C. La., Oct. 23, 1888; 5 South Rep. 55.

121. JUDICIAL SALES—Payment—Receiver. — A purchaser at judicial sale, who pays the price to a receiver before the latter has given bond as ordered by the court, may be made to pay again on the receiver's failure to account for the money, though the latter afterwards gave bond. — *Woods v. Ellis*, S. C. App. Va., Nov. 15, 1888; 7 S. E. Rep. 852.

122. JUDICIAL SALES—Purchaser—Suit. — Land conveyed to a trustee, as surety, was sold in an action on the debt, and the report of the sale confirmed, but the trustee executed a conveyance to a third party and the suit terminated: Held, that a motion would not lie by the purchaser at the sale, who was not a party to the suit, to re-instate it and to compel the trustee to convey to him. — *Mock v. Coggins*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 899.

123. JOINT STOCK COMPANY — Statute. — Construction of the act Pa. 1874, authorizing the formation of joint stock companies. — *Lauder v. Logan*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 44.

124. JURISDICTION—Amount—Remittitur. — Plaintiff in open court in the absence of the defendant was allowed to remit \$500 of a judgment for \$5,500. A motion to set aside the remittitur was denied: Held, that a motion to dismiss the writ of error will be granted. — *Pacific P. T. C. Co. v. O'Connor*, U. S. S. C. Nov. 19, 1888; 9 S. W. Rep. 112.

125. JURISDICTION—Court of Claims — Patent. — A patentee exhibited his patent to an army board, which recommended its use in the army, and the ordinance department manufactured a number of the articles: Held, the court of claims has jurisdiction of his action for a reasonable royalty thereon. — *United States v. Palmer*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 104.

126. JURISDICTION—Writ of Error—Amount. — A writ of error does not lie to the supreme court from a judgment of the circuit court on an appeal bond conditioned to prosecute an appeal from the circuit to the supreme court when the amount in controversy is less than \$5,000. — *Cogswell v. Fordyce*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 112.

127. JUSTICE OF THE PEACE—Judgment—Default. — A judgment in a justice's court, where the defendant did not appear, for an amount larger than that indorsed upon the copy of the summons served upon him is void and may be enjoined. — *Basset v. Mitchell*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 671.

128. LANDLORD AND TENANT—Defective Building. — Where a landlord leases without warranty a defective building and the lessee has full opportunity to ascertain its ruinous condition, which is apparent to the most casual observer, the landlord is not liable for damages resulting to the lessee from the fall of the walls. — *Davidson v. Fischer*, S. C. Colo., Nov. 16, 1888; 19 ac. Rep. 652.

129. LIMITATIONS—Admiralty—Laches. — A claim in admiralty, which would be barred at law by the statute of limitations, is barred by analogy on the ground of laches. — *Southard v. Brady*, U. S. C. O. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 560.

130. LIMITATIONS—Adverse Possession. — Where a county road as located three small strips of A's land on B's side of the road, and small strips of B's land on A's side, and A and B have recognized such road for more than fifteen years as their boundary, ejectment to recover the land so cut off is barred. — *Hammond v. Williams*, Ky. Ct. App., Oct. 30, 1888; 9 S. W. Rep. 711.

131. LIMITATIONS—Adverse Possession—Grantee. — Possession of land by a grantor and by those claiming under a second deed for the land, executed by him while in possession and after the first deed had been recorded will not be presumed adverse to the first grantee, without proof of ouster or of some unequivocal act amounting to an open denial of his title. — *Schwalbach v. Chicago*, etc. R. R. S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 579.

132. LIMITATIONS — Dower. — An action for the assignment of dower is barred in Missouri in ten years. — *Chouteau v. Hurvey*, U. S. C. O. (Mo.), Nov. 9, 1888; 36 Fed. Rep. 541.

133. LIMITATIONS—Feme Covert. — A deed to plaintiff's husband was executed in 1852. The husband died in 1879. Plaintiff sued in 1885 to have the deed set aside as obtained by fraud to her husband when the intent was, that she should be the grantee: Held, that the action was not barred. — *Summerlin v. Cowles*, S. C. N. Car., Nov. 26, 1888; 7 S. E. Rep. 881.

134. LIMITATIONS—Personal Property—Creditor. — An action by a creditor of the donor of personal property to subject the same to the payment of his debt must be brought within two years. — *Connor v. Hawkins*, S. C. Tex., Oct. 26, 1888; 9 S. W. Rep. 684.

135. LIMITATIONS—Running of Statute. — An action for payment due in 1866 and 1867 by deed of record reserving a vendor's lien, brought prior to Jan. 1, 1889, is not barred. — *Kerlin v. Kerlin*, S. C. App. Va., Nov. 15, 1888; 7 S. E. Rep. 849.

136. MANDAMUS—Public Duty—Parties. — In mandamus, to enforce a purely public duty, not due the government as such, any private person may move as relator. — *State v. Weld*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 561.

137. MASTER AND SERVANT—Assumption of Risk. — A brakeman, who, in attempting to let off a brake, known by him to be defective, is struck by a cattle-guard, which is dangerously near the track, and who was aware of such fact relative to the cattle-guards generally, cannot recover. — *Missouri P. R. R. v. Somers*, S. C. Tex., Nov. 9, 1888; 9 S. W. Rep. 741.

138. MASTER AND SERVANT—Contract—Construction. — An old contract between employer and employee, providing for the payment of the latter of a per cent. of the profits of each year as wages, and, in case of the death of either during the year, at the rate, for the expired term, of a certain sum per annum, having been found by the jury to have been in force at the death of the employee, his executrix may recover the proportional part of the sum agreed, to the date of his death, though by reason of sickness he stopped work some time before. — *Dunlap v. Montgomery*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 41.

139. MASTER AND SERVANT—Negligence—Jury. — In an action by an employee against a railroad for personal injuries, where it appears that plaintiff, while lawfully riding on one of its trains and standing on the lowest step of a car, was struck by a switch-signal, which was so near the track that it scraped the sides of the cars, it is error to withdraw the case from the jury. — *Boss v. Northern P. R. R.*, S. C. Dak., Oct. 2, 1888; 40 N. W. Rep. 590.

140. MECHANIC'S LIEN—Assignee—Executor. — One who is made defendant in a suit of an administrator to enforce a mechanic's lien, who claims the fund by

reason of an assignment of the contract, under which the lien was required, cannot complain that the fund is distributed among other lienors, when he did not establish the assignment, and the debt due him, for which the assignment was made, has not been presented to the administrator for allowance. — *Red R. C. Bank v. Higgins*, S. C. Tex., Nov. 26, 1888; 9 S. W. Rep. 745.

141. **MECHANIC'S LIEN** — Description of Property. — A notice of a mechanic's lien, which merely describes the property as that certain lot and parcel of land situated in said county of Nevada, State of California, and sought to be charged with this lien, and described as follow-, to wit, is insufficient. — *Penrose v. Calkins*, S. C. Cal., Nov. 26, 1888; 19 Pac. Rep. 641.

142. **MECHANIC'S LIEN** — Parties — Demurrer. — A complaint, averring that plaintiff furnished labor upon, and furnished materials for, the building in question under a contract with defendant, but making no reference to a principal contractor, is not demurrable for defect of parties. — *Frederickson v. Niebham*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 501.

143. **MECHANIC'S LIEN** — Title. — One holding real estate under a deed conveying the right of occupancy and covenanting for the conveyance of the absolute title, may subject his interest therein to a mechanic's lien. — *Pierce v. Osborn*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 666.

144. **MORTGAGE** — Foreign Execution. — A deed of trust, executed in another State, on property in Louisiana, to secure the payment of promissory notes, will be enforced as a conventional mortgage. — *Pickett v. Foster*, U. S. O. C. (La.), Feb. 1888; 36 Fed. Rep. 314.

145. **MORTGAGES** — Future Advances. — A recorded mortgage to the extent of the sum limited in it is entitled to priority for future advances made without knowledge of subsequent incumbrances, including mechanics' liens, though it is not expressed to be for future advances, and the agreement making it a lien therefor is verbal. — *Tapia v. Demartini*, S. C. Cal., Nov. 21, 1888; 19 Pac. Rep. 641.

146. **MUNICIPAL CORPORATIONS** — Tax-payers — Suits. — In proper cases citizens and tax-payers may sue in the enforcement or restraint of municipal action, but they cannot in affirmation of its contracts which contain no stipulation *pour autrui*. — *Loeber v. New Orleans & C. R. R.*, S. C. La., May 25, 1888; 5 South. Rep. 60.

147. **NEGLIGENCE** — A deck-hand was sent on shore in the morning before it was light, to cut ropes which held the boat. He cut the last one inside the knot by which it was fastened to the tree, causing it to rapidly unwind, and strike his leg, breaking it: *Held*, that the negligence caused the injury, and that his action therefor was properly nonsuited. — *Brown v. Wood*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 42.

148. **NEGLIGENCE** — Contributory — Jury. — Under the evidence, where plaintiff in coming out of the depot was run over by a train, it was *held* error to direct the jury to find for defendant. — *Jones v. East T. etc. R. R.*, U. S. S. C., Nov. 12, 1888; 9 S. C. Rep. 118.

149. **NEGLIGENCE** — Dangerous Premises. — The owner of a city lot bounded by a street cut down by the city thirty-eight feet below the grade of the lot, not being bound to guard the edge of his lot, is not responsible for the death of a policeman who comes upon the lot in pursuit of an offender, and is killed by falling into the street. — *Wood v. Floyd*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 43.

150. **NEGLIGENCE** — Defective Highway. — In action for injuries sustained by reason of alleged defective highway where defendant urged that the accident was caused by the action of plaintiff's horse, unmanageable on account of defective harness, and where the court was asked to charge that if the accident was caused by the uncontrollable struggle of a choking horse their verdict must be for defendant, to which the court replied "refused unless plaintiff by his negligence contributed or was the cause of the uncontrollable struggle of the horse: *Held*, error. — *Charters Tp. v. Phillips*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 26.

151. **NEGLIGENCE** — Passengers — Railroads. — A railroad is not liable for injuries to a passenger sustained in attempting to alight from a moving train, which had passed the passenger's destination without stopping. — *Watson v. Ga. P. R. Co.*, S. C. Ga., Oct. 12, 1888; 7 S. E. Rep. 864.

152. **PARTITION** — Equity — Pleading — Amendment. — A bill in equity for partition, filed by the heirs of a decedent, may be amended by adding the name of the widow as a party thereto, and by adding to the prayer, "and such other relief as they may be entitled to in the premises." — *Appeal of Cowan*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 28.

153. **PARTNERSHIP** — Accounting — Interest. — Upon settlement of a partnership by a suit for an accounting, interest should be allowed on the amount found due to one partner from the institution of the suit, there being many items in dispute and no agreement as to interest. — *Carroll v. Little*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 582.

154. **PARTNERSHIP** — Injunction. — A change in the location of the works of a partnership for the manufacture and sale of steel, as fixed by the articles of association, is a departure from the partnership enterprise, and may be enjoined by a minority of the members. — *Appeal of Gemmings*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 19.

155. **PARTNERSHIP** — Suit Against Partner. — A made a contract with B for cutting hay, belonging to the firm of A and B, agreeing to pay for it himself and charge the firm: *Held*, that A might be sued alone by B for his services. — *Cowles v. Robinson*, S. C. Colo., Nov. 16, 1888; 19 Pac. Rep. 654.

156. **PAYMENT** — Voluntary — Recovery. — Money paid under mistake of law cannot be recovered back, where the transaction is unaffected by any fraud, trust, confidence or the like, and both parties knew all the facts. — *Erkens v. Nicolai*, S. C. Minn., Nov. 28, 1888; 40 N. W. Rep. 567.

157. **PLEADING** — Contradictory Defenses. — Under Georgia law, the general issue and a plea of justification may both be filed in an action for malicious prosecution. — *Rigdon v. Jordan*, S. C. Ga., Oct. 29, 1888; 7 S. E. Rep. 857.

158. **PLEADING** — Contributory Negligence — Reply. — In an action against a railroad for injuring a horse in unloading him, a reply alleging that plaintiff's agents, by their negligence and by reason of the wildness of the horse, suffered him to rear and fall, and also denying all injury, but not alleging that but for this negligence the horse would not have fallen, does not set up contributory negligence, and no reply is necessary. — *Owen v. Louisville, etc. R. Co.*, Ky. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 696.

159. **PLEADING** — Corporations — Stock. — *Held*, that the complaint stated a cause of action for failure to pay a subscription to corporate stock. — *Minneapolis, etc. Co. v. Cretier*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 507.

160. **PLEADING** — Exemption — Homestead. — A petition to recover land sold on execution, as being a homestead, need not aver that the execution debt did not exist before the purchase of the land. — *Snapp v. Snapp*, Ky. Ct. App., Nov. 27, 1888; 9 S. W. Rep. 705.

161. **PLEADING** — Insurance — Consideration. — A complaint alleging that defendant, for a valuable consideration, entered into a contract of insurance, is sufficient on demurrer, without any allegation that any premium was ever paid or agreed to be paid. — *Bank of River Falls v. German A. I. Co.*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 506.

162. **PLEADING** — Uncertainty — Damages. — If a complaint, alleging injury from a defective sidewalk, does not sufficiently show the nature or amount of the damages, the remedy is by motion for a bill of particulars. — *Barney v. City of Hartford*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 581.

163. **PLEADING** — Vendor's Lien — Assignee. — The complaint alleged that A gave B his notes for the un-

paid purchase money for some land, that B died, and his administrator, for value, assigned the notes to plaintiff, who prayed for an enforcement of the lien and a sale of the land, but did not ask for a personal judgment: *Held*, that a good cause of action was stated.—*Bowles v. Smith*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 716.

164. PLEADING—Verification—Agent.—The agent of a plaintiff, having authority from his principal, may verify under oath the complaint filed in an action of forcible detainer.—*Mercer v. Ringer*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 670.

165. PRACTICE—New Trial—Conditions.—The court directed a new trial, unless plaintiff should elect to take judgment against three of the defendants for a specified sum and against another for a specified part of that sum: *Held*, that plaintiff could not, under the order, take judgment against the three and have a new trial as to the other.—*First N. Bank v. Lincoln*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 573.

166. PRACTICE—New Trial—Newly-discovered Evidence.—Newly-discovered evidence of the same kind as that used at the trial is not cause for a new trial.—*Brinson v. Faircloth*, S. C. Ga., Nov. 21, 1888; 7 S. E. Rep. 923.

167. PRACTICE—Trial—Directing Verdict.—Where the plaintiff's evidence, conceding it the greatest probative force allowable by the rules of evidence, is insufficient to justify a verdict in his favor, the court may instruct the jury to find for defendant.—*Knapp v. Sioux Falls N. Bank*, S. O. Dak., Oct. 13, 1888; 40 N. W. Rep. 587.

168. PRACTICE—Trial—Improper Evidence.—Where improper evidence is admitted, which is excepted to, a new trial will be granted, notwithstanding subsequent instructions to disregard it, unless from the whole case it is reasonably clear that the party objecting was not prejudiced.—*Juergens v. Thorn*, S. O. Minn., Nov. 26, 1888; 40 N. W. Rep. 559.

169. PRACTICE—Trial—Instruction.—Where the party failed to ask a qualification of the instruction given, which would doubtless have been granted, and such qualification would not have changed the result, the judgment will be affirmed.—*Druck v. Nicolai*, S. O. Oreg., Nov. 5, 1888; 19 Pac. Rep. 650.

170. PRACTICE—Trial—Opening and Closing.—Under Georgia law, a defendant in a libel suit, who pleads both justification and the general issue, is entitled to open and close.—*Johnson v. Bradstreet Co.*, S. C. Ga., Oct. 22, 1888; 7 S. E. Rep. 867.

171. PRINCIPAL AND AGENT—Undisclosed Principal.—A, who has intrusted cotton to a cotton buyer, and directed him to ship it in his own name to commission merchants, cannot recover the proceeds from the latter, when they have accounted with the latter before notice of the agency.—*Rosser v. Darden*, S. C. Ga., Nov. 5, 1888; 7 S. E. Rep. 919.

172. PUBLIC LANDS—Entry—Cancellation.—A entered two tracts of public land, paying the receiver of the land office therefor. Subsequently the commissioner of the general land office, finding one tract not subject to entry, cancelled both entries, without notifying A or offering to return his money: *Held*, that A was entitled to have conveyed to him the legal title held by one who had received a patent for the tract subject to entry after the order of cancellation.—*Cornelius v. Kessel*, U. S. S. C., Nov. 19, 1888; 9 S. O. Rep. 122.

173. PUBLIC LANDS—Title from State—Islands.—Green island, in Tionesta creek, Forest county, Pa., is within what is known as the "new purchase," made in 1764-65, by the "commissioners appointed for making a further purchase of all the residue of the unpurchased lands within the limits of the State," and by the act of 1784 subject to be appropriated and sold, and included in a survey of the main land.—*Hutings v. Lewis*, S. O. Penn., Oct. 29, 1888; 16 Atl. Rep. 34.

174. RAILROADS—Car Tracts—Leases.—Under the contract for lease of cars to a railroad, which, on payment of the rent for ten years, were to belong to the

railroad, it was held that the car trust certificates were in legal effect mortgage bonds, and as such inferior in point of lien upon such rolling stock to a prior mortgage with an after acquired property clause.—*Central T. Co. v. Ohio C. R. Co.*, U. S. C. C. (Ohio), Aug. 29, 1888; 36 Fed. Rep. 520.

175. RAILROADS—Street—Damages.—A railroad company may, under a statute and a city ordinance, construct and operate its railroad in a public street, making such alterations in the surface of the street as are necessary therefor, which do not necessarily impair the usefulness of the street, without being liable to abutting lot owners or others for damages.—*Ottawa, etc. R. Co. v. Larson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 661.

176. RECORD—Contract—Deed.—Under the law of 1878, the record of an executory contract for the sale of lands is constructive notice to a purchaser thereof, but the prior record of such contract does not entitle the holder thereof to a preference over the grantee in a deed given before the execution of such contract.—*Thorsen v. Perkins*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 557.

177. REWARD—Criminal—Constable.—Under Texas law, a constable may recover a reward for the arrest and conviction of a criminal in his own precinct, such offer having induced him to make the search.—*Kasheng v. Morris*, S. O. Tex., Oct. 26, 1888; 9 S. W. Rep. 789.

178. SALE—Auction—Vendee.—The purchaser of a house and lot at public auction, who has refused to comply with his bid, may be sued for damages by the vendor, where the property, after due notice, has been resold at auction for a less sum.—*Ansley v. Green*, S. O. Ga., Nov. 5, 1888; 7 S. E. Rep. 921.

179. SALVAGE—Towage—Award.—A steamship worth with freight and cargo \$568,600 lost a week's time and incurred \$2,000 in towing in a disabled steamer worth \$260,000. Salvage of \$15,000 and \$2,000 for expenditures were allowed.—*The California*, U. S. D. C. (N. Y.), Oct. 3, 1888; 36 Fed. Rep. 563.

180. SCHOOLS—District—Writ of Error.—A writ of error does not lie to a refusal of the court of quarter sessions to open a decree establishing an independent school-district under act Pa. May 8, 1855, notwithstanding the act of May 20, 1856.—*School-district v. Cummings*, S. O. Penn., Oct. 29, 1888; 16 Atl. Rep. 32.

181. SEAMAN—Wages.—Under the evidence it was held that libellant was employed as mate at \$50 per month.—*Sacqueland v. The Meteor*, U. S. D. C. (N. Y.), Oct. 4, 1888; 36 Fed. Rep. 566.

182. SPECIFIC PERFORMANCE—Contract—Husband and Wife.—On a bill for specific performance of a contract for the sale of land, praying for a good and sufficient deed, where defendant's wife refuses to join, and plaintiff, on the argument before the master, agrees to accept a deed from the husband alone, a decree may be entered granting so much of the prayer of the bill.—*Harrigan v. McAless*, S. O. Penn., Oct. 29, 1888; 16 Atl. Rep. 31.

183. SPECIFIC PERFORMANCE—Laches—Waiver.—Delay in the payment of the purchase money is no defense to a bill for specific performance, where it does not appear from the stipulation between the parties or from the nature of the property, that time was to be of the essence of the contract.—*Brown v. Guarantee T. & S. D. Co.*, U. S. S. C., Nov. 19, 1888; 9 S. C. Rep. 127.

184. SPECIFIC PERFORMANCE—Married Women—Agent.—Specific performance of a contract for the sale of a married woman's property made by her agent will not be decreed, when he has exceeded the authority given him in writing, and the authority given by the husband is insufficient under the State laws.—*Hennessey v. Woolworth*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 109.

185. SUBROGATION—Surety—Creditor.—Where a security is given with the intention that it shall be applied to the payment of the debt for the relief of the surety, or to enable the creditor to make his debt, equity will substitute him to the right of the surety.—*Talbot v. Lancaster*, Ky. Ct. App., Oct. 22, 1888; 9 S. W. Rep. 694.

186. **TAXATION—Deductions—Corporations.**—Under the former revenue law of Kentucky, corporations as well as natural persons, are entitled to deduct their indebtedness from the value of property not required to be listed.—*Cow. v. St. Bernard C. Co.*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 709.

187. **TAXATION—Exemption—Cemeteries.**—Where a cemetery has been bought as an investment for a church, and whatever revenues are derived from it are for the use of the church, and may be appropriated to any purpose which to the church may seem fitting, it is not embraced within the provision of act Pa. May 14, 1874, which exempts from taxation "all burial grounds not used or held for private or corporate profit.—*Browns' Heirs v. City of Pittsburg*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 43.

188. **TAXATION—Tax-title—Burden of Proof.**—A State assignment certificate is only evidence of title when accompanied by proof of service of the notice of the expiration of the time of redemption, as required by law, and the burden of proof is on the party claiming title thereunder.—*Muller v. Jackson*, S. C. Minn., Nov. 22, 1888; 40 N. W. Rep. 565.

189. **TAXATION—Void Sale—Possession.**—The holder of the State's lien on real estate for taxes, acquired by purchase of the real estate at a void tax-sale, cannot, independent of the occupying claimant's law, defend his possession of the real estate upon the lien, even though he enter with the acquiescence of the owner.—*Taylor v. Slingerland*, S. C. Minn., Nov. 30, 1888; 40 N. W. Rep. 575.

190. **TENANCY IN COMMON—Adverse Possession—Jury.**—Two brothers purchased two adjoining tracts of land together, but occupied them separately, each making improvements on the track on which he resided. One of them purchased the interest of the other in the tract occupied by himself, at a sheriff's sale, and made a lease of the mining privileges, stipulating for a royalty on the coal, and collecting it: *Held*, that whether the brother purchasing at the sheriff's sale paid a portion of the royalties to the other and his heirs, within the period of limitations, and, if he did so, whether it was as a charity or in recognition of a right in them as owners, was properly submitted to the jury.—*McCloskey v. McCloskey*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 30.

191. **THREATS—Evidence.**—On a trial for maliciously threatening to accuse another of burning a building, with intent to extort money, under Pub. St. Mass., ch. 202, § 29, the evidence was that defendants said that "unless you give us \$100, we will make a jail-bird of you." *Held*, that the crime charged involving no wrong to defendants, evidence of the truth of the charge was inadmissible on the question of malice or of intent, or to impeach the prosecuting witness.—*Commonwealth v. Buckley*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 577.

192. **TOWNSHIPS—Negotiability.**—A township order is not negotiable, and the mere blank assignment thereof does not vest in the holder the right to maintain an action in his own name against the township for the amount of the order.—*Township of Snyder v. Bovard*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 910.

193. **TRESPASS TO TRY TITLE—Vacating Judgment—Pleading.**—Where a complaint states a good cause of action in trespass to try title, but also asks to vacate the judgment, under which defendant claims, and states facts showing the judgment to be void, the complaint is good on original demurrer.—*Bender v. Damon*, S. C. Tex., Nov. 28, 1888; 9 S. W. Rep. 747.

194. **TROVER—When Lies.**—An action for conversion will not lie, when the taking and conversion of the property is with the knowledge and consent of the plaintiff.—*Tousley v. Bd. of Education*, S. C. Minn., Nov. 20, 1888; 40 N. W. Rep. 509.

195. **TRUST—Constructive—Executor De Son Tort.**—Where A died, leaving a widow and six children, and without administering on the estate one of the sons undertook to complete the payments due by A on land purchased by him: *Held*, that he held the land in trust

for the widow and the heirs.—*Risk v. Risk*, Ky. Ct. App., Nov. 17, 1888; 9 S. W. Rep. 712.

196. **TURNPIKES—Election of Officers—Notice.**—The act Ky. April 12, providing for the election of turnpike road officers, did not fix a place for holding the election, and no presumption arises of notice to the stockholders.—*Cassell v. Lexington, etc. R. Co.*, Ky. Ct. App., Nov. 26, 1888; 9 S. W. Rep. 701.

197. **VENDOR—Boundaries—False Representations.**—When a vendor points out to the vendee certain fences as boundaries of the land sold, he is liable therefor to the vendee if such fences are not the boundaries, whether he made the representations in good faith or not.—*Davis v. Nuzum*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 497.

198. **WAYS—Obstruction—Removal.**—Under Georgia law a person, on whose application a private way was established, cannot sue to require the removal of obstructions placed therein without proof that the way is the same originally appropriated, that it does not exceed the prescribed width, and that he has himself kept it open and in repair.—*Collier v. Farr*, S. C. Ga., Oct. 22, 1888; 7 S. E. Rep. 860.

199. **WILLS—Ambiguity—Devisees.**—A devised his estate to his wife during her life or widowhood, and bequeathed \$1,000 more to one son than the others, and directed that, if any died without issue, that their shares should be divided among the others: *Held*, that each child took an equal part of his estate, subject to the mother's right with the exception in favor of the one son.—*Ferguson v. Thomasson*, Ky. Ct. App., Nov. 17, 1888; 9 S. W. Rep. 714.

200. **WILL—Construction—Legacy.**—Testator gave to his three married sisters "each the sum of \$3,000 to be paid them however without interest and in such installments and at such times as my executors may deem proper in their discretion so as not to impair my investments or cause loss or injury to my estate," and afterwards gave a like sum to an unmarried sister payable out of the income of the estate: *Held*, that the legacies to the married sisters were payable out of the corpus of the estate.—*Appeal of Patterson*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 33.

201. **WILL—Construction—Powers.**—Where a testator devised property to his wife for life with power to dispose of the same by will in such manner as she might see fit, and the wife directed by her will that all her debts be paid: *Held*, that such direction to pay debts did not change the land therewith as the wife had no power to incumber it.—*Balls v. Dampmon*, Md. Ct. App., Nov. 22, 1888; 16 Atl. Rep. 17.

202. **WILLS—Realty—Investment.**—A directed land in Wisconsin to be sold and an investment of the proceeds in land in Missouri for a certain time and for certain purposes: *Held*, that such equitable conversion might be effected, unless it opposed Missouri law, though it was repugnant to Wisconsin law.—*Ford v. Ford*, S. C. Wis., Nov. 8, 1888; 40 N. W. Rep. 502.

203. **WITNESS—Attorney—Waiver of Privilege.**—Defendant, alleging that she was deceived in relation to her rights by her counsel, and having given testimony in relation thereto, cannot object to testimony by such counsel upon the same matters.—*Hunt v. Blackburn*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 125.

204. **WITNESS—Competency—Felony.**—One against whom a judgment of conviction for a felony has been entered, but against whom sentence has not been pronounced, is not disqualified as a witness in a criminal case, under Texas law.—*Arcia v. State*, Tex. Ct. App., Oct. 26, 1888; 9 S. W. Rep. 685.

205. **WITNESS—Transactions with Decedent.**—When a party to the cause on trial is incompetent to prove the facts, on which his title rests, he is incompetent to prove the more general fact of his ownership in connection with such other facts.—*Robson v. Haine*, S. C. Ga., Nov. 21, 1888; 7 S. E. Rep. 926.

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CURRENT EVENTS.

THE recent case of *Anderson v. Bennett*, decided by the Supreme Court of Oregon, and of which we gave a brief synopsis last week, is a fair illustration, not only of the tendency of courts to legislate for themselves, but also of the advance, which has been made, in the judicial determination of questions, arising out of the liability of the master, for injuries to his servant. The later current of judicial decisions, as well as legislative action, indicates a marked departure from the old rule of the master's non-liability for injuries, to a servant, caused by another servant in the same common employment, to the extent of holding the master liable, for the improper or negligent performance of a duty, which the employer owes the servant. The first general act, modifying and defining the doctrine of non-liability, was the English Employers' Liability Act of 1880. It provides that, in five classes of cases, the workman injured shall have the same remedy, against the employer, as if the workman had not been in the service of the employer. These cases are (1) by reason of any defect in the condition of the works, machinery or plant; (2) by reason of the negligence of a person in the service of the employer who has superintendence whilst in the exercise of such superintendence; (3) by reason of the negligence of any person to whose orders the workman was bound to conform and did conform; (4) by reason of the act or omission of any person in the service of the employer, done in obedience to his rules or by-laws or particular instructions; (5) by reason of the negligence of any person in the service of the employer who has charge of any signal points, locomotive engine or train upon a railway.

A recent number of the *Harvard Law Review* contains an interesting article, on "Statutory Changes in Employers' Liability." It appears therefrom that in Georgia, Iowa, Kansas, Wisconsin and Wyoming, the legis-

latures have guarded the employees of railroad companies from the common law rule of non-liability. The Wisconsin statute has, however, been repealed, and the common law rule prevails there. In England, Alabama and Massachusetts, the statutory changes are more extensive, and are confined to no special class of workmen. The Alabama act is a substantial copy of the English act, but the provisions of the Massachusetts act are somewhat more restricted. These statutes have been passed upon, and construed by the English and American courts. But in the absence of statutes, as in the Oregon case, to which we first called attention, there is a disposition on the part of courts, both federal and State, to restrict the doctrine of non-liability, and practically to follow the English statutory rule.

MINORS, without parent or guardian, in States having a liquor selling law similar to that in force in Georgia, will do well to take note of a recent decision, of the supreme court of that State, wherein it is held, that the statute prohibiting the sale of liquor to a minor, without the written consent of his parent, or guardian, makes no exception, as to minors whose parents are dead, and who have no guardians, and, that it is no defense to such prosecution to prove, that the parents of the minor are dead, and that he had no guardian. It was claimed that this minor was his own guardian, and the court suggested that he should have given himself permission in writing. This seems to be a reasonable solution, of a dilemma, not anticipated by the legislators, but the thought will naturally suggest itself, at least to those of a convivial turn, that an orphan in a State like Georgia possesses some advantages and privileges, not enjoyed by an ordinary common law orphan.

At the recent annual meeting of the Kansas State Bar Association, held in Topeka, January 9, 1889, among other interesting contributions, an address was delivered by Judge W. A. Johnston, in which he advocated a constitutional convention, and an entire reorganization of the judicial system.

of that State, claiming that the business of the supreme court was such as to demand seven judges instead of three, and that there should be a limit placed upon cases, appealable to that court. The fact that within recent times, several cases involving as small amounts as twenty-five and fourteen cents, came into that court, seems to justify the position taken by Judge Johnston.

THE next national reform is said to be a reform of the ballot. Though, after each general election, for the past decade, at least, a spasm of political virtue has seized the public and the politicians, with reference to a reconstruction of election laws—having as its chief purpose to render fraud impossible—it is only within recent months that any substantial step has been taken in that direction. A new election law was passed last year in Massachusetts, but which does not go into effect until November next. It seems also that a similar law is being tried in Louisville. It is an adoption of what is known as the Australian system of voting, and is, with a slight exception, the English and Canadian law. Its features seem to the American voter, unused to so much machinery, quite complex and almost impracticable, but we are assured by those, familiar with its operations, that it is not only simple in enforcement, but that it accomplishes everything for which it was intended. Without going into an extended exposition of its features, it aims to provide for an official and absolutely secret ballot, so marked and identified as to be incapable of counterfeit, for orderly elections free from electioneering and bulldozing at the polls, and to prevent bribery, though as to the latter, it is said, not to be so effective as the English amendment, compelling the publication, under oath, after election, of a complete statement of all the expenditures made. It seems to be admitted by all, who have made the question a study, that a secret ballot officially provided and marked is the first essential for the prevention of frauds at elections.

At this time and naturally enough in view of the last election, the question is being extensively agitated in New York State, following upon the suggestions, in that direction made by Gov. Hill, in his recent message. It

is a matter of public congratulation that the popular feeling in favor of this reform, in that great State, and the promise of its early enactment, is seconded in many of the States, by a marked effort to correct the abuses of the ballot.

NOTES OF RECENT DECISIONS.

THE Supreme Court of the United States, in a very elaborate opinion by Mr. Justice Miller, has declared constitutional the act Minnesota, March 7, 1881, providing for assignments for benefit of creditors, in the case of *Denny v. Bennett*, 9 S. C. Rep. 134. The act in question provided that a debtor may assign all his property for the equal benefit of all his creditors, who shall file releases of their claims, etc. The court says:

The question of the invalidity of this Minnesota statute, as it relates to the rights of creditors, is an interesting one. The argument in favor of that proposition is that it impairs the obligation of contracts; it may be conceded that, so far as an attempt might be made to apply this statute to contracts in existence before it was enacted, it would be liable to the objection raised, and therefore in such a case of no effect. But the doctrine has been long settled that statutes limiting the right of the creditor to enforce his claims against the property of the debtor, which are in existence at the time the contracts are made, are not void, but are within the legislative power of the States where the property and the debtor are to be found. The courts of the country abound in decisions of this class, exempting property from execution and attachment, no limit having been fixed to the amount—providing for a valuation at which alone, or generally two-thirds of which, the property can be brought to a forced sale to discharge the debt—granting stays of execution after judgment, and in numerous ways holding that, as to contracts made after the passage of such laws, the legislative enactments regulating the rights of the creditors in the enforcement of their claims are valid. (Citing *Edwards v. Kearzy*, 95 U. S. 595.) * * * The power is conceded, when not forbidden by the statutes of a State, to a failing debtor to make a general assignment of his property for the benefit of his creditors, as this one does. It is further admitted that in such an assignment, if there be nothing fraudulent otherwise, he can prefer some creditors over others, and that he can secure to some payment in full while he leaves others who will certainly get nothing out of his estate. When this is done, the creditors who are not provided for in the assignment are left in a worse condition than they are where it is done under the present law, because in the first instance they would certainly get nothing out of the debtor's property, though they would retain a right to proceed against him by a judgment and execution; while in the present case they have the option of pursuing that course, or of coming in with the other creditors, executing releases, and obtaining their share of the property assigned. Here, instead of naming the

preferred creditors, the assignor gives his property to all who will execute a release of their claims against him. Nobody is required by the statute to do so unless he thinks it is to his interest. The creditor who executes such a release gets his share of the property assigned, while the one who does not receives nothing, unless there may be a surplus left after the payment of the releasers, but he is not hindered or delayed in obtaining a judgment against the debtor, or in levying upon any other property, if such can be found, not conveyed by the instrument, or upon any afterwards acquired by the debtor. The latter remains liable, notwithstanding this statute and this assignment, as he always was, for the debt of the non-assenting creditor. It is not easy, then, to see how this statute can be more complained of as impairing the obligation of contracts than the statutes of exemption which we have already mentioned, and the principles which lie at the foundation of all voluntary assignments for the benefit of creditors with preference that exhaust the fund assigned. But it is said that this statute of Minnesota is void under the principles laid down by this court in the cases of *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213; *Baldwin v. Hale*, 1 Wall. 223; and *Gilman v. Lockwood*, 4 Wall. 409. The proposition lying at the foundation of all these decisions is that a statute of a State, being without force in any other State, cannot discharge a debtor from a debt held by a citizen of such other State. Any one who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a State insolvent law is that it cannot, like the bankrupt law passed by congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded; but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature, where the creditor is not within the control of the court. The Minnesota statute makes no provision for any such release. Harlan, J., dissents.

LEGISLATORS, as well as lawyers, will be interested in the case of *People ex rel. Hart v. McElroy*, 40 N. W. Rep. 750, lately decided by the Supreme Court of Michigan. It was there held that the courts may look behind the enrollment and into the legislative journals to ascertain whether an act was passed in accordance with the constitutional requirements. The court says:

If the act, as in this case, is authenticated by the signature of the presiding officers of both houses, approved by the governor, and certified in the published laws by the secretary of State, it is declared by the courts of last resort in many of the States that the court will not go behind these certificates, and search further to ascertain whether such facts existed as gave these officers constitutional warrant for their action. *State v. Swift*, 10 Nev. 178; *Sherman v. Story*, 30 Cal. 256; *Bender v. State*, 53 Ind. 254; *Pangborn v. Young*, 32 N. J. Law, 41; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *People v. Devlin*, 33 N. Y. 299. The courts of some of the States have taken cognizance of the journals, and looked into them, for the purpose of determining whether the constitutional

methods have been followed in the passage of laws. But it is held, in all the cases, that the presumption is always strong that the legislature has not violated the constitution in the passage of an act, duly authenticated, as stated above; and that the proof furnished by the journals must be clear, in order to overcome this presumption. *Larrison v. Railroad Co.*, 77 Ill. 11; *Worthen v. Badgett*, 32 Ark. 496. * * I am of the opinion that the right of the courts to look into the journals for certain purposes, should be sustained, rather than to hold that the enrollment and authentication of the act, as enrolled by the proper officers, is conclusive. The courts certainly ought to have the right to open the journals of the legislature to ascertain whether the fraud or mistake of some clerk or employee of the legislature, or its committees, has not imposed upon the statute-books a different law from the one actually passed by the legislature, or to determine whether the requisite number of votes have been given under the constitution to pass a law, when the constitution requires that the ayes and noes shall be entered upon such journals. It must have been intended by the framers of that instrument, on such requirement, that the courts should look into the journals to determine whether the ayes were sufficient to pass a bill in either house as recorded in the journals. How far the journals may be examined, to impeach duly authenticated acts of the legislature, it is not necessary here to determine. We certainly cannot act upon anything not found in the journals, nor can we presume that any requirement of the constitution has not been fulfilled, unless the fact appears affirmatively in such journals; and every intendment is to be made in favor of the constitutionality of the passage of the act.

An interesting question of exemption was decided by the Supreme Court of California, in the case of *Cowen v. Their Creditors*, 19 Pac. Rep. 755. A firm, composed of two members, filed a petition asking to be adjudged insolvents and discharged from their debts. All the property scheduled was partnership property and all the debts partnership liabilities. Petitioners applied to the court, and claim now to be entitled to their exemption. The objection is made that no exemption can be allowed out of partnership property. The court, after citing the statute (§ 690, Code Civ. Proc.), says:

If the petitioner had been the sole owner of the property in question, there can be no doubt that it would have been exempt from execution, and the duty of the court to set it apart for his use and benefit. Did the fact that it was partnership property change the rule in this regard, and make it subject to seizure and sale by creditors? The authorities upon the question are sharply conflicting, and a majority of the cases hold that partnership property is not exempt. See *Thomp. Homest. & Ex.* §§ 194-216, where the cases are very fully collected and reviewed. See also *Freem. Ex'ns* (2d ed.) § 221. The leading case in favor of the proposition that partnership property is exempt is *Stewart v. Brown*, 37 N. Y. 350. And see *Skinner v. Shannon*, 44 Mich. 86; *Burns v. Harris*, 67 N. C. 140; *Blanchard v. Paschal*, 68 Ga. 32. On the other side the leading case seems to be *Pond v. Kimball*, 101 Mass. 105. It appears to us that the statute is intended to

apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless, possibly, the clause as to fishermen be an exception. Its apparent object is to secure to the debtor the means of supporting himself and his family, by following his trade or handicraft, with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessities out of his property. But property belonging to the firm cannot be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot, in whole or in part, be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his accounts with the firm. The exemption, in our opinion, is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only. And see *Gaylord v. Inhoff*, 28 Ohio St. 317; *Guptil v. McFee*, 9 Kan. 30; *Giovanni v. Bank*, 55 Ala. 305; *Baker v. Sheehan*, 29 Minn. 235; *State v. Spencer*, 64 Mo. 355.

THE Court of Appeals of New York, in reversing the case of *Kernochan v. Murray*, 18 N. E. Rep. 868, pass upon the question as to whether a guaranty by one selling stock that the purchaser shall receive dividends thereon equal to a certain percentage, and that he will make good any deficiency, is terminated by the guarantor's death. In deciding the question in the negative, the court says:

We think the judgment below proceeds upon a misconstruction of the contract of guaranty. The guaranty did not in terms purport to bind the executors or administrators of *De Mill & Co.* But it is a presumption of law, in the absence of express words, that the parties to a contract intend to bind, not only themselves, but their personal representatives. * * * There are cases cited holding that a continuing guaranty of advances to be made to a third party, in the absence of any express provisions, is revoked as to subsequent advances by the death of the guarantor, and notice. *Coulthart v. Clementson*, 5 Q. B. Div. 42; *Harris v. Fawcett*, L. R. 15 Eq. 311. These cases stand upon a perfectly equitable principal, each advance constituting a separate consideration. But a guaranty creating a continuing pecuniary obligation, the consideration for which is given once for all, is very different, and it would be very inequitable to hold that it was terminated by the death of the guarantor, unless this intention is plainly in the guaranty itself. See *Lloyds v. Harper*, 16 Ch. Div. 290. The judgment in this case cannot, therefore, we think, be supported on the theory that the guaranty by fair intentment was limited to the lives of the guarantors. Equally unfounded we think is the claim of the defendants that *De Mill & Co.* were sureties, and for that reason their obligation terminated on the death of *Getty v. Binsse*, 49 N. Y. 385. Their undertaking was original, and not collateral. They entered into the guaranty for their own benefit, upon a consideration moving to them as principals.

In the case of *Edwards v. Geo. Knapp*, 10 S. W. Rep. 54, the Supreme Court of Missouri decide a question of libel and slander, heretofore unsettled in the law of that State, or at least upon both sides of which there has been direct precedent. The question was as to whether, in an action for libel, where defendant pleads truth in justification of a charge imputing a crime to plaintiff, he must prove the charge "beyond a reasonable doubt," or whether a preponderance of evidence is sufficient. The case of *Polston v. See*, 54 Mo. 291, a decision rendered by a divided court, adopted the rule requiring proof beyond a reasonable doubt. The case of *Marshall v. Insurance Co.*, 43 Mo. 586, took the opposite ground. The court here carefully reviews the authorities, and show that *Polston v. See* was decided on the English theory, viz: If, upon a trial of the plea of justification in a slander suit, when a felony is imputed, the issue was found for defendant, the plaintiff was thereupon held to answer for the felony, without any further accusation, the verdict being held equivalent to an indictment, and the intervention of a grand jury therefore unnecessary. And as the reason of the rule has no application here, the English cases establishing it do not amount to persuasive authority, and for the *status* of the question we are remitted to reason, and to what has been held by the courts of this country. At the time the case of *Polston v. See* was decided, a similar rule was laid down in the States of Iowa and Indiana, but since then it has been directly repudiated in Iowa, and in effect in Indiana. See *Riley v. Norton*, 65 Iowa, 306; *Ins. Co. v. Jachinchen*, 110 Ind. 59; *Ellis v. Bruzzell*, 60 Me. 209; *Peoples v. Evening News*, 57 Mich. 11. The court concludes:

From what has been said it will be seen that the English authorities referred to, in support of the rule in section 426 of *Greenleaf*, *supra*, have no application here, and that the Iowa cases cited in support of it have been expressly overruled, and the Indiana cases in effect overruled. We therefore conclude that the rule stated in *Marshall v. Insurance Co.*, 43 Mo. *supra*, that in civil cases the rights of the parties are to be determined by the preponderance of the evidence is the correct one, both on principle and authority, and that the case of *Polston v. See*, *supra*, in so far as it holds that in action of slander or libel, when a crime is imputed, and the defendant justifies, he must introduce evidence sustaining his plea beyond a reasonable doubt, ought no longer to be followed, and it is hereby overruled.

OFFICERS of municipal corporations will learn something in the case of *Robinson v. Rohr*, 40 N. W. Rep. 668, recently decided by the Supreme Court of Wisconsin. There the board of street commissioners of the city of Watertown, after making futile effort by resolution and advertisement for proposals for bids, to repair a bridge, undertook to do the work themselves under plans and specifications adopted by them, and appointed a superintendent of the work. While it was being done, plaintiff was injured by the fall of a derrick. It was held by the court that though the board, when they determined upon the work, and adopted the plans and specifications of it, acted as public officers, exercising judicial and legislative power, and are not amenable to any one except the public for any errors, negligence or mere misfeasance in the matters within their jurisdiction. But when, after adopting the plans and specifications, they undertake to carry them out practically, and to do the work themselves, and employ agents and servants to execute the plans and specifications manually, then, if they are acting as officers at all, they are merely ministerial officers, and not judicial or legislative, and, according to the same authorities, are liable to third persons for their negligence or misfeasance, or, as the authorities say, as public officers they acted in a ministerial capacity, and are therefore liable.

An interesting question is involved in the case of *Plano Manufacturing Co. v. Burrows*, 19 Pac. Rep. 809, lately decided by the Supreme Court of Kansas. The facts are these: The plaintiff sold a twine binder harvester to A, who gave to plaintiff his three notes therefor. A afterwards sells the machine to B, who in consideration therefor orally promised A to assume payment of the notes. Two of these were not paid, and plaintiff brought suit against both A and B. The court here lay down the following propositions, applicable to the above facts: All actions must be prosecuted in the name of the real party in interest, and, therefore, whenever a contract is made between two persons for the benefit of a third, the latter is the proper person to commence and maintain action. *Brenner v. Luth*, 28 Kan. 581. And generally it makes no difference whether the contract is in writing or only in parol. *Grant v. Pendery*, 15

Kan. 236. Such a promise, it is true is, in one sense, a promise to pay the debt of another. It is the promise to pay the pre-existing debt of the promisee to the third person. But that is not all, nor is it the principal thing. The principal thing is that the promisor shall pay his own debt created at the time of making the promise, not to the promisee, it is true, but to a third person for the benefit of the promisee. Such a contract or promise is not within the statute of frauds. *Lee v. Newman*, 55 Miss. 365; *Seaman v. Hasbrouck*, 35 Barb. 151; *Stanha v. Greenwood*, 28 Minn. 521. The court concludes:

Under this contract the company, and not A was to receive the purchase money, and the company, and not A, was therefore the real party in interest; and under the statutes of this State, and the decisions of this court, the company, and not A would be the proper party to sue for the recovery of the purchase price of the harvester. Stephen Burrows was the primary debtor, and the Plano Manufacturing Company was the primary creditor; and Stephen Burrows, as such primary debtor, should not be allowed to escape from the fulfillment of his contract to pay his own debt, merely because he put his promise in the form of a promise to pay the debt of another. Nor should he be allowed to multiply suits by compelling the Plano Manufacturing Company to sue A, and A to sue him. Nor has he any right to require that the Plano Manufacturing Company should first elect to treat the debt due from A to the Plano Manufacturing Company as extinguished before commencing an action against him to recover the debt he owes. *Horton, C. J.*, dissented.

THE Supreme Court of Illinois, in the recent case of *McDonald v. People*, 18 N. E. Rep. 817, took occasion to rebuke the State's attorney who prosecuted below. It was a criminal prosecution for conspiracy to defraud Cook county by the presentation and collection of bills for repairs on a county building, alleged to be fraudulent. It appears that the prosecuting attorney, in his opening statement to the jury, being allowed full scope by the judge, went out of his way to speak of matters not within the record, but which were intended to have effect upon the jury, unfavorable to defendant. He was allowed to talk about the "boodle prosecutions in New York city," to discuss and explain to the jury the meaning of an "exception" entered by counsel for defendant, stating that the purpose was to fill the record with errors. He also informed the jury that the law had been so changed that any defendant might testify in his own behalf, and that defendants had applied for a change of

venue to another county. Other matters wholly foreign were stated and argued to the jury, and full liberty was given counsel for the people by the court, to make any statement he saw proper to make, whether it had any legitimate bearing on the case or not. The court says:

Much latitude is always allowed counsel in the statement or argument of a case to a jury, but there are bounds which ought not to be transcended. As a general rule a full statement of the facts expected to be proven on the trial, with a statement of the law relied upon, would seem to be sufficient; but here the court ruled that counsel for the people might elect the manner in which to make their opening. * * * It is a proposition too plain to admit of argument that the jury had nothing to do with the force or effect or the office of an exception that might be taken by counsel during the trial; nor could they take into consideration the fact (if it was a fact) that the defendants had applied for a change of venue; nor was it material for them to know that the law had been so changed that a defendant might testify in his own behalf. And it is plain that the court ought not to have permitted the attorney of the people to bring these matters before the jury in the opening statement. In *State v. Kring*, 64 Mo. 596, where the jury was told in the argument that if they wronged the defendant by finding him guilty that wrong can be righted by an appeal by the defendant to the supreme court, the remark was held to be error. It is there said: "The statements that the higher courts referred to had the power to review the finding of the jury on the weight of evidence was calculated to induce the jury to disregard their responsibility." Our statute, which allows a defendant in a criminal case to testify, declares that "his neglect to testify shall not create any presumption against him," nor shall the court permit any reference or comment to be made to or upon such neglect. Under this statute, why was the attorney of the people allowed to comment before the jury of the right of the defendant to testify in the case? In *State v. Smith*, 75 N. C. 307, a judgment wherein a defendant was convicted was reversed, upon the ground alone that the attorney for the people was allowed, in addressing the jury, to state that "the defendant was such a scoundrel he was compelled to remove his trial from Jones county to a county where he was not known;" and yet, in this case, counsel for the people was permitted to argue at great length upon the fact that the defendants had applied for a change of venue, and the application had been denied.

A NOVEL question of garnishment arose in the case of *Montrose Pickle Co. v. Dodson & Hills Manufacturing Co.*, 40 N. W. Rep. 689, decided by the Supreme Court of Iowa. The facts were that the garnishee, a common carrier of freight and passengers on the river, was an Iowa corporation, having its place of business at Dubuque. The plaintiff was a resident of Iowa and the defendant of Missouri. The property subject to be garnished was on board a steamer of the garnishee company en route from Alexandria to St.

Louis, Mo. The question was whether the property was liable to attachment by garnishment. The court says:

The ground of the attachment was that the defendant was a non-resident of this State. An attachment issued upon this ground avails nothing, unless the defendant has property or debts owing to him within this State. Without such property or debts, there could be no service of the attachment, either by actual levy, or by the process of garnishment. It is not claimed by appellant that any jurisdiction of the property could be obtained by seizing it outside the State. The contention is that, as the garnishee is a resident of the State, the *situs* or location of the property in question must be held to be in this State. This rule has been held to apply to debts owing by the garnishee to the defendant. *Mooney v. Railway Co.*, 60 Iowa, 346. That was a case of garnishment of the wages of a railroad employee. The garnishee was held to be a resident of this State, and there was no contract that the wages due were to be paid in the State of Nebraska, where the employee resided and the garnishee had its principal place of business. It appears to us that the right to garnishee the steamer company, and hold it for the value of the property in question in this case, presents a very different question. The law of attachment in this State does not contemplate that property not actually within the State, but located in another State, shall be the subject of garnishment. We need not cite the various sections of the statute upon the subject of attachment and garnishment. Its whole scope and tenor leads to the conclusion that the claim made by counsel for appellant cannot be sustained. The facts in this case are as good an illustration of the fallacy of this claim as can be given. The steamer company had taken this property upon one of its boats, and was under way, bound under its contract of affreightment to deliver the same at St. Louis. To avail itself of its right under the above statute, it would be required to ship the goods back to Keokuk, make its answer, and deliver the property to the sheriff. The law imposes no such an obligation upon a garnishee; and yet, under the claim made by appellant, the garnishee must either do this or become the debtor of the defendant for the value of the property. The law puts no such a hardship upon a garnishee. It is very different where a debt is garnished. It is a debt first and last. In such case the process of the law does not practically compel the garnishee to become a debtor against his consent. (Citing *Railroad Co. v. Cobb*, 48 Ill. 462; *Bates v. R. R. Co.*, 19 N. W. Rep. 72.)

BURIAL LOTS.

1. Church Yards and Cemeteries; Right of Burial.
2. Rules and Regulations.
3. Remedies of Lot Owners.
4. Rights of Lot Owners in Alleys and Avenues.
5. Conveyances in Trust for Burial Purposes.
6. Dedication; Municipal Control.
7. Removal of the Dead.
8. Legislative Control over Church Property Held in Trust.
9. Police Control over Burial Places.
10. Enlargement of Cemeteries.
11. Exemption from Taxation; Local Assessments.

I. Church Yards and Cemeteries—Rights of Burial.—The right of sepulchre in the burial grounds of a church is not an absolute right, but a privilege to be enjoyed as long as the ground continues to be the church burial place, and subject to any right which the church possesses, to abandon it for purposes of interment.¹ In one case the court held that although the deed might stipulate that the piece of ground conveyed, should "never be dug up, disturbed or destroyed," if the premises are described as belonging to a church corporation, and adjacent to a church edifice, as in a church yard, and to be used exclusively as a place of interment, and subject to church assessments for regulation and repair, both parties will be held to have considered it as the grant of a mere easement, and not of an absolute estate in fee.² It has been held, in Maryland, that a burial certificate which grants and conveys a burial lot to a certain person "his heirs and assigns forever, subject to the regulations of the trustees" of the religious society holding the ground in fee, does not confer upon the holder any title to the soil; and not being under seal, nor acknowledged nor recorded, no easement is granted, the privilege conferred amounting only to a license to make interments in the lot described, exclusive of others, as long as the ground remains a cemetery; and furthermore, that where in all such cases the ground ceases to be a place of burial, the lot holder's right and privilege ceases except for the purpose of removing the remains previously buried.³ So it has also been held, in Pennsylvania, in a similar case.⁴ This doctrine does not apply however, where the grave is in a separate independent cemetery.⁵ For a deed in fee of a lot thus located conveys a fee even when the cemetery company reserves the entire care, management, and control thereof.⁶ But a simple receipt for

the purchase money of a burial lot carries with it only the right to use the same, subject to the rules and regulations of the cemetery association.⁷

2. Rules and Regulations.—It cannot be doubted that religious corporations may lawfully establish cemeteries and burying grounds, exclusively denominational, and guard and protect the same by such rules and regulations as will make effective the objects and purposes of their organization. When a person applies for a burial lot in a distinctively Roman Catholic Cemetery, it is with the tacit understanding that he is either a Roman Catholic, and as such eligible to burial therein, or that he applies in behalf of those who are in communion with that church.⁸ But with reference to cemetery companies, it has been held that while such a company may make general rules and regulations it cannot make special ones which will derogate from prior grants.⁹ Thus a grantee, owning a qualified fee in a cemetery lot limited to the purpose of sepulture, has the right to plant flowers and shrubs thereon, notwithstanding an order passed by the cemetery association, providing that it alone should have the care and improvement of all lots within the cemetery bounds.¹⁰ And it is furthermore settled, that where there is no evidence to show which one of two families is entitled to a burial lot in a free burying ground, members of both being buried therein, and there remains ground unoccupied, the trustees thereof have no right to prohibit the interment of a member of one of the families in question.¹¹

3. Remedies of Lot Owners.—The purchaser of a cemetery lot, whether he acquire an absolute or qualified property therein, is entitled to the equitable remedy of injunction to protect him in the full enjoyment of the same.¹² But such owner cannot enjoin the removal of remains from his lot, when such action is in strict consonance with a legislative act.¹³ If the conveyance to the grantee

¹ *Craig v. First Presbyterian Church*, 88 Pa. St. 42. But see *In the Matter of the Brick Presbyterian Church*, 8 Edwards Ch. 155.

² *Richards v. Northwest Protestant Dutch Church*, 32 Barb. 42.

³ *Partridge v. First Independent Church of Baltimore*, 39 Md. 638.

⁴ *Kincald's Appeal*, 66 Pa. St. 420. And see *Washburne's Easements and Servitudes*, 682; *Washburne's Real Property*, 35; *Bryan v. Whistler*, 8 B. & C. 288; *Windt v. German Reformed Church*, 4 Sandf. Ch. 471; *Sohler v. Trinity Church*, 109 Mass. 1.

⁵ *Washburne's Easements and Servitudes*, 682.

⁶ *New York Bay Cemetery Co. v. Buckmaster*, 49

N. J. L. 449; s. c., 17 Am. & Eng. Corp. Cas. 214.

⁷ *Rayner v. Nugent & Brown*, 1 Am. & Eng. Corp. Cas. 267; *People v. Trustees*, 21 Hun, 185.

⁸ *Id.* 198. And see the late case of *McGuire v. Trustees of St. Patrick's Cathedral*, N. Y. Supreme Court, decided January 7, 1889, unreported.

⁹ *Ashby v. Harris*, L. R., 3 C. P. 523.

¹⁰ *Id.* 525; *Silverwood v. Latrobe*, 13 Atl. Rep. 161.

¹¹ *Antrim v. Malsbury*, 13 Atl. Rep. 180.

¹² *Burke v. Wall*, 29 La. Ann. 39.

¹³ *Richards v. Northwest Protestant Dutch Church*,

is in fee, ejectment can be maintained by the lot owner against the cemetery association if it remains in possession.¹⁴ And it has been held, in Massachusetts, that where a person makes an interment in a cemetery lot of which he holds possession under a deed, which sets forth that the grantee is entitled to the lot, *habendum* to him, his heirs and assigns, to his and their use, as a place for the burial of the dead, such person may maintain an action of tort in the nature of *quare clausum fregit* against the superintendent of the cemetery for disinterring the body placed therein, although there be a condition in the deed that the lot should not be conveyed without the consent of the cemetery association, and should be subject to its rules and regulations in regard to the care and management of the same.¹⁵ But where the owner of a tract of land, conveyed the same to trustees to be used as a grave yard, reserving a certain portion of it for the use of his family, and subsequently assigned his interest therein to a third person, it was held that such third person had no right of action against the cemetery trustees who, after notice, removed a fence erected by him around the lot in question, on the ground that the reservation by the grantor was personal to himself and his family and incapable of assignment.¹⁶ It has been held, in England, that the mortgagee of a burial ground has notice of the purposes to which it is devoted, and is bound by rights of burial, temporary or in perpetuity, granted by his mortgagor while left in possession, that an injunction will ensue to restrain such mortgagee from doing any act interfering with burial therein, and that he may be ordered to repair any damage that may have been done to the same with his orders.¹⁷

4. *Rights of Lot Owners in Alleys and Avenues.*—No interest in the alleys which separate one cemetery lot from others, besides the right of way, passes to any purchaser unless granted in the deed. If the language of the deed is ambiguous, evidence of the custom in other cemeteries is admissible as

32 Barb. 42; *Windt v. German Reformed Church*, 4 Sandf. Ch. 471.

¹⁴ *New York Bay Cemetery Co. v. Buckmaster*, 49 N. J. L. 449; s. c., 17 Am. & Eng. Corp. Cas. 214.

¹⁵ *Meagher v. Driscoll*, 99 Mass. 281.

¹⁶ *Pearson v. Hartman*, 100 Pa. St. 84; *Supplee v. Hansell*, 5 Norr. 384.

¹⁷ *Moreland v. Richardson*, 24 Beav. 33.

to the control and care exercised by the respective lot proprietors over alleys and avenues, and furthermore, remarks made during the negotiations for the sale, tending to convey the impression that if one person bought two or more adjoining lots the purchaser could close the alleys between them, will not estop the grantor from asserting his title, in defense of an action of trespass for disturbing the soil, where such remarks were made with no intention to authorize the closing of alleys to the detriment of other owners, or to convey an exclusive right in any alley without extra compensation therefor.¹⁸ It has been held, in Louisiana, that where a cemetery lot is sold with reference to a plan, on which plan appears a certain avenue leading up to, or close beside the lot, affording a convenient highway to and from it, that avenue becomes a servitude in favor of the lot, and cannot be legally obstructed.¹⁹

5. *Conveyances in Trust for Burial Purposes.*—It has been held, in California, that where land is conveyed by a municipality to trustees, to be used for cemetery purposes, a very small part of which was used for burials, and the trust relation was finally terminated by the abolishment of the cemetery, a conveyance of the property not used for burials should be made to the city.²⁰ And furthermore, when land is given in trust for a burial ground, such trust is not to be considered at an end, when the last body which can be buried therein has been deposited.²¹

6. *Dedication—Municipal Control.*—It was held in a Massachusetts case, that where land originally part of a private estate, had been enclosed and used for burial purposes for sixty years, it could be looked upon as a public burying ground, within the statute prescribing a punishment for the desecration of such spots.²² On the other hand, it has been held in the same State that the use of a parcel of land for growing trees and shrubs, cutting turf and as a place of deposit for stone, wood, and other material, to be ultimately used in improving and ornamenting the cemetery proper, is no dedication of such

¹⁸ *Seymour v. Page*, 33 Conn. 61; *Darnell v. Wood*, 1 Pick. 102.

¹⁹ *Burke v. Wall*, 29 La. Ann. 39.

²⁰ *Schlessenger v. Mallard*, 11 Pac. Rep. 728.

²¹ *Stockton v. City of Newark*, 9 Atl. Rep. 209, and cases cited.

²² *Com. v. Viall*, 2 Allen, 512.

land to such a purpose.²³ The Supreme Court of the United States held in an early case that, where the original plan of an addition to a town had been marked "for the Lutheran church," and had been used by the German Lutherans of the place as a place of burial from the dedication, although no church was erected upon it and by them cared for and protected, such act and occupation might be looked upon as a dedication to public and pious uses.²⁴ And it seems well settled, that the power of a municipality over an ancient burying ground within its bounds, extends only to its care and protection and the regulation of its use. The city cannot in default of legislative action sell the land, or release or extinguish the use to which it was dedicated, or employ it in any way variant from the purposes for which it was designed.²⁵ And, of course, municipal authorities have no control over cemeteries established beyond the corporate limits.²⁶

7. *Removal of the Dead.*—The legislature has power to authorize the removal of the remains of the dead from cemeteries, and may delegate such power to municipalities.²⁷ A lot holder is not entitled to any compensation out of the proceeds of the sale of a cemetery for improvements or erections placed on his lot, although it would rightly seem that he might claim the amount originally paid for the burial license. All monuments, tombs, and the like, capable of removal, being personal property, may be taken away, upon the lot ceasing to be used for the purpose of burial.²⁸ And where under a legislature act it was provided that no application for the removal of dead bodies from the burial grounds of religious societies should be made under the provisions of said act, "except in pursuance of the wishes of a majority of the members of such society or church, expressed at a church election held for that purpose, after two weeks' public notice," it was held that majority, meant of

those present and voting, and that a notice from the pulpit on a Sunday was sufficient public notice of the holding of the meeting.²⁹

8. *Legislative Control over Church Property Held in Trust.*—When church property is held in trust for the general purposes of a given society, and cannot otherwise be conveyed, the legislature has constitutional power to authorize the trustees thereof to sell its edifices and burial ground in order that the avails may be reinvested, or otherwise appropriated to the purposes of the trust.³⁰ And where such a legislative act has been accepted by a majority of the pew holders, they ordinarily have authority to sell the property.³¹

9. *Police Control over Burial Places.*—Rights of burial under churches or in public burial grounds are so far public, that private interests in them are subject to the control of the public authorities having charge of police regulations.³² Thus, in one case, where land had been conveyed for a church and cemetery in 1776, and in 1823 the legislature prohibited the use of the cemetery, it was held that such prohibition was constitutional.³³ In another New York case, an act which had been passed in respect to Trinity and other church-yards, authorizing the city of New York to enact by-laws in restraint of burials, was held to be constitutional, resting upon the same ground, of the right of the legislature to provide for the suppression of nuisances, and make provisions for the public health.³⁴ It has also been held in the same State, that a conveyance by a municipality of lands for a church site and cemetery, with a covenant for quiet enjoyment, cannot stand in the way of a subsequent legislative act prohibiting the use of the lands in question for cemetery purposes, and that such act

²³ *Craig v. First Presbyterian Church*, 88 Pa. St. 42.

²⁴ *Sohler v. Trinity Church*, 109 Mass. 15; *Rice v. Parkman*, 16 *Id.* 326; *Pine Street Congregational Society v. Weld*, 12 Gray, 570.

²⁵ *Sohler v. Trinity Church*, 109 Mass. 17.

²⁶ *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 192. And see *Com. v. Alger*, 7 Cush. 53; *Fisher v. McGerr*, 1 Gray, 1; *Vandine, Petitioner*, 6 *Id.* 187; *Nightingale, Petitioner*, 11 *Id.* 168; *Salem v. E. R. R. Co.*, 98 Mass. 431; *Dingley v. Boston*, 100 *Id.* 544; *Cooley on Constitutional Limitations*, 594; *Brick Presbyterian Church v. New York City*, 5 Cowen, 588; *Coates v. New York City*, 7 *Id.* 585; *Windt v. German Reformed Church*, 4 Sandf. Ch. 471; *Kincaid's Appeal*, 66 Pa. St. 411.

²⁷ *Brick Presbyterian Church v. New York City*, 5 Cow. 585.

²⁸ *Coates v. New York City*, 7 *Id.* 585.

²³ *Woodlawn Cemetery v. Everett*, 118 Mass. 362.

²⁴ *Beatty v. Kurtz*, 2 Peters, 565. And see *Trustees v. Walsh*, 57 Ill. 366.

²⁵ *Stockton v. Newark*, 9 Atl. Rep. 203; *Com. v. Viall*, 2 Allen, 512; *Campbell v. Liverpool*, L. R. 9 Eq. 579.

²⁶ *Bergein v. City of Anderson*, 28 Ind. 79.

²⁷ *Craig v. First Presbyterian Church*, 88 Pa. St. 42.

²⁸ *Partridge v. First Independent Church of Baltimore*, 30 Md. 640. See also *Barnes v. Barnes*, 6 Vt. 388; *Ashman v. Williams*, 8 Pick. 402; *Prince v. Case*, 10 Conn. 375.

cannot be looked upon as a breach of the covenant which entitles to damages.³⁵

11. *Enlargement of Cemeteries*.—Where it is sought to enlarge a cemetery, the members of the cemetery association having the right of burial therein have sufficient interest in the subject-matter to qualify them to petition for the enlargement, although the fee may be in others who are not members of the association, as where said cemetery is a part of a private estate. Such a proceeding would not affect any rights in the old ground, and whether the right of burial in the old ground be in the public or in private individuals, the part added will be public, subject to the regulations of the association. Therefore, the taking of land for such enlargement will not amount to the taking of private property for private use.³⁶

10. *Exemption from Taxation—Local Assessments*.—Numerous cases are to be found in the books construing legislative acts, exempting the property of cemetery associations from taxation. It has been ordinarily held, that such exemption has relation to taxation for revenue purposes, and does not extend to an assessment for local improvements.³⁷ And that such exemption also covers all permanent improvements, which are essential to the use and enjoyment of the land, for the purpose contemplated in the

cemetery charter, such as the dwelling of the superintendent, gate houses, and the like.³⁸ We find it laid down in Illinois, however, that tracts of land belonging to a cemetery company located some distance from the cemetery proper, are not exempt from taxation, when the same are only used to supply sand, mold and turf, to be employed in improving that portion of the cemetery property used for burial purposes. And it was furthermore held to make no difference that the company had the right under its charter to hold 500 acres of land, it having in actual use about 100 acres only. It was observed by the court: "The act must receive a reasonable construction—one that will carry out the object and purpose of the charter, and at the same time protect the public from imposition by the mere pretenses of the corporation, that its interests require 400 acres of land to be held subservient to a tract of 100 acres in actual use."³⁹ On the other hand, such portions of existing burial grounds as are not actually in use but are within the same enclosure, and likely to be at any time devoted to interments, naturally come within a law exempting cemetery property from taxation.⁴⁰ But such would not be the case where only one acre out of forty was used for burial purposes.⁴¹ It has been held in New York, that it is proper to assess the expense of a sidewalk laid alongside a cemetery to the cemetery association, rather than a portion to lot owners, where such owners simply have the right of interment, the fee remaining in the cemetery association.⁴² Such is the law also in England.⁴³ And it has furthermore been decided in New Jersey that, where the charter of a cemetery provides "that the premises, burial lots, vaults, monuments and other erections and fixtures of said cemetery shall not be subject to any assessments, taxes and fines, unless otherwise ordered by the board of chosen freeholders of the county of Essex," such provision has none of the characteristics of a contract with the State,

³⁵ *Presbyterian Church v. City of New York*, 5 Cow. 588; *Coates v. Mayor of New York*, 7 *Id.* 584.

³⁶ *Edwards v. Stonington Cemetery Association*, 20 Conn. 465.

³⁷ *Lima v. Lima Cemetery Association*, 5 Am. & Eng. Corp. Cas. 550; citing *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503, 506; *Roosevelt Hospital v. Mayor*, 84 *Id.* 108, 115; *People v. Davenport*, 91 *Id.* 574, 588; *Reclamation District v. Goldman*, 61 Cal. 205, 208; *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Boston, etc. Society v. Boston*, 166 Mass. 181; s. c., 17 Am. Rep. 153; *Patterson v. Society*, 24 N. J. L. 385; *State v. Newark*, 35 N. J. L. 185; *State v. Elizabeth*, 87 N. J. L., 330; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Pray v. North. Liberties*, 31 *Id.* 69; *Greensburgh v. Young*, 53 *Id.* 280; *Olive Cemetery Co. v. Philadelphia*, 93 *Id.* 129; *Miller v. Kirkpatrick*, 5 Casey, 226; *Orange, etc. R. Co. v. Alexandria*, 17 Gratt. 176; *Matter of College Street*, 8 R. I. 476; *Crowley v. Copley*, 2 La. Ann. 329; *Lafayette v. Male Orphan Asylum*, 4 *Id.* 1; *Yeatman v. Crandall*, 11 *Id.* 220; *Lockwood v. St. Louis*, 24 Mo. 20; *St. Louis Pub. Schools v. St. Louis*, 26 *Id.* 468; *Sheehan v. Good Samaritan Hospital*, 50 *Id.* 155; s. c., 11 Am. Rep. 412; *Barry v. Wesleyan Cemetery Assn.*, 10 *Id.* 587. And generally, *Price v. Methodist E. Church*, 4 Ohio, 515; *Hullman v. Honcomp*, 5 Ohio St. 235; 12 Moak's Eng. Rep. 665; 2 Wait's Act. & Def. 127-133; 2 Dillon on Mun. Corp. § 777; 2 Bishop's Crim. Law, §§ 1188, 1190.

³⁸ *Appeal Tax Court of Baltimore v. Baltimore Cemetery Co.*, 50 Md. 432; *Hoboken v. North Bergen*, 43 N. J. L. 146.

³⁹ *People v. Cemetery Co.*, 86 Ill. 337.

⁴⁰ *Hoboken v. North Bergen*, 43 N. J. L. 146.

⁴¹ *Murray v. Churchman*, 52 Iowa, 288.

⁴² *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 505.

⁴³ *Reg. v. St. Mary Abbots*, 12 A. & E. 824; *Reg. v. Abney Park Cemetery Co.*, L. R. 8 Q. B. 515.

being simply an attempt to delegate to a subordinate public body, the power to tax the cemetery which if not valid is unquestionably repealable.⁴⁴ But where the charter of a cemetery company contains a clause which states that the ground "when used as a place of sepulchre shall be exempt from taxation excepting for State purposes," such exemption will cover an assessment for the construction of a sewer.⁴⁵ But it has been held in Kentucky, that "a municipal corporation has no power to charge a cemetery company with the cost of grading and paving an adjacent street, and that a court of equity will not decree a sale of a lot in such a cemetery to enforce such a lien, and this on the ground "that the court ought not to offer that for sale which it will not allow to be used by the purchaser for any purpose, that can be of the slightest value to him," in the face of a statute prescribing penalties in all cases where graves, tombs, monuments, etc., shall be mutilated or destroyed.⁴⁶

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⁴⁴ State (Mount Pleasant Cemetery Co., Prosecutor) v. Mayor, etc. of Newark, 18 Am. & Eng. Corp. Cas. 206.

⁴⁵ Olive Cemetery v. Philadelphia, 93 Pa. St. 129. See also Dolan & Fay v. Mayor, etc. of Baltimore, 4 Gill (Md.) 394.

⁴⁶ City of Louisville v. Nevin, 2 Cent. L. J. 108. But see Lima v. Lima Cemetery Assn., 5 Am. & Eng. Corp. Cas. 547.

JUDGMENT — RES ADJUDICATA — EQUITY — CONTRACTS—SPECIFIC PERFORMANCE.

FISHBURNE V. FERGUSON.

Supreme Court of Appeals of Virginia, August 23, 1888.

1. *Judgment — Res Adjudicata.* — A decree of a court of equity, cancelling a deed of real estate because of insanity of the grantor, existing at the date of its execution, does not conclude the rights of the grantees to claim in a subsequent suit the specific performance of the agreement to convey such real estate, made by the grantor before he became insane, where such relief could not have been granted under the pleadings in the former suit.

2. *Equity—Contracts—Specific Performance.* — An oral agreement, made by a childless widower, sixty years old, to his niece and her husband, to convey his home to them, in consideration that they would give up their own home and live with and care for him in his old age, will be specifically enforced in equity upon the performance of such consideration by the promisees, who have also made valuable improvements upon the property.

LACY, J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Roanoke city, rendered at the April term, 1888. On the first Monday in February, 1886, the appellants filed their bill in the hustings court for the city of Roanoke, against the appellees, to have specific performance of a parol agreement made about the 1st day of April, 1880, by which Isham M. Furguson had contracted with them, to give and grant unto them his house and lot of six acres of land, and the furniture therein, upon the condition of their giving up their own home, and living in his, the said Furguson's, house, to protect, provide for, and take care of the said Furguson, an old man, then diseased, childless, and a widower, much distressed and upset by the recent death of his wife; which agreement was consummated by the delivery of possession to the said plaintiffs, and their change of circumstances, by abandoning their own home, and by the sale of it; and the expenditure by them of large sums of money in erecting and constructing valuable improvements on the said house and lot, with the approbation of the said Furguson; such as refencing the said lot, erecting a small house thereon, and roofing the dwelling-house with slate, and repainting the same, which cost them \$1,000. And that they cared for the said Furguson in sickness and in health until his decease. That he, the said Isham M. Furguson, was in sound mind, and competent to contract when this contract was made; and afterwards, on the 15th of September, 1880, when his mind was perfectly sound, he voluntarily executed a deed of conveyance, conveying to them the said house and lot and furniture in effectuation of the said parol contract. That the said Isham M. Furguson having had an attack of mental aberration about the 1st of May, 1880, and another, lasting a few hours, about the 10th of August, 1880, after his death, his brothers and his sister, the two Fergusons, and Mrs. Tench, brought suit in the county of Franklin to set aside the said deed of conveyance to the appellants, Fishburne and wife, upon the ground that the grantor therein, their brother, Isham M. Furguson, was insane and incompetent to execute it, in which they succeeded, and the same was set aside, and the decision affirmed on appeal by this court. 4 S. E. Rep. 575. But that there was no evidence adduced, and none can be adduced, tending to show any unsoundness of mind on the part of Isham M. Furguson at the time the parol agreement was made; and, the deed having been set aside for a cause which did not vitiate nor in anywise affect the parol agreement to convey, that they were entitled, upon well settled principles, to have the said agreement, which was upon a valuable consideration and fully executed on their part, specifically performed. The defendants demurred to the bill, and depositions were taken in the cause; whereupon, for reasons personal to the judge of Roanoke city, which rendered it improper in his opinion for him to preside at the trial, and decide the cause, it was removed

to the circuit court of Roanoke; when the said circuit court, at the December term, 1886, overruled the demurrer so far as it rested upon the ground that this suit had been concluded by the suit to set aside the deed; but so far as it rested upon an alleged variance between the contract set up in the bill, and the one set forth in the deed alleged to be in furtherance of the said agreement, sustained the said demurrer, and granted leave to amend. An amended bill having been filed, and the defendants having filed their answer, by decree in the cause rendered at the April term, 1888, the demurrer was overruled, and the bill of the plaintiffs dismissed for reasons which the decree recites are in writing and made a part of the record, but which do not appear therein. Whereupon, the appellants, Fishburne and Callie, L., his wife, applied for and obtained an appeal to this court.

It is sought to maintain the decree of the circuit court—First, upon the ground that the decision in the Franklin county case is conclusive of this case, and the question here is *res adjudicata*; and, secondly, because the contract sought to be enforced is not such as a court of equity should enforce, because it is not fair and equal; that full possession did not accompany it, and because the conduct of the parties procuring it was not such as would entitle them to the aid of a court of equity; and, if fair, certain, and just in all its parts, still is not sufficiently proved.

It is necessary, first, to consider whether this suit is concluded by the suit referred to in Franklin county; for, if the question is *res adjudicata*, the whole matter end there; for, when a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails with very few exceptions throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case; and when the facts which constitute the cause of action or defense have been between the same parties submitted to the consideration of the court, and passed upon by the court, they cannot again be the proper subject for an action or defense, unless the finding and judgment of the court are opened up or set aside by competent authority. This principle of law extends still further in quieting litigation. A party cannot relitigate matters which he might have interposed, but failed to do in a prior action between the same parties, or their privies, in reference to the same subject-matter. *Bates v. Spooner*, 45 Ind. 493, 7 Rob. Pr. 172; *Hopkins v. Lee*, 6 Wheat. 109. Courts of justice do not, in stating the rule, always employ the same language; but when every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings in the first suit, and might have been presented at that trial, the matter must be considered as hav-

ing passed *in rem judicatem*, and the former judgment in such a case is conclusive between the parties. *Aurora City v. West*, 7 Wall. 92, 103; *Lee v. Kingsbury* 13 Tex. 68; *Blackwell v. Bragg*, 78 Va. 529. Mr. Wells, in his work on this subject, says (section 252): "The first step in determining whether the matter might have been decided in the prior action is to ascertain whether it was relevant or not; that is, whether it was within the scope of the pleadings. So that, when one sets up, in a subsequent suit, a former judgment, he must show that the matter alleged by the other party either was actually litigated, or that it might have been under the issues; it being only matters involved in the issues that are regarded as *res adjudicata*." And the general language of a decree will be restrained to the issue made, and the subject-matter under consideration when it was rendered.

The original record in the Franklin suit, by Furguson's Adm'r and others v. Jacob A. Furguson and others, was by consent brought here with this cause, so that the depositions therein may be read in this cause. Upon looking into that suit, the bill is filed to set aside and annul the conveyance of September, 1880. An issue was directed out of chancery to try the following issues: (1) Whether the deed in the proceedings mentioned, from Isham M. Furguson to T. T. Fishburne and C. L. Fishburne, was obtained by fraud or undue influence. (2) Whether or not, at the time of the execution of the said deed, the grantor, Isham M. Furguson, was incapable, by reason of disease, old age, or other causes, of clearly understanding the purport and object of the deed. The jury found the following verdict, which was recorded and approved by the court: "We, the jury, find for the defendants on the first issue; but find that Isham M. Furguson, on the 13th September, 1880, was incapable of understanding the purport and object of the deed executed by him on that day to Tipton T. Fishburne and Callie, his wife, and we therefore find for the plaintiffs on the second issue." On appeal, the decree of the court below rendered on this verdict was affirmed.

It appears from the foregoing statement of the issues and judgment thereunder in the first suit that the sole question in issue there was as to the validity of the said deed, and the sole finding therein was that the said deed was not valid and binding on the grantor and those claiming as his heirs at law, because of his mental incapacity at the time of its execution. The question as to the validity of this deed was the sole question in the case to be determined, and the question in this suit as to the parol partly executed contract, for the conveyance of the said house and lot, etc., was not in anywise pertinent to the issue. If evidence of it had been offered, it must have been excluded, under the scope of the pleadings in that case; and whenever any attempt was made to refer to this, in the course of taking the testimony, it was promptly objected to as irrelevant. It was excepted to, and properly ruled out, as it could

not have been introduced under the pleadings in that cause. But it is suggested that it might have been brought in by way of defense to the action by a cross-bill, by the defendants setting it up against the plaintiffs. But this would have been, in effect, the institution of a new suit, making new pleadings, which would have been independent of the pending suit; and the original bill might have been dismissed, and the cross-bill remain unaffected, and the court might have proceeded to decree upon the issues in the cross-bill. A cross-bill is proper whenever the defendants, or either of them, have equities arising out of the subject-matter of the original suit, which entitle them to affirmative relief which they cannot obtain in that suit. *Ragland v. Broadnax*, 29 Grat. 420. In a subsequent case, decided in the court of appeals of West Virginia (*Land Co. v. Vinal*, and *Vinal v. Land Co.*, 14 W. Va. 637), the subject is elaborately treated by Green, J., and upon this subject the foregoing case is followed. Such a bill is an auxiliary suit brought by the defendants for their purposes, and such they might have brought if they were so advised; and the controversy would have been a distinct controversy, arising under the issues therein, upon which the court might have decreed after the original bill had been dismissed or otherwise disposed of. They were not obliged to bring their suit in this way, however. The question thus to be raised was distinct from the issue made by the suit against them, and the decision of that suit, therefore, in nowise affected their rights in this regard, which stood on wholly distinct and unconnected ground. And they have a right now to maintain this suit, upon the same or kindred principles which entitled them, if they had been so advised, to have filed their cross-bill in the other suit. They had a right to take either course, but, it would seem, not both. If they had pursued the one and brought the matter into that suit, and it had been decided, it would have been *res adjudicata*, and they would have had no right to pursue the other. The case of *Stearns v. Beckham*, 31 Grat. 381, is referred to by counsel, and is a case in point. On the 29th of November, 1862, the vendor agreed to sell, for \$100,000, a tract of land, and received \$45,000 in cash, with the understanding that the residue, \$55,000, should be paid in ten days. On the 3d of December following the vendor was stricken with paralysis; but the matter was carried on, and the \$55,000 was paid, and the deed made and possession given of the land. Thus the matter stood for some years, when the grantor, growing worse, a committee was appointed for him, and in September, 1866, the said committee instituted his suit to set aside the deed, on the ground of mental incapacity of the grantor at the time of its execution, and also to have the contract rescinded, because of improper influences exercised over him, and the inadequacy of consideration. The court set aside the deed, and directed that the vendees should surrender the land, unless within ninety days they

should file a bill for the specific execution of the contract, which bill for specific execution was filed; and in that case, while the contract was not specifically executed, the vendees were required to make restitution of the money they had received, which was declared to be a lien on the land. Notwithstanding the cancellation of the deed because of imbecility of the grantor at the date of its execution, such action was held not to have concluded or to have adjudged the rights of the parties to claim the specific execution, of the agreement made under different circumstances; that is, before the stroke of paralysis which wrought the imbecility. So, in this case, the cancellation of the deed, because of incompetency existing at the date of its execution, does not affect in anywise a contract made and performed before any incapacity or insanity had set in; and we think the plaintiffs have a right to maintain this suit.

Upon the question as to whether this contract is such as should be specifically performed in the light of the decided cases, we have no doubt. An agreement, to be entitled to be carried into specific performance, ought to be certain, fair, and just in all its parts. It is not considered as a matter of right in either party; but it is matter of discretion in the court; a matter of sound and reasonable discretion, which grants relief according to the circumstances of each particular case. Courts of equity will not decree a specific performance in cases of fraud or mistake, or of hard or unconscionable bargains; or when the decree would produce injustice; or when it would compel the party to an illegal or immoral act; or when it would be against public policy; or when it would involve a breach of trust; or when a performance has become impossible; and generally not in any cases when such a decree would be inequitable, under all the circumstances. 2 Story, Eq. Jur. § 769; Sndg. Vend. ch. 3, § 4, p. 123. In this case an old man sixty-six years of age, a widower, and childless, finds himself, upon the death of his wife, lonely and unhappy in their former home. He has relatives who appear to have been anxious to get a share of his property at his death, but they do not fill the measure of his need. His wife's niece, the appellant Mrs. Fishburne, had been reared in his house from early childhood, had been married a short time before his wife's death to T. T. Fishburne, who was a *protege* of his, and they together had gone to live in their own home. Needing womanly ministrations about his home, he said this foster child was most suited to his wants. She knew his ways; he knew her; there was nothing strange between them; and he asked her to give up her home, and come to his house, and with her husband make it a home for him, provide for him, feed him in health, nurse him in sickness. He might live for years; he might survive a short time only. For this care and nurture he could not offer hire or wages. He wanted a daughter, not a servant; and he agreed to give this property

to the two; to be a home for him and for them as long as he lived, and for them when he died. He was otherwise wealthy, and this was but a small part of his estate. They fully performed on their part—left their home, changed their circumstances, and, with unchallenged kindness and affection, cared for him tenderly as long as he lived. He made them a deed to the property; but, before this was done, old age and disease had made more rapid strides than he thought, and he has been adjudged to be incompetent, by reason of mental and bodily infirmity, to make a deed in September, 1880. But there is not a hint in all the evidence in the cause that he was in anywise affected mentally or bodily when he made this contract. All his maladies came long afterwards. He received, at the hands of Fishburne and wife all he bargained for; and much or little, speaking generally, it was a great deal to him in his old age, his loneliness and infirmity. It was what in his right mind, in unimpaired mental and bodily vigor, he agreed to give this house and lot for, and to which he did give a deed. Why should this contract not be enforced? These parties have expended their money on it, and greatly improved it. They have fully performed on their part, and the contract should be specifically executed. The principles upon which this should be decreed are fully set forth in the late case of *Halsey v. Peters*, 79 Va. 66, and authorities cited. *Burkholder v. Ludlam*, 30 Grat. 225. The first named case was similar to this in its details, and the contract was there specifically executed by decree of this court.

The decree of the circuit court of Roanoke city having dismissed the bill of the plaintiffs, the same will be reversed and annulled, and a decree rendered here in accordance with the foregoing opinion.

NOTE.—The peace of society demands that there should be an end of litigation and for this reason the doctrine of *res adjudicata* is enforced, that a judgment in a suit is conclusive upon parties and their privies.¹

A question contested and determined in one case is determined, so far as the parties to the same are concerned, for all time and purposes. It cannot be ground over and over again in another action, and a decision on the merits of a question estops parties and privies to maintain or allege anything to the contrary in any other litigation between them.²

Much doubt and uncertainty exists in judicial decisions as to the limits within which the conclusive effect of a judgment is confined by law. It is held in one class of decisions, that the judgment is conclusive as to all questions which are material to the issues as formed by the pleadings, and which the parties had an opportunity of bringing before the court.³

¹ Greenleaf on Evidence, § 522.

² *Neal v. Foster*, 38 Fed. Rep. 32; *Outram v. Morewood*, 3 East, 346; *Cromwell v. County of Sac*, 94 U. S. 351; *Willson v. Dean*, 121 U. S. 525; *Bigelow on Estoppel*, 84; *Duchess of Kingston's Case*, 60 State Trials, 538; *Bank of United States v. Boverly*, 1 How. 184; *Farrish v. Ferris*, 3 Black. 606; *Gelston v. Hoyt*, 3 Wheat. 246; *Hopkins v. Lee*, 6 Wheat. 109; *Stockton v. Ford*, 18 How. 418; *Harshman v. Knox County*, 55 Cent. L. J. 176.

³ *Aurora City v. West*, 7 Wall. 82; *Shenandoah R. Co.*

The binding effect of a judgment has even been extended still further to include matters not set forth in pleadings so as to admit proof and call for an actual decision upon them, and where in an action for specific performance the defendant has before action brought disposed of part of the real estate and all the relief asked in the complaint and granted in the judgment was the conveyance of real estate not so disposed of, that judgment is a bar to a subsequent action to recover damages for such disposition of real estate.⁴

The rule, now generally, if not universally, conceded and supported by the preponderance of authority is that stated by Justice Miller, in his dissenting opinion in the case of *Aurora City v. West*.⁵

"When a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or to be made to appear by extrinsic proof that it was in fact decided."⁶

A distinction is made between cases where the second action between the same parties is upon the same demand or claim, in controversy in the former action, and where it is founded on a different claim or demand of a similar nature. In the first case the judgment in the first suit is conclusive as to all matters which were actually presented, and also those which might have been presented, while in the second case the judgment is conclusive only as to those questions actually litigated and determined in the original action.⁷

The foregoing principles are best illustrated by a reference to decided cases in which they were applied. Where a widow, an heir, was made a party defendant in a partition suit, and was served and failed to appear and partition was had, such decree is a bar to a subsequent action for dower.⁸

A counterclaim cannot be made the subject of an independent action when it results from an alleged contract, the existence of which in material parts is negatived by a prior judgment. Thus an action by a tenant for breach of verbal agreement to repair, is barred by a prior judgment in a proceeding to dispossess him.⁹

In an action by a physician for services rendered, the defense of malpractice is barred by a judgment on the merits for the physician in a suit brought against him by the patient for malpractice in the same service.¹⁰

Judgment in trespass for an unlawful sale of property to pay a school tax, is an estoppel to an action against school district in *assumpsit* for the amount of such tax.¹¹

Occupants who fail to set up a claim for improvements in an action by one claiming under paramount title, are barred by judgments therein.¹²

A bill for specific performance of a contract under seal, alleging that it has never been rescinded but containing an alternative prayer for repayment of money paid under it, which has been dismissed after

v. Griffith, 76 Va. 919; *Knitsinger v. Brown*, 72 Ind. 466.

⁴ *Thompson v. Myrick*, 24 Minn. 4.

⁵ 7 Wall. 106.

⁶ *Cromwell v. County of Sac*, 94 U. S. 351; *Steam Packet Co. v. Sickles*, 24 How. 333; *Hubbard v. Flint*, 58 Miss. 286; *Hickerson v. City of Mexico*, 58 Mo. 65; *Freeman on Judgments*, §§ 273, 274, and cases cited; *Duchess of Kingston's Case*, 2 Smith's Leading Cases, from page 791 to end of volume.

⁷ *Cromwell v. County of Sac*, 94 U. S. 357.

⁸ *Jordan v. Van Epps*, 85 N. Y. 437.

⁹ *Nemetty v. Taylor*, 63 How. Pr. 387.

¹⁰ *Haynes v. Ordway*, 58 N. H. 167.

¹¹ *Rendall v. School District*, 75 Me. 368.

¹² *Raymond v. Ross*, 40 Ohio St. 343.

a hearing on the merits, is no bar to an action at law to recover money so paid on the ground of the rescission of the contract.¹³

Extrinsic and parol evidence is admissible to prove what issues were actually tried and determined, and given to the jury.¹⁴

So it may also be shown by parol, that a claim though set out in the former record, was not submitted for adjudication, and hence was not covered by the judgment.¹⁵

Thus, where two or more causes of action are sued for in the same declaration, and a general judgment and verdict is rendered, it is *prima facie* evidence only of the adjudication of every demand which might have been drawn in controversy under it, but may be met by evidence tending to show that any particular demand was not presented or considered.¹⁶

A finding not involved in the issue of a case is no bar to a later adjudication.¹⁷

But when a question is presented by a bill in equity, urged and relied upon in the argument and passed upon by the court in the opinion, it cannot with reason be said that the point was not involved, and that the opinion of the court on the question is *obiter dictum*.¹⁸

It is of no consequence in what form a claim was presented, or defense made in a former suit. If it was in issue and actually litigated and decided, it binds the parties in subsequent proceedings.¹⁹

Thus if the question has been presented on a motion and decided it is *res adjudicata*.²⁰ Final judgment on demurrer for plaintiff is a bar to another action,²¹ but it is no bar if given for defendant.²² An adjudication in a former suit in which a certain account was presented as a set-off is a bar to a suit based on the same account.²³ What has been determined against a party in a former suit, cannot in a subsequent action be set up by way of counterclaim.²⁴ Nor can a matter once decided in a suit be opened in a second suit between the same parties where they have changed sides,²⁵ or where the object of the second suit is different.²⁶

Specific Performance.—An application for the specific performance of a contract is addressed to the sound discretion of a court of equity, and even where a legal contract is shown to exist, it will not be granted as a matter of course.²⁷ Such discretion is not to be exercised arbitrarily but in accordance with the facts established, and in accordance to such principles as

are applicable to the facts.²⁸ One of these principles is that the contract must be certain and unambiguous, both in the description of the property and the estate conveyed,²⁹ and must be capable of being performed.³⁰ The certainty requisite in a contract which is the subject of adjudication in a court of equity is greater than in a suit at law.³¹ But this certainty need be only a reasonable one, satisfactory to the court in regard to the subject-matter of the contract and the circumstances under which it was entered into.³² It must be founded upon a valuable consideration.³³ A good consideration, as distinguished from a valuable consideration, such as love and natural affection, will not be sufficient.³⁴ So the mere expression of an intention to make a gift of land without further proof that the promisee expended money or labor on the faith of it, will not support a specific performance.³⁵ Mere inadequacy of price furnishes no ground for refusing a specific performance of a contract.³⁶ But an unconscionable bargain, or one that will produce injustice or hardship, will not be enforced.³⁷ When the consideration is inadequate, evidence of the contract must be especially clear and satisfactory.³⁸ A party who seeks the aid of a court of equity to have a contract specifically performed, must bring himself within the equitable maxim that "he who seeks equity must do equity," and must, therefore, show that he has performed the acts which formed the consideration of the contract,³⁹ and should not be guilty of delay in making the application.⁴⁰

It is well settled that equity will compel the performance of a promise, whether written or oral, to give land to another who, relying thereon, has entered into possession, made improvements, expended money on its account and thereby changed his condition in life.⁴¹ The improvements ought to be of greater value than the use and occupation of land, when entered on the faith of a verbal grant.⁴² Where the husband makes

²⁸ *Paris v. Haley*, 61 Mo. 461.

²⁹ *Preston v. Preston*, 95 U. S. 200; *Los Angeles Assn. v. Phillips*, 56 Cal. 539; *Brown v. Brown*, 38 N. J. Eq. 650.

³⁰ *Mastin v. Halley*, 61 Mo. 196; *Pomeroy Eq. Jur.* 1405.

³¹ *Mastin v. Halley*, 61 Mo. 196.

³² *Paris v. Haley*, 61 Mo. 463.

³³ *Minturn v. Seymour*, 4 Johns. Ch. 497; *Lear v. Chouteau*, 23 Ill. 39; *Butman v. Porter*, 100 Mass. 337.

³⁴ *Kennedy v. Ware*, 1 Barr, 453; *Morris v. Lewis*, 38 Ala. 53; *Bispham Eq.* § 373.

³⁵ *Galloway v. Garland*, 104 Ill. 375.

³⁶ *Erwin v. Parham*, 12 How. 197.

³⁷ *Snell v. Mitchell*, 65 Me. 43; *Miss. R. Co. v. Cromwell*, 91 U. S. 643; *Cameron Coal Co. v. Emanuel*, 49 N. Y. (Superior Ct.) 77.

³⁸ *Cole v. Cole*, 106 Ill. 462.

³⁹ *Colson v. Thompson*, 2 Wheat. 336; *Vawter v. Bacon*, 89 Ind. 565; *Watts v. Waddle*, 6 Pet. 389; *Reeves v. Kimball*, 40 N. Y. 299; *King v. Ruckman*, 21 N. J. 599; *Rogers v. Taylor*, 40 Iowa, 193; *Jenkins v. Harrison*, 66 Ala. 345; *McComas v. Easley*, 21 Gratt. 23; *Allen v. Atkinson*, 21 Mich. 351.

⁴⁰ *Alexander v. Hoffman*, 70 Ill. 114; *Hedenberg v. Jones*, 73 Ill. 149; *Marshall v. Peck*, 91 Ill. 187.

⁴¹ *West v. Bundy*, 78 Mo. 407; *Freeman v. Freeman*, 48 N. Y. 34; *Galbraith v. Galbraith*, 5 Kan. 402; *Hardesty v. Richardson*, 44 Md. 617; *Shepherd v. Berlin*, 9 Gill, 32; *Langston v. Bates*, 84 Ill. 524; *Bright v. Bright*, 41 Ill. 97; *Hiatt v. Williams*, 72 Mo. 214; *Sluder v. Steyer*, 69 Ga. 125; *Dunn v. Stevens*, 94 Ind. 181; *Cannon v. Collins*, 3 Del. Ch. 132; *Campbell v. Felterman*, 20 W. Va. 398; *Sutton v. Myrick*, 39 Ark. 424; *Lorentz v. Lorentz*, 14 W. Va. 761; *Hanlon v. Wilson*, 10 Neb. 138; *Patterson v. Copeland*, 15 How. Pr. (N. Y.) 460; *Dozier v. Matson*, 94 Mo. 328, and cases cited.

⁴² *Eason v. Eason*, 61 Tex. 225.

¹³ *Ballou v. Billings*, 136 Mass. 307.

¹⁴ *Foye v. Hatch*, 132 Mass. 106; *Merchants' Bank v. Schulenburg*, 48 Mich. 103; *Hickerson v. Mexico*, 58 Mo. 61; *Armstrong v. St. Louis*, 3 Mo. App. 100.

¹⁵ *Paine v. Insurance Co.*, 12 R. I. 440; *Lightford v. Wilmot*, 23 Mo. App. 5.

¹⁶ *Dickinson v. Hayes*, 31 Conn. 423; *Hungerford's Appeal*, 15 Am. Law Reg. 79. See note, 3 Cent. L. J. 263.

¹⁷ *Yeates v. Briggs*, 95 Ill. 79.

¹⁸ *Almy v. Daniels*, 23 Cent. L. J. 528.

¹⁹ *Harriman v. Roberts*, 52 Md. 64.

²⁰ *Wilson v. McIntosh*, 30 Kan. 234; *Johnson v. Latta*, 84 Mo. 139.

²¹ *Smith v. Hornsby*, 70 Ga. 552; *Dixon v. Zadik*, 59 Tex. 529.

²² *Los Angeles v. Mellus*, 59 Cal. 444.

²³ *Miller v. Ticker*, 14 Ill. App. 558.

²⁴ *Worrel v. Smith*, 6 Colo. 141.

²⁵ *Hayner v. Stanley*, 8 Sawyer C. C. 214.

²⁶ *Re Roberts*, 59 How. Pr. 136.

²⁷ *Bowman v. Cunningham*, 73 Ill. 48; *Abbott v. L'Houmedieu*, 10 W. Va. 677; *Iglehart v. Vasil*, 73 Ill. 63; *Thurston v. Arnold*, 43 Iowa, 41; *Sweeny v. Ohara*, 43 Iowa, 34; *Vincent v. Larson*, 1 Idaho (N. S.) 241; *Goodwin v. Collins*, 3 Del. Ch. 189; *Pomeroy on Eq. Juris.* § 1404; *Shenandoah R. Co. v. Lewis*, 76 Va. 833.

improvements relying on a promise made to his wife, in a suit for specific performance, she can have the benefit of these improvements as if paid for in part by herself.⁴³ The heirs of a grantee can also enforce the performance of a promise made to him.⁴⁴ The ground upon which equity enforces the performance of an oral agreement to convey land in violation of the statute of frauds is that of equitable fraud. To refuse a decree enforcing the performance of a promise when another relying upon it had altered his condition would operate as a fraud upon him, and place him in a situation for which he could not obtain compensation at law.⁴⁵

DAVID PLESSNER.

⁴³ *Murphy v. Stever*, 47 Mich. 523.

⁴⁴ *Bohanon v. Bohanon*, 96 Ill. 591.

⁴⁵ *Campbell v. Feltzman*, 20 W. Va. 396; *Sutton v. Myrick*, 39 Ark. 424; *Williams v. Morris*, 95 U. S. 444; *Dougherty v. Harsel*, 91 Mo. 161; *Anderson v. Schockley*, 82 Mo. 250.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

Under the title of "correspondence" in No. 8 of the current volume of your JOURNAL, Mr. Jno. B. Fithian, of Joliet, Ill., undertakes to correct what appears to him to be an erroneous statement of the law in Illinois made by the writer of the leading article on the "Statute of Limitations in Mortgage Foreclosure," published in the preceding number. Mr. Fithian refers to Rev. Stat. Ill., ch. 83, § 11, which provides an action of foreclosure or sale is absolutely barred unless brought within ten years from the time the right of action accrues, and cites as an example, a note dated January 1, 1877, payable one year after date, and secured by real estate mortgage, upon which a payment had been made in 1880, that the mortgage could not be foreclosed now, although a judgment could be obtained for the unpaid balance of the note. This precise point has been passed upon by our supreme court in the case of *Schifferstein v. Allison*, decided January 20, 1888, and reported in 12 West. Rep. 847. Judge Scholfeld delivered the opinion of the court, holding that an action of foreclosure would not be barred in the above example cited by Mr. Fithian, and that the cause of action or right to make sale is to be regarded as having accrued after the last payment indorsed upon the indebtedness. THOS. F. FERNS.

Jerseyville, Ill.

To the Editor of the Central Law Journal:

The letter of Jno. B. Fithian, of Joliet, in No. 8, of the current (28th) volume of the JOURNAL, on the limitation of foreclosure of mortgages in Illinois, is misleading, as the Supreme Court of Illinois, on January 20, 1888, in case of *Schifferstein v. Allison*, has settled that question. The court holds that § 11 of the limitation act, which provides that "no person shall commence an action or make a sale to foreclose a mortgage, or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues." It must be read in connection with § 16 of the same chapter, which provides that an "action on bonds, promissory notes, etc., shall be commenced within ten years next after cause of action accrued; but if any payment, or new promise to pay, shall have been made in writing * * * within or after said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to

pay;" and an action to foreclose a mortgage is not barred when payments on the note secured thereby have been made within ten years: 15 N. E. Rep. 275.

Elgin, Ill.

JAMES COLEMAN.

QUERIES AND ANSWERS.*

QUERY No. 4.

A corporation is created under the laws of Minnesota for manufacturing purposes. The time for which it was incorporated expires; under the laws of this State three years' time is given for closing up the business of the corporation after it is dissolved by limitation. The three years have expired, but no steps have been taken to close up its business. It owns property, both real and personal, and continues to do business as usual. How can its affairs be now closed up, and how can its property be disposed of? W. S.

QUERIES ANSWERED.

QUERY No. 2 [28 Cent. L. J. 51].

Has a divorced wife a legal right to continue the use of her late husband's name. Cite authorities. X.

Answer. It is the English and American usage for a woman to retain her husband's surname, till by a decree of divorce she is authorized to resume her maiden name. However, she can be known by any name she may choose to assume: *Schouler's Dom. Rel.* § 40. C. Z.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF LANDLORD AND TENANT, with special reference to the American Law. By H. L. Gear, of the San Francisco Bar. San Francisco: Bancroft-Whitney Co., Law Publishers and Booksellers. 1888.

Every practitioner is familiar with what is popularly known as the "pony" series of text-books. Their standing among members of the profession is already determined and fixed, owing to the reputation of such writers as Mr. Boone, Mr. Desty, Mr. Hawes and Mr. Newmark. The book we are considering is the latest of this series. The subject is a difficult one upon which to collate authorities and reduce to rules, owing largely to the local differences of statute and practice. The aim of the author, as he tells us, is to present a complete, yet succinct view of the law of landlord and tenant. A large number of English cases have been cited, but the special purpose has evidently been to make the work a complete presentation of the American authorities. In this, if one may judge by its very extensive notes and citations, the author has succeeded. There is no work of this series that seems to the writer more thoroughly and carefully annotated. There are many sections in the work, occupying only a page of text, the notes to which fill a half dozen pages. In terse, succinct style, the author treats of the nature and creation of tenancy, making clear distinctions between those for life, for a fixed term, from year to year, at will and by sufferance. The care in which it has been prepared, is seen upon finding chapters on detailed branches of the subject, such as "occupancy on shares," "lodgings and apartments," etc. The features of the instrument of lease and the payment of rent, with all the questions arising thereunder, are carefully treated, as well as those of possession, transfer and termination of tenancy. In short, so far as we can see, there is nothing omitted belonging to this very practical branch of the law. The subject and the book are such that lawyers will have almost every day use of it.

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMIRALTY—Salvage—Award. — Facts reviewed with reference to whether amount allowed a proper salvage award in case of disabled steamer towed into port by claimant.—*The Erin*, U. S. D. C. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 712.

2. ADMIRALTY—Collision—Evidence. — Facts sufficient to justify the finding of the district court in the case of injury to canal boat.—*The Onwego*, U. S. C. C. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 720.

3. ADMIRALTY—Salvage.—Facts reviewed with reference to question of amount of compensation for salvage service.—*The Carondelet*, U. S. D. C. (N. Y.), Nov. 13, 1888; 36 Fed. Rep. 714.

4. APPEAL—Bill of Exceptions. — Where an appeal of action tried without jury the bill of exceptions does not state that exception was taken to the finding or motion for new trial made, the appellate court will consider the question of sufficiency of the evidence. — *Fireman's Ins. Co. v. Peck*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 753.

5. APPEAL—County Commissioners—Public Road.—An appeal from the order of the board of county commissioners opening a public road through defendant's land, under Code N. C. § 2038, is not prematurely taken before the order is executed; section 2039 providing that "any person may appeal to the superior court" from such order. — *Board of Commrs. v. Western Asylum*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 120.

6. APPEAL.—Where a commissioner, directed by the court to sell goods for cash, sells them on credit, and then sues the purchaser for the price, the fact that he had a remedy by motion will not defeat the action when the objection is first raised in the supreme court.—*Lacey v. Pearson*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 121.

7. APPEAL—Injunction Bond. —Code N. C. § 543, allowing appeals to be taken "from every judicial order or determination of a judge of a superior court upon or involving a matter of law or legal inference," does not embrace an order adjudging the sufficiency of an injunction bond, the right to supervise the bond being given to the judge under Code, § 841.—*Bynum v. Board of County Commrs.*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 139.

8. APPEAL—Review—Partnership.—Where the controlling question in a case is whether real estate sold by a surviving partner, as partnership property, is individual or partnership property, and there is nothing recorded by which such fact can be determined with certainty, a distribution of the proceeds, made upon the assumption that the land was partnership property, will not be disturbed. — *Appeal of Williams*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 912.

9. ARSON—Indictment.—An indictment for arson is good, though redundant in alleging the ownership of the house in a certain person, and its occupation by defendant for and as the agent of another, who held it under a lease from the owner. — *Rogers v. State*, Tex. Ct. App., Nov. 21, 1888; 9 S. W. Rep. 763.

10. ASSUMPSIT—Common Counts—Commission Merchant.—Advances made by a commission merchant in the line of his employment for his principal, who is acquainted with the manner of doing business on the board of trade, are recoverable on the common money counts as for money advanced to the principal's use at his request.—*Perin v. Parker*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 747.

11. ASSIGNMENT—Validity.—An assignment of all the partnership property for the benefit of partnership creditors is not rendered fraudulent and void by a failure to include the individual property of the partners.—*Trumbo v. Hamel*, S. C. S. Car., Nov. 27, 1888; 8 S. E. Rep. 83.

12. ASSIGNMENT—Partnership.—Under statutes providing for voluntary assignments and requiring sworn statement of assets and liabilities by "the person, firm or corporation" making such assignment, insolvent firms may assign their property though the partners as individuals are solvent and individual property of the partner need not be assigned. — *Druckey v. Wellhouse*, S. C. Ga., Nov. 9, 1888; 8 S. E. Rep. 40.

14. ASSIGNMENT—Preferences.—Under the facts in this case held illegal preferences for insolvent debtor to execute notes at a time when he had determined to assign. — *Hide and Leather Nat. Bank v. Rehm*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 783.

15. ASSUMPSIT—Partnership.—Assumpsit will lie by the executor of one member of a firm against a surviving member thereof who assumes all the liabilities of the firm, it being admitted that the firm was indebted to the deceased member.—*Schmidt v. Glade*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 762.

16. ATTACHMENT—Appeal.—In an attachment execution, where it appears from the record that the controversy was conducted in the trial court on the theory that the property seized was transferred by the debtor to the garnishee in fraud of creditors, and the record contains no requests for charges by either party, the plaintiff cannot assign as error the failure of the court to submit to the jury the rights of the parties, if the transaction was found to be a sale without conclusion.—*Stucklager v. Neel*, S. C. Penn., Nov. 6, 1888; 16 Atl. Rep. 94.

17. ATTORNEY AND CLIENT—Evidence.—In an action for professional services as attorney at law in certain cases, evidence of the value of a "retainer" in the cases

is admissible on behalf of plaintiff, the value of the services including the value of the retainer. — *Knight v. Russ*, S. C. Cal., Dec. 4, 1888; 19 Pac. Rep. 698.

18. BANK—Directors—Fraud. — The knowledge of the conspiring directors of the misappropriation of the funds is not imputable to the bank, or its agent who negotiated the loan, as their connection with it was not in their capacity as directors, but as county officers. — *Mayor, etc. Co. v. Tenth Nat. Bank*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 618.

19. BILL OF EXCEPTIONS — Signing and Filing. — A bill of exceptions, properly allowed, signed and filed, and ordered to be made a part of the record, is not void because the clerk fails to make a general entry thereof. — *State v. Fry*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 742.

20. BOND—Payment—Construction. — A bond executed in North Carolina, June 1, 1863, is presumed to be payable in Confederate currency. — *Smith v. Smith*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 183.

21. BOUNDARIES—Possession—Deed. — A marked line, experimentally located by a surveyor in attempting to divide a tract of land, not mentioned in the deed, and disagreeing with its courses and distances, as well as with a plat therein referred to, will not control the description in the deed. — *Kuhns v. Fennell*, S. C. Penn., Oct. 2, 1888; 15 Atl. Rep. 920.

22. BREACH OF PROMISE—Damages. — In an action for breach of promise, it is proper to charge that plaintiff's damages are not limited to the mere pecuniary loss she may have sustained, but the injury to her feelings, affections, and wounded pride may be considered. — *Bird v. Thompson*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 788.

23. CARRIERS—Disorderly Passenger. — Mass. St. ch. 108, § 18, does not take away common law powers of railroad conductors in removing and confining disorderly passengers on train. — *Sullivan v. Old Colony N. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 878.

24. CARRIERS — Passengers — Contract. — With or without a ticket, a passenger has no right to remain on a train and be carried when he is disorderly, or uses any obscene, profane or vulgar language. — *Peary v. Georgia R. Co.*, S. C. Ga., Dec. 8, 1888; 8 S. E. Rep. 70.

25. CARRIERS—Passenger. — Where plaintiff had a round trip ticket to O and return which was taken up by conductor going to O and trip slip given in return, and plaintiff entered upon defendant's cars to make her return journey but the former conductor's slip was rejected and she was compelled to get off: *Held*, that defendant was liable. — *Balt. & Ohio R. R. Co. v. Bambray*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 67.

27. CHATTEL MORTGAGE—Redemption. — In replevin by mortgagee against a mortgagor for stock of goods, where defendant offers to pay amount due to redeem, the court in stating the account properly omits therefrom money received by defendant on sales made from the stock. — *Burr v. Dana*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 635.

28. CHATTEL MORTGAGE—Lien. — Chattel mortgage, given by landlord to tenant providing that rent of the leased land should be applied to pay interest on principal of note, does not create any lien on the land. — *Bowen v. McCarthy*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 757.

29. COLLATERAL ATTACK—Intoxicating Liquors. — Defendant in a prosecution for selling intoxicating liquor contrary to a local option law cannot attack the validity of the election adopting the law. — *State v. Cooper*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 184.

30. COLLISION—Measure of Damages. — As to the measure of damages allowable in case of injuries to vessel by collision. — *The New Haven, etc. Co. v. Mayor*, U. S. D. C. (N. Y.), Oct. 3, 1888; 36 Fed. Rep. 720.

31. CONSTITUTIONAL LAW—Taxation—Railroads—Interstate Commerce. — A municipal ordinance imposing a tax of a specified amount on every railroad company running its road through corporate limits, when imposed under legislative authority, is valid. — *Richmond &*

D. E. R. v. Town of Reiderville, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 124.

32. CONSTITUTIONAL LAW—Statute. — The provision of act S. C. December 23, 1882, entitled "an act to charter the Greenville & Port Royal R. R. Co." and of act December 24, 1888, amendatory thereto, giving counties power to subscribe to the stock of the company, does not infringe const. art. 2, § 20, providing that acts shall relate to but one subject. — *Floyd v. Perria*, S. C. S. Car., Nov. 30, 1888; 8 S. E. Rep. 14.

33. CONSTITUTIONAL LAW—Taxation. — The Lewis county tax law (Laws 1884, ch. 153, and amended by Laws 1885, ch. 215 and Laws 1886, ch. 102), prohibiting the cutting of lumber on lands upon which taxes remain unpaid is not unconstitutional. — *Prentice v. Weston*, N. Y. Ct. App. Nov. 7, 1888; 18 N. E. Rep. 720.

34. CONSTITUTIONAL LAW—Taxation—Collection. — Act Nev. March 5, 1888, § 62, providing for the payment of a commission by the State of 10 per cent. of all poll-taxes collected to the county, does not infringe const. Nev. art. 2, § 7, providing that one-half of the poll-taxes collected shall be paid to the State and one-half to the county. — *State ex rel. Scallock v. Donnelly*, S. C. Nev., Nov. 23, 1888; 19 Pac. Rep. 680.

35. CONTINUANCE—Witness—Action on Bail-bond. — In an action on a forfeited bail-bond, defendants are entitled to a continuance, on the first application therefor, when their affidavit shows that material witnesses, who had been duly subpoenaed, and had been in attendance during the term, are absent, they having used due diligence to procure their attendance. — *Bolley v. State*, Tex. Ct. App., Nov. 3, 1888; 9 S. W. Rep. 758.

36. CONTRACT—Habitual Drunkards—Evidence. — On proceeding to reopen certain judgments, where the debtor had been adjudged an habitual drunkard for the period in which the notes, were given: *Held*, where the evidence was conflicting as to whether the debtor was sober when he gave the notes, that the preponderance of evidence was in the creditor's favor and overcame the presumption arising from the adjudication that the debtor was an habitual drunkard. — *Appeal of Donahoo*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 924.

37. CONTRACT—Interpretation. — Interpretation and construction of a contract between a railroad company and patentee of a method of weighing and transferring grain. — *Lake Shore & M. S. Ry. Co. v. Richards*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 794.

38. CONTRACT—Construction. — Agreement to furnish coal by contract, defendants are not required to accept the same when their work should be out of operation: *Held*, that defendants having substituted natural gas for coal were not bound to receive coal. — *Cannonsburg Iron Co. v. McKeen*, S. C. Penn., Oct. 15, 1888; 16 Atl. Rep. 97.

39. CONTRACT—Parol Evidence. — Facts stated under which the court held that the parol evidence was insufficient to change the written agreement between the parties. — *Yisley v. Bundel*, S. C. Penn., Oct. 1, 1888; 15 Atl. Rep. 854.

40. CONVERSION—Election — Ejectment. — A testator directed his executor to sell his land at such time and for such price as he might deem most beneficial to the estate, and to pay the proceeds to the widow, who was to hold for the benefit of testator's children. The executor conveyed the land to the widow, for a nominal consideration, and the widow conveyed it to a third person: *Held*, that the conversion of the land into personality by the will was not affected by the election of the widow to take the land, instead of the proceeds thereof, and the testator's children had no such interest in the land that one claiming under them could maintain ejectment for it. — *Reed v. Mellor*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 80.

41. CONVICTS—Hiring out Labor — Statute. — *Held*, that special acts February 17, 1886, and February 18, 1887, relating to the working of public roads in Jefferson county, do not supersede the jurisdiction of the State board of inspectors, and governs under Crim. Code Ala.

1886, § 4591. — *Jefferson County v. Truss*, S. C. Ala., Dec. 6, 1888; 5 South. Rep. 86.

42. CORPORATIONS—Estoppel.—Stockholders who organize themselves as a corporation, transact business, and hold themselves out to the world as such corporation, cannot, when proceeded against by creditors, set up as a defense that the preliminary steps of the organization were irregular. — *Aultman v. Waddle*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 780.

43. CORPORATIONS—Mortgages—Improvement Companies.—A mortgage made and recorded before a proposition to a contractor is accepted, and before any work is done, does not come within the prohibition of act Pa. January 21, 1843, providing that improvement companies shall not make an assignment, conveyance, mortgage, or other transfer of their estate, while debts or liabilities to contractors, etc., remain unpaid, without their written consent. — *Appeal of Reed*, S. C. Penn., Oct. 29, 1888; 16 Atl. Rep. 100.

44. CORPORATIONS—Stock—Assignment—Laches.—The assignment and delivery, as collateral, of certificates of stock transferable on the books of the company, on presentment, properly indorsed, passes an equitable title only; and where the assignee delays for seven years to notify the company of the assignment, or present the stock for transfer, pending which the stock is attached and sold as property of the assignor, and a transfer on the books made by the sheriff to the purchaser as authorized by statute, his title is extinguished. — *Noble v. Turner*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 124.

45. CORPORATIONS—Franchises—Forfeiture.—Where a count in a petition prays for the forfeiture of franchises then being exercised by a company of persons acting as a corporation, and alleges, that, if it ever had, as a corporation, any legal existence, privilege, or franchise, the same has become forfeited, the previous existence of the corporation not being alleged, no cause of action is stated. — *People ex rel. Attorney General v. Stamford*, S. C. Cal., Nov. 21, 1888; 19 Pac. Rep. 698.

46. CORPORATIONS—Stockholders—Directors.—Complaint by stockholders against directors of a ditch company, alleging incorporation for the purpose of constructing water ditch for irrigation, and fraudulently distributing water gratuitously, without alleging that the corporation was organized for the purpose of selling water, does not state a cause of action. — *Applegarth v. McQuiddy*, S. C. Cal., Dec. 4, 1888; 19 Pac. Rep. 692.

47. COUNTY CLERK—Tax-list.—A county clerk has no authority to copy a portion of the certificate of publication of the delinquent tax-list, and of the application of the county treasurer for judgment, and certify that the record so made up is complete in the matter of such application, and no question can be raised thereon on appeal. — *Village of Melrose v. Barnard*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 671.

48. COUNTIES—Power of Legislature.—The legislature has the power to abolish a county organization. — *State ex rel. v. Hamilton*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 723.

49. COVENANT—Incumbrances—Damages.—A covenant against incumbrances is not broken by the existence of a recorded tax-deed, and Massachusetts statute ch. 126, § 18, does not give any right of action where apparent incumbrances are not removed until after suit is begun. — *Tibbets v. Leeson*, S. C. Mass., Nov. 23, 1888; 18 N. E. Rep. 679.

51. CRIMINAL LAW—Perjury—Indictment.—An indictment for perjury, charging that defendant, in a prosecution for assault and battery, swore falsely that the defendant in that prosecution had and used a pistol in the assault, is not bad for failing to show that she swore how and for what purpose he used it. — *State v. Murphy*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 142.

52. CRIMINAL LAW—Statement of Accused—Instruction.—An instruction in regard to defendant's right to make a statement, that "his statement, to avail him, must be in those parts that are in conflict with the evi-

dence in material matters," is erroneous; the statement being entitled to consideration, though not contradicted. — *Lovejoy v. State*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 66.

53. CRIMINAL LAW—Burglary—Evidence.—Facts sufficient to justify conviction for burglary under Pen. Code Tex. acts 704, 708. — *Painter v. State*, Tex. Ct. App., Nov. 21, 1888; 9 S. W. Rep. 774.

54. CRIMINAL LAW—Continuance.—Facts sufficient to justify a continuance under Code Crim. Pro. Tex. art. 560. — *Browning v. State*, Tex. Ct. App., Nov. 21, 9 S. W. Rep. 770.

55. CRIMINAL LAW—Homicide—Evidence.—It appearing that defendant, after being informed of the adultery of K and his wife, had gone half a mile to procure his gun, and secreted himself, and fired from ambush, killing A instead of K, the killing cannot be said to have been the impulse of sudden passion, and is murder in the second degree; since it would have been murder in the first degree if K, the intended victim, had been hit. — *Breedlove v. State*, Tex. Ct. App., Nov. 21, 1888; 9 S. W. Rep. 768.

56. CRIMINAL LAW—Larceny—Statute.—To constitute theft a felony under Code Tex. art. 54, 735, the articles stolen must be of the value of \$20. — *Clerk v. State*, Tex. Ct. App., Nov. 21, 1888; 9 S. W. Rep. 767.

58. CRIMINAL LAW—Appearance—Waiver.—When a defendant is arrested and brought before a court, and, at his own suggestion, enters into a recognizance for his appearance at a subsequent time, he waives all irregularities of the warrant and arrest. — *City of Junction City v. Keefe*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 735.

59. CRIMINAL LAW—Change of Venue.—An application for change of venue on the ground of prejudice is properly refused, where the prejudice is confined to one section of the county, from which none of the jurors were drawn. — *Johnson v. State*, Tex. Ct. App., Nov. 15, 1888; 9 S. W. Rep. 762.

60. CRIMINAL LAW—Change of Venue.—The trial of a defendant charged with a criminal offense cannot, upon the motion of the prosecutor or State, and against the objection and without the consent of the defendant, be removed out of the county and district where the offense is alleged to have been committed. — *Stave v. Knapp*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 728.

61. CRIMINAL LAW—Evidence—Conspirators.—To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common criminal design. When the conspiracy has ended, or the crime involving conspiracy has been consummated, the admission of one, in the absence of the other conspirators, that he and others participated in the crime, is a mere narrative of a past occurrence, and can only affect the one who makes it. — *State v. Johnson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 749.

62. CRIMINAL LAW—Former Conviction.—Where an information read to the jury charges petit larceny, and a former conviction of burglary, and defendant pleads guilty to the latter, and the trial is had on the charge of petit larceny only, the jury being instructed that they have nothing to do with the charge of former conviction, defendant cannot complain that the form of verdict, given by the court, stating that the jury find defendant guilty as charged in the information, misled the jury into the belief that they must consider the charge of former conviction in determining his guilt or innocence of petit larceny. — *People v. Ross*, S. C. Cal., Dec. 4, 1888; 19 Pac. Rep. 691.

63. CRIMINAL LAW—Homicide—Threats.—Where defendant in a trial for murder testified that deceased made demonstrations of attacking him with deadly weapons, when he shot him, and there was evidence of prior threats by deceased against defendant, it was error to charge that no mere spoken words by deceased justified or excused killing him, nor can threats be considered, unless the jury have reasonable doubt as to who began the conflict, in which event they may con-

sider the threats with the other evidence.—*Johnson v. State*, S. C. Miss., Nov. 26, 1888; 5 South. Rep. 95.

64. CRIMINAL LAW—Indictment.—Where the foreman of the grand jury wrote his name in blank across the back of a bill of indictment, under the proper date, without more, and no finding by the grand jury was either reduced to writing or publicly announced in court, after plea of not guilty, trial and conviction: *Held*, that judgment must be arrested for want of a finding.—*United States v. Levally*, U. S. D. C. (Penn.), Nov. 17, 1888; 36 Fed. 687.

65. CRIMINAL LAW—Jurisdiction—Sanity.—Where the district court has jurisdiction of a criminal case, its jurisdiction to try such case cannot be taken away by the commencement of proceedings in the probate court for the purpose of having the question determined whether the defendant was sane or insane.—*State v. Gould*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 739.

66. CRIMINAL LAW—Larceny—Evidence.—A copy of a record of a cattle brand was certified to as follows: "State of T., County of Y. I, J., clerk of the county court in and for said county, do hereby certify that the foregoing is a true copy of the record of the mark and brand of W." *Held*, sufficient to authorize its admission in evidence on a trial for theft.—*Byrd v. State*, Tex. Ct. App., Nov. 14, 1888; 9 S. W. Rep. 739.

67. CRIMINAL LAW—Larceny—Evidence.—Where, on a trial for larceny, direct evidence was given of the defendant's possession of the stolen horse in an adjoining county, and circumstantial evidence of his taking the same in the county where the case was tried, a verdict of guilty was warranted.—*State v. Espinoza*, S. C. Nev., Nov. 23, 1888; 19 Pac. Rep. 677.

68. CRIMINAL LAW—Larceny—Possession.—Where there is no evidence of possession of the stolen property by defendant until eleven months after the theft, the question of recent possession should be submitted to the jury under proper instructions.—*Flores v. State*, Tex. Ct. App., Nov. 21, 1888; 9 S. W. Rep. 772.

69. DAMAGES—Justification—Pleading.—In an action for tort, where the defendant by his plea admits and justifies, and no further evidence is adduced by either party, damages may be assessed by the jury upon the admissions contained in the plea.—*Parker v. Lanier*, S. C. Ga., Nov. 22, 1888; 8 S. E. Rep. 57.

70. DEED—Acknowledgment—Certificate.—Under Code Ga., requiring a deed executed in another State to be attested by, *inter alia*, a judge of a court of record, with a certificate of the clerk as to the genuineness of the judge's signature, the clerk's certificate must show that the judge is a judge of a court of record.—*McKenzie v. Jackson*, S. C. Ga., Nov. 28, 1888; 8 S. E. Rep. 77.

71. DEED—Construction—Grantee.—The granting clause of a deed was to the grantee, "her children and assigns forever," and the *habendum* was to said grantee, "her heirs and assigns forever." The grantee then had eight children: *Held*, that she took a fee-simple.—*Rines v. Mansfield*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 798.

72. DEED—Description—Patent Ambiguity—Evidence.—Parol testimony allowed to explain patent ambiguity in description of real estate in a deed.—*Black v. Pratt Coal Co.*, S. C. Ala., Dec. 6, 1888; 5 South. Rep. 89.

73. DEED—Mortgage—Evidence.—A deed will not be declared a mortgage where the grantee testifies positively that it was an absolute conveyance, and the evidence for complainant is conflicting and unsatisfactory.—*Strong v. Strong*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 665.

74. DEED OF TRUST—Power of Sale—Successor.—Trustee in deed of trust, with power of sale, may appoint a successor to act in his absence, or upon a refusal of the trustee to act, and a sale by a successor so named is valid.—*Irish v. Antioch College*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 768.

76. DIVORCE—Drunkenness—Evidence.—In an action for divorce on the ground of cruelty and habitual drunkenness, where the testimony of defendant con-

tradicts that of the plaintiff, and the corroborating testimony on each side balances that on the other, but there is the unimpeached testimony of the three children of the parties in support of the allegations of the petition, there is such a preponderance of evidence in favor of plaintiff as to warrant a reversal of a judgment denying the divorce.—*Orrichon v. Orrichon*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 638.

77. DOWER—Allotment—Notice.—Code Ga. § 4043, provides that the applicant for dower shall give written notice of her intention to the "representative" of the estate: *Held* that, although there be no permanent administrator, a notice to the temporary administrator is insufficient.—*Langford v. Langford*, S. C. Ga., Nov. 28, 1888; 8 S. E. Rep. 76.

78. EASEMENT—Right of Way.—A reservation in a deed of "23 feet for a street," to be "kept open," gives to the owners of the easement an unobstructed thirty-feet for a street, and the owners of the servient estate cannot place a fence across the street, with a gate ten feet wide, through which the owners of the easement may pass.—*Patton v. Western, etc. Co.*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 140.

79. EJECTMENT—Mortgage.—It is no defense to an action of ejectment, brought by the grantee of a purchaser at foreclosure sale, upon a mortgage given by one of the defendants, that the land was deeded to the mortgagor by mistake, when it should have been deeded to his wife, the other defendant, and that the mortgagees had agreed without consideration, except the promise by the husband to pay his debts, to convey the land after sheriff's sale to the wife.—*O'Neil v. Soles*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 89.

80. ELECTIONS AND VOTERS—Injunction.—In a suit to contest an election ordered by county commissioners, upon a proposition to subscribe to the capital stock of a railroad company, brought after the election had been held, where the apparent unofficial result was known to plaintiffs, but the result was not ascertained and declared by the county commissioners, it was the duty of the latter to declare the result, and they could not be enjoined from so doing.—*Bynum v. Bd. County Commrs.*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 138.

82. EMINENT DOMAIN—Estoppel—Ejectment.—Where a railroad company enters upon land, and without compensation to the owner, or proceedings to condemn, puts its improvements thereon, with his knowledge, he is not estopped from maintaining ejectment against it; but execution will be stayed, on payment of costs, for a time sufficient for the company to condemn the land.—*Allegheny, etc. Co. v. Colwell*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 927.

83. EMBEZZLEMENT—Indictment.—An indictment, under Pen. Code Tex. art. 103, prescribing the penalty for misapplication of the funds, etc., of any county, city or town, which fails to allege that the money misapplied was owned by any county, city or town, is insufficient.—*Crane v. State*, Tex. Ct. App., Nov. 22, 1888; 9 S. W. Rep. 773.

84. EQUIT—Cancellation.—Question of weight of evidence under bill to restrain defendants from disposing of certain notes and praying for their cancellation.—*Frick v. Moore*, S. C. Ga., Nov. 30, 1888; 8 S. E. Rep. 80.

85. EQUIT—Practice—Dismissal.—Under circuit court rule 69, giving a complainant three months after issue joined in which to take depositions, a cause will not be dismissed for want of prosecution for nine months' delay, where it appears from the affidavits of complainant's counsel that from a conversation with defendant's counsel they were led to believe that a compromise was mutually desired and would be effected.—*Beirne v. Wadsworth*, U. S. C. C. (Minn.), Nov. 14, 1888; 36 Fed. Rep. 614.

86. EVIDENCE—Boundary—Map.—Where there had been an order of survey, which had not been executed, the county surveyor, when called as a witness as to the lines of the land in controversy, may use a map of his former survey made by him to explain his testi-

mony to the jury, though the map itself is inadmissible.—*Dobson v. Whisenant*, S. C. N. Car., Dec. 2, 1888; 8 S. E. Rep. 126.

87. EVIDENCE—Books—Corporation.—In an action on life insurance policies, testimony of officers of defendant that they have seen its books, and that the policies appear from the entries therein to have been forfeited by non-payment of an assessment, is properly excluded, though plaintiff asks one of the witnesses to refer to the books and give information as to a different matter, the books being the best evidence.—*Dial v. Valley Mut. Life Assn.*, S. C. S. Ca., Nov. 27, 1888; 9 S. W. Rep. 27.

88. EVIDENCE—Fraudulent Conveyance—Declarations.—In an action to set aside a fraudulent conveyance for valuable consideration, declarations made by the grantor before the transfer, and in absence of grantee, are not admissible in evidence against the grantee.—*Bush v. Roberts*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 732.

89. EVIDENCE—Negotiable Instruments—Alteration.—A note which has been admitted without objection on a former trial of the action is admissible on the second trial, though it has been materially altered, where there is evidence that the note was in the same condition as it was at the first trial.—*Graham v. Spang*, S. O. Penn. Nov. 5, 1888; 16 Atl. Rep. 91.

90. EVIDENCE—Negligence—Res Gestæ.—In action against the company for an explosion of a boiler by increasing the flow of gas, a declaration of an agent of defendant, who was not present at the accident, made several hours after it occurred, that a certain well had been turned on, without showing his authority to open new wells, is not a part of the *res gestæ*, and is inadmissible.—*Oil City, etc. Co. v. Boundy*, S. O. Penn., Oct. 22, 1888; 15 Atl. Rep. 685.

91. EVIDENCE—Note—Alteration.—Sufficiency and weight of evidence in mortgage foreclosure to prove alteration of note.—*McNail v. Welch*, S. C. Ill., Sept. 28, 1888; 18 N. E. Rep. 737.

92. EXCEPTIONS—Waiver.—A party who asks for rulings, threatening to except if not given, and then agrees that the judge may charge the jury, reserving the right to except if his requests are not covered by the charge, waives the right to except if, after charge is given, he takes no exceptions.—*Brutelle v. Dean*, S. J. O. Mass., Nov. 28, 1888; 18 N. E. Rep. 681.

93. EXECUTOR—Sale.—Where an executor sells land of decedent and himself becomes the purchaser, the sale is voidable.—*Bordens v. Murphy*, S. C. Ill., June 16, 1888; 18 N. E. Rep. 739.

94. EXECUTORS AND ADMINISTRATORS—Widow.—Realty vests in heirs immediately. Widow is co-heir with her children, unless she takes dower. Before an administrator is appointed she may rent out the lands, if adult children do not object, and the administrator, when appointed, need not prevent her from collecting the rents, but may aid her in doing so, without incurring liability as administrator.—*Cross v. Johnson*, S. O. Ga., Nov. 21, 1888; 8 S. E. Rep. 56.

95. EXECUTORS AND ADMINISTRATORS—Interest.—Where a referee's report shows that the administrators have not used any portion of the funds of the estate for their own advantage, and have derived no profit therefrom, they are properly not charged with interest.—*Smith v. Smith*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 128.

96. EXECUTION—Sale—Statute.—Under acts N. O. 1868-69, ch. 237, § 8, providing for the time of having execution sales, a sheriff's deed found on a sale made April 16, 1870, in a county where no term of the superior court was held during that month, is void.—*Lowdermilk v. Corpening*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 117.

98. EXTRADITION—Embezzlement.—Under Rev. Stat. Wis. § 4418, in relation to embezzlement, as to what allegations are necessary in the affidavit to authorize governor of another State, to which defendant has fled, to grant a warrant for extradition.—*In re Keller*, U. S. D. O. (Minn.), Nov. 20, 1888; 36 Fed. Rep. 681.

99. FISHERIES—License.—The Maryland oyster law of 1886, ch. 296, held, not a tonnage tax, but a lawful compensation, demanded by the State as the proprietor of the oyster beds for the privilege of taking the oysters.—*Dize v. Lloyd*, U. S. C. C. (Md.), Nov. 21, 1888; 38 Fed. Rep. 651.

100. FALSE IMPRISONMENT—Pleading.—A complaint for false imprisonment which does not allege that the process was void or groundless, or had expired, or that it was issued maliciously or without probable cause, does not state a cause of action, though it also alleges, as matter of aggravation, that plaintiff was wrongfully and illegally imprisoned by defendants.—*Barfield v. Turner*, S. O. N. Car., Nov. 26, 1888; 8 S. E. Rep. 115.

102. FRAUDULENT CONVEYANCES—Burden of Proof—Husband and Wife.—In an action to set aside as fraudulent a conveyance by third persons to a husband as trustee for his wife, the burden of proof is upon plaintiff; such case does not come within the rule that post-nuptial settlements by a husband indebted are presumed voluntary and void as against creditors.—*Welsh v. Solenderger*, S. O. App. Va., Nov. 8, 1888; 8 S. E. Rep. 91.

103. FRAUDULENT CONVEYANCE—Possession—Jury.—Facts under which it was claimed a sale of stock of goods was made with intent to defraud creditors.—*Gray v. Trent*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 107.

105. FRAUDULENT REPRESENTATIONS—Innocent Purchaser—Usury.—The innocent purchaser of a usurious security, where purchase is induced by fraud, may enforce the security against an obligor privy to the transaction to the extent of the money advanced, but cannot recover the difference between the amount he paid and the face value.—*Müller v. Zeimer*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 716.

106. GAMING—Indictment—Statute.—An indictment charging that defendant permitted "a game of cards to be played upon his premises, the said premises then and there being appurtenances to a public place, to-wit, a house for retailing spirituous liquors," is sufficient, under Pen. Code Tex., arts. 355, 365.—*Ballew v. State*, Tex. Ct. App., Nov. 24, 1888; 9 S. W. Rep. 765.

107. GARNISHMENT—Payment to Sheriff.—Where garnishee admits money in his hands received from defendant, alleging that he holds it for his mother, who intervened in the suit, and was rendered against garnishee, it was proper to order the fund delivered to the sheriff, there to abide the decision of the case.—*Germania Sav. Bank v. Penser*, S. C. La., Nov. 19, 1888; 5 South. Rep. 75.

108. GIFT—Evidence.—Facts reviewed with reference to question whether money left by a father with the husband of his daughter was executed gift to her or a loan to the husband.—*Crawford v. Manson*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 54.

109. GIFT—Undue Influence—Burden of Proof.—Where a father, eighty years of age and feeble, shortly before death, acknowledge deeds to a son, with whom he has been living, and on a bill by the other heirs to set them aside, there is evidence that the father was mentally incompetent, the son has the burden to show fairness and absence of undue influence.—*Collins v. Collins*, N. J. Ct. Chan., Nov. 14, 1888; 15 Atl. Rep. 849.

110. GUARANTY—Acquiescence—Evidence.—In an action on guaranty, where the defense claim negligent delay in collecting the debt, evidence of acquiescence of defendant in the delay is admissible.—*Mead v. Parker*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 727.

111. GUARDIAN AND WARD—Jurisdiction.—One who applies for and receives letters of guardianship from the court of ordinary of a county other than that in which he resides, thereby submits himself to the jurisdiction of that court, and may be cited to appear before it for an accounting with his ward, under Code Ga., § 2598.—*Usry v. Usry*, S. C. Ga., Nov. 8, 1888; 8 S. E. Rep. 60.

112. HUSBAND AND WIFE—Marriage Settlement.—

Under a marriage settlement conveying land to a trustee, in trust for the sole use of the wife, without restriction as to the manner in which the power of disposition may be exercised, she may, by mortgage duly acknowledged, her husband joining therein, convey her interest without the concurrence of the trustee. — *Norris v. Lutner*, S. C. N. Car., Nov. 5, 1888; 8 S. E. Rep. 36.

113. HUSBAND AND WIFE — Separate Maintenance — Public Policy. — Bond given by the wife to husband for separate maintenance is not void as against public policy. — *Winn v. Sanford*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 677.

114. HUSBAND AND WIFE — Wife's Separate Estate — Laches. — Where a wife, at the time of taking title to realty in her name, has money with which to pay for it, and the husband, on discovering the state of the title, is told by her to sell and get other property in his name, but fails to do so, and asserts no right to the property for twenty years, nor until after the wife's death, he cannot maintain a suit to have the wife's title declared to be in trust for him, as having been purchased with his money. — *Pfifner v. Pfifner*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 72.

115. INDEMNITY BOND — Bank Officer. — Where an indemnity bond given by a bank clerk and the resolutions of the bank appointing him were in blank as to the official designation of his position, and while so employed made false entries in the book and became a defaulter: *Held*, that the bond remained in force although the surety contended that his appointment was to the position of teller and the bond given as such, but the defalcation was made by him as book-keeper. — *Appeal of Vogley*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 878.

116. INDIANS — Land Grants. — Act, N. C. 1783 (1 Pot. Rev. ch. 185, p. 435; Code, §§ 2346, 2347), is not rendered inoperative by a treaty of the United States with the Indians, extinguishing their title to the lands. — *Brown v. Brown*, S. C. N. Car., Nov. 26, 1888; 8 S. E. Rep. 111.

117. INJUNCTION — Discretion of court. — The refusing or granting of a temporary injunction is largely in the discretion of the judge or court, and for that reason close and intricate questions will not be reviewed, and the action of the court reversed, unless it shall clearly appear that the judgment was erroneous. — *Mead v. Anderson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 708.

118. INSURANCE — Relief Association — Public Policy. — The by-law of a railroad relief association providing for payment of life insurance only on condition that all persons entitled to sue the railroad company should release the railroad company from liability, is not invalid as against public policy. — *State v. Baltimore, etc. Co.*, U. S. C. C. (Md.), Nov. 13, 1888; 36 Fed. Rep. 655.

119. INSURANCE — Evidence — Waiver. — Evidence of interviews with the local agent of insurance company held by attorney of plaintiff after the death of the attorney who served proof of loss together with letter written by such attorney to local agent, is admissible to show a waiver of defects in the proof of loss. — *Birmingham Fire Ins. Co. v. Pulver*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 804.

120. INSURANCE — Construction — Statute. — Construction of statute March 11, 1869, § 22, imposing penalties upon agents acting for foreign insurance companies not authorized to do business in Illinois. — *People v. People's Ins. Ex.*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 774.

121. INSURANCE — Contract — Specific Performance. — *Held*, that equity would enforce payment of insurance, though the policy provided that no shipment was to be considered incurred until approved and indorsed on the book where it was the intention and both parties supposed it had been done. — *Phoenix Ins. Co. v. Ryland*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 109.

122. INTOXICATING LIQUORS — Illegal Sale. — Indiana statute 1881, § 5320, creates two offenses, the one selling less than a quart at a time without license, the other selling without license to be drank in seller's house, conviction under the second offense cannot be sustained where the evidence shows that the sales were

made from a wagon standing upon a highway. — *Schilling v. State*, S. O. Ind., Nov. 27, 1888; 18 N. E. Rep. 682.

123. INTOXICATING LIQUORS — Evidence. — *Held* proper for court in Massachusetts to refuse instructions that delivery of intoxicating liquors and payment of money for same was not *prima facie* evidence of sale. — *Commonwealth v. Gavin*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 675.

124. INTOXICATING LIQUORS — Civil Damage Law — Intoxicated Persons. — In an action under the Pennsylvania statute for damages for selling liquor to a person while drunk or to one of known intemperate habits, it is not error for the court to charge that, "whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated, though he can walk straight, though he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk." — *Elkin v. Buschner*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 102.

125. JUDGMENT — Evidence. — On the hearing of motions to set aside judgments for irregularity, and motions of similar nature, the court can hear any evidence which is calculated to aid it in reaching a conclusion, the rules of evidence not being strictly adhered to as in the trial of an issue by a jury. — *Gay v. Grant*, S. C. N. Car., Nov. 19, 1888; 8 S. E. Rep. 99.

126. JUDGMENT — Equitable Relief — Injunction. — The doctrine is well settled that this court will not, on the application of a defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense over which the court pronouncing the judgment had full jurisdiction, enjoin the enforcement of the judgment simply on the ground that it was unjust. — *Phillips v. Pullen*, N. J. Ct. Chan., Nov. 13, 1888; 16 Atl. Rep. 9.

127. JUDGMENT — Res Adjudicata. — In suit against trust estate for services made under agreement with the trustee, a decree is conclusive in a subsequent suit by the *cestui que trust* against complainant in first suit where there was no fraud or collusion. — *Adam v. Franklin*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 44.

128. JUDGMENT — Mortgage — Res Adjudicata. — While a *scire facias* on a mortgage was pending the terretenant filed a bill charging the mortgagor and mortgagee with fraud in its execution, being the same fraud alleged in his defense in the *sc. fa.* proceeding: *Held*, that the fraud alleged in defense to the *sc. fa.* was not *res adjudicata*. — *Ballentine v. Ballentine*, S. C. Penn., Oct. 18, 1888; 15 Atl. Rep. 869.

129. JUDGMENT — Res Adjudicata. — In a former suit between a vendor and purchaser, involving the validity of title, the former vendor and warrantor, having notice thereof, and participating in the case through counsel is not bound by the judgment therein, adverse to the title, but in a subsequent suit against him as warrantor of the same title the former adjudication will be followed unless manifestly erroneous or unless the issue is changed by additional evidence. — *Elder v. Farrell*, S. C. La., May 26, 1888; 5 South. Rep. 71.

130. JUDICIAL SALE — Collateral Attack. — Judicial sale held valid notwithstanding the judgment of sale did not describe the land to be sold and other irregularities. — *Johnson v. McDyer*, Ky. Ct. App., Nov. 22, 1888; 9 S. W. Rep. 778.

131. JUDICIAL SALE — Decree. — Facts upon which court held that judicial sale could not be set aside. — *Phillips v. Benson*, S. C. Ala., Dec. 4, 1888; 5 South. Rep. 78.

132. JURISDICTION — Court of Claims — Federal Courts. — Act of Congress March 3, 1887, which confers certain jurisdiction upon the court of claims and gives the United States circuit courts concurrent jurisdiction, does not confer upon the circuit court jurisdiction to restrain the public land department officials from allowing land to be entered as a portion of the public domain, which is claimed by a railroad company to have been earned under its grant. — *Stout, etc. Co. v. United States*, U. S. C. C. (Iowa), Nov. 28, 1888; 36 Fed. Rep. 610.

133. JURISDICTION — Federal Courts — Claims Against United States. — The comptroller of the treasury

having charge of the adjustment of accounts against the government, a rejection of an account by him is a rejection by a department authorized to hear and determine the same, within the meaning of the proviso contained in act March 3, 1887, giving to United States courts jurisdiction of claims against United States. — *Rand v. United States*, U. S. D. C. (Me.), Oct. 26, 1888; 36 Fed. Rep. 671.

137. LANDLORD AND TENANT. — The legal ground of warrant under §§ 4077, 4078 Code, to remove a tenant by sufferance is not the non-payment of rent, but the retention of possession after demand. — *Matthershead v. DeGise*, S. C. Ga., Nov. 12, 1888; 8 S. E. Rep. 62.

138. LANDLORD AND TENANT—Possession. — Where a vendee leases the premises, and afterwards procures a deed to be made by his vendor to another, who pays the balance of the price, and the tenant holds over his term, the grantee in such deed may maintain summary proceedings for the ejection of the tenant, under Code Ga. § 4077. — *Morrow v. Sawyer*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 51.

139. LANDLORD AND TENANT — Lease. — A lease for years, making no disposition of the estate in case of the lessee's death, but containing directions as to the mode of husbandry to be pursued, and stipulations for improvements to be made by the lessee, with a provision that he shall have the use of certain cotton seed, "so long as he remains on the place, to be returned at the close of his lease," is not personal to the lessee, but passes the estate at his death to his administratrix. — *Charles v. Byrd*, S. C. S. Car., Nov. 27, 1888; 8 S. E. Rep. 1.

140. LANDLORD AND TENANT — Conveyance. — In Maryland, a deed conveying the unexpired term of a leasehold estate for ninety-nine years, renewable forever, is not rendered void by the reservation of the use and enjoyment of the property during the natural life of the grantor. — *Culbreath v. Smith*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 112.

141. LANDLORD AND TENANT—Lease—Construction. — Under a stipulation in an oil lease that if the first well mentioned produces ten barrels of oil daily for thirty days the lessor should receive therefor \$500, and if the second well should produce fifteen barrels, "in like manner," the lessor should be paid "the further sum" of \$1,000, with the subsequent explanation that in no case should more than \$500 be paid for the first well, the lessee is bound for the payment on the second well, which produced fifteen barrels daily, though the first well produced nothing. — *Brushwood v. Hickey*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 70.

142. LEASE—Charges upon Lands—Presumption. — Application of the act of 1855, providing that if no payment or demand shall be made on or for any sum charged on land for twenty-one years, or no acknowledgment of its existence by the owner of the land, an extinguishment of the charge shall be presumed. — *Appeal of Bell*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 863.

143. LICENSE — Insurance Companies — Statute. — The proviso in Laws Ill. 1879, p. 179, § 80, does not confer upon a city power to require license of foreign insurance companies. — *City of Chicago v. Phoenix Ins. Co.*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 668.

144. LIMITATION OF ACTIONS—Married Women. — Plaintiff's interest in an estate was, on partition thereof, assigned to the purchaser at bankrupt sale of her husband's life estate, who had also bought plaintiff's interest. *Held*, that the statute of limitations did not run against her right of action arising out of the nullity of her deed and of the partition proceedings until the termination of her husband's life estate, which had vested in the purchaser and his vendees. — *Beattie v. Wilkinson*, U. S. O. C. (Va.), Oct. 29, 1888; 36 Fed. Rep. 646.

145. MANDAMUS—Auditors—Justice of the Peace. — A mandamus will not be issued to the auditor of the county of Monmouth to audit, adjust, allow and certify to the collector for payment bills of costs and fees of a justice of the peace for services, under the act concerning disorderly persons and the act for suppressing vice

and immorality. — *State v. Applegate*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 59.

146. MANDAMUS. — The object of writ of mandamus is to compel action. — *State v. Newman*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 603.

147. MARRIAGE CONTRACT — Construction. — As to what passes to survivor on a marriage settlement providing that "all the furniture, plate, horses, carriages and other personal property, in use by the parties for family purposes," shall vest in the survivor. — *Gorham v. Fullmore*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 729.

149. MASTER AND SERVANT — Negligence. — It was not criminal negligence in a corporation not to give warning to the master machinist employed in their establishment that there was danger of fire in the gas room, or that there was danger that the wall or walls would fall in case fire occurred, it not being alleged that he was ignorant of the danger or of the causes which produced it. — *Allen v. Augusta Factory*, S. C. Ga., Nov. 23, 1888; 8 S. E. Rep. 68.

150. MASTER AND SERVANT—Negligence. — A master, whose servants acting within the scope of their employment, pile up lumber in a negligent and unsafe manner, whereby a third person is injured without fault on his part, is responsible for such injury, though the servants were assisted in piling the lumber by another person. — *Andrews v. Boedecker*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 661.

151. MASTER AND SERVANT—Negligence. — Where injury to servant arose from his being subject to epileptic fits, of which fact he claimed to be ignorant, but of which the master had been informed: *Held*, improper to examine experts as to the probability or possibility of such ignorance on part of servant. — *Crowley v. Appleton*, S. J. C. Mass., Nov. 23, 1888; 18 N. E. Rep. 676.

152. MECHANIC'S LIEN—Architects. — Rev. Stat. Ill., ch. 82, § 1, confers no lien on architects for keeping book, auditing accounts and making settlements with contractors, nor for labor as supervising architects in improvements of grounds. — *Adler v. World's, etc. Co.*, S. C. Ill., Nov. 16, 1888; 18 N. E. Rep. 809.

153. MECHANIC'S LIEN—Statute—Constitutionality. — *Held*, that act of June 17, providing for the construction of former acts as to giving separate mechanic's liens to persons working on a building, violates const. Penn., art. 3, § 6, providing that no law shall be amended, revived, extended or conferred by a reference to its title only. — *Titusville, etc. v. Keystone, etc. Co.*, S. C. Penn., Nov. 5, 1888; 15 Atl. Rep. 917.

154. MINES AND MINING. — An owner under a patent of mineral lands, including a gold bearing vein or lode having its apex within the boundaries of the land patented, is not entitled to follow his vein or lode down on the dip, across his exterior boundaries, into the lands of an adjacent proprietor, holding an elder title under a patent for agricultural lands. — *Amador, etc. Co. v. South, etc. Co.*, U. S. C. C. (Cal.), Nov. 5, 1888; 36 Fed. Rep. 668.

155. MORTGAGE—Trust Deed—Injunction. — The sale of land under a trust deed given to indemnify a surety will not be enjoined where the debt is past due and the parties have agreed that the trustee may advertise in time to sell by a certain day, though the surety has not yet paid the debt. — *Brower v. Buxton*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 116.

156. MORTGAGE—Foreclosure—Payment. — On mortgage foreclosure, the mortgagor testified that he shipped goods to the mortgagee, with instructions to apply the proceeds to the mortgage, and also drew on the mortgagee, thinking the proceeds would pay both mortgage and draft: *Held*, that the drafts were a revocation of the instructions, and there was no evidence of payment of the mortgage. — *Kennedy v. Davis*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 51.

158. MORTGAGE—Rents and Profits. — Where it appears that the only possession of the mortgagee was as husband of one of the mortgagors, that he employed at his own expense a person to take care of the property,

and that he received no rents from the estate, nor was he guilty of default in not collecting any, he is not accountable to the mortgagors for the rents and profits during that period.—*Young v. Omokundro*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 120.

159. MORTGAGE—Foreclosure.—Where conveyance contains covenants against grantor's acts only, defendant cannot in foreclosure set up a partial failure of title and avail himself of covenants in a previous deed, except those that were with the land.—*Barry v. Guild*, S. O. Ill., Nov. 15, 1888; 18 N. E. Rep. 759.

160. MORTGAGE—Foreclosure—Remainder.—On foreclosing a mortgage made by the tenant for life, but purporting to convey the fee, and given by order of court to raise money with which to improve the land, certain contingent remaindermen were made parties, the complaint alleging that their interest in the land was inferior to the mortgage, and a decree was rendered against them by default: *Held*, that this barred their interest, and gave the purchaser at foreclosure sale a good title, though such remaindermen were not parties to the proceeding in which the mortgage was directed to be given.—*Goebel v. Iffa*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 649.

161. MUNICIPAL CORPORATIONS—Public Improvements.—Under the law of New York, where a contract was let for street improvement to the one supposed at the time to be the lowest bidder, but it afterwards appearing, owing to mistake in estimates, that he was the highest bidder: *Held*, there being no fraud or collusion, the contract was valid.—*Reilly v. Mayor, etc.*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 623.

162. MUNICIPAL CORPORATIONS—Public Improvements—Assessments.—In assessments for benefits in extending an avenue in the city of Passaic, the report and assessment of commissioners, having been returned to them by the common council, and another amended report and assessment being made, there is no authority in the charter for a second return to the commissioners.—*State v. Mayor, etc.*, S. O. N. J., Nov. 20, 1888; 16 Atl. Rep. 62.

164. MUNICIPAL CORPORATIONS—Taxation—Natural Gas Companies.—Act Penn., March 7, 1846, authorizing the city of Pittsburg to levy "upon all goods, wares and merchandise, and upon all articles of trade and commerce sold in said city, an annual tax not exceeding five mills," does not authorize the levy of a tax on the gross receipts of a natural gas company doing business in that city.—*Appeal of City of Pittsburg*, S. O. Penn., Nov. 5, 1888; 16 Atl. Rep. 92.

165. MUTUAL BENEFIT ASSOCIATION—Assessment—Estoppel.—Where charter provided for notice by posting, and the company adopts habit of sending written notice by mail of assessments due, and where it failed to send such notice, and delinquent, as soon as informed, tendered payment, the company is estopped from claiming forfeiture.—*Gunther v. New Orleans, etc. Assn.*, S. O. La., Nov. 19, 1888; 5 South. Rep. 65.

166. MUTUAL BENEFIT ASSOCIATION—Insurance—Beneficiary.—Where the rules of a mutual benefit association allowed the surrender of certificate and issue of a new one, a member may at any time change his beneficiary.—*Appeal of Beatty*, S. O. Penn., Oct. 22, 1888; 15 Atl. Rep. 861.

167. NATIONAL BANKS—Liability of Directors.—*Held*, that directors of a national bank were not liable for acts of the cashier in violation of the banking law done without their participation or knowledge where the directors were selected by the principal owner of the stock as advisors, it being understood that they were unused to the banking business and the cashier had considerable experience therein.—*Clews v. Bardon*, U. S. C. C. (Wis.), Nov. 22, 1888; 36 Fed. Rep. 617.

168. NEGLIGENCE—Canal.—Where the State, for the purpose of draining a canal, constructs a sewer along a city street in place of a city sewer, without condemning the land, and allows the property owners to connect with such sewer the drains formerly flowing into the

city sewer, the State assumes the same obligation that a city does in regard to its sewers, and is responsible for damage to such property owners caused by water backing into their sellers from the sewer.—*Bailow v. State*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 627.

169. NEGLIGENCE—Master and Servant.—In an action by a servant against his master for personal injuries caused by a defective hammer furnished by the latter, an allegation that defendant negligently furnished plaintiff the hammer is a sufficient averment that defendant knew, or might by the exercise of ordinary care have known, of the hammer's condition.—*Johnston v. Mo. Pac. Ry. Co.*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 790.

170. NEGLIGENCE—Child—Due Care.—*Held*, under the facts of the case, that there was no want of due care on the part of the mother of the child, injured by the horse of defendant improperly in the highway.—*Marsland v. Murray*, S. J. O. Mass., Nov. 28, 1888; 18 N. E. Rep. 680.

171. NEGLIGENCE—Injuries.—Facts reviewed with reference to liability of railroad company in case of injury to child crossing tracks, the negligence of the company not being the immediate cause of injury.—*Barkley v. Mo. Pac. R. R. Co.*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 793.

172. NEGLIGENCE—Evidence—Injuries.—Facts reviewed upon the question of contributory negligence on the part of plaintiff where crossing a railroad track being told to do so by the company's flagman, but where he might have escaped had it not been for a defective foot board in his wagon.—*McIntosh v. Chicago, etc. Co.*, U. S. C. O. (Minn.), Nov. 14, 1888; 36 Fed. Rep. 661.

173. NEGLIGENCE—Evidence—Verdict.—In an action for negligence, where the evidence on the material issues is conflicting, the court will not set aside a verdict, though it would have been entirely satisfied if the result had been the other way.—*Hardy v. Minneapolis, etc. Co.*, U. S. C. O. (Minn.), Nov. 14, 1888; 36 Fed. Rep. 657.

174. NEGLIGENCE—Injury.—To recover damages received it is necessary for plaintiff to prove that the accident was caused by the negligence of the railroad company, and that the plaintiff was not guilty of any negligence.—*Deikman v. Morgan's, etc. Co.*, S. O. La., Nov. 19, 1888; 5 South. Rep. 78.

175. NEGLIGENCE—Injuries—Child.—As to what constitutes evidence of contributory negligence on the part of a child of tender years.—*Rummelev. Allegheny, etc. Co.*, S. O. Penn., Nov. 5, 1888; 16 Atl. Rep. 78.

176. NEGLIGENCE—Injuries—Due Care.—Facts stated showing negligence on part of defendant and due care on part of plaintiff in case of injuries to a child in charge of its mother, and run over by street railroad.—*Chicago City Street Ry. Co. v. Robins*, S. O. Ill., Nov. 15, 1888; 18 N. E. Rep. 772.

177. NEGLIGENCE—Master and Servant.—Plaintiff, an employee of a railroad company which had leased the tracks of another railroad company of which defendant was manager, was injured by a defective fog: *Held*, that knowing the conditions of the tracks he had assumed the risks of the employment, as against defendant, as fully as if he had gone on the tracks under a contract with him.—*Wood v. Looche*, S. J. O. Mass., Nov. 27, 1888; 18 N. E. Rep. 678.

178. NEGLIGENCE—Ordinary Care—Injury.—Degree of care and diligence ordinarily exacted from persons crossing railroad tracks, in order to leave or board railroad train halted for that purpose.—*Weeks v. New Orleans, etc. Co.*, S. C. La., May 25, 1888; 5 South. Rep. 82.

179. NEGLIGENCE—Trespasser.—Rules stated as to negligence and care where trespasser on a railroad track was injured by an engine moving faster than ordinance permitted.—*Blanchard v. Lake Shore M. S. Ry. Co.*, S. O. Ill., Nov. 18, 1888; 18 N. E. Rep. 800.

180. NEGOTIABLE NOTE—Accommodation Paper.—F procured for his accommodation the execution to him of a note by defendant, which he took to plaintiff, and on the representation that it was regular business

paper, which he could not get indorsed without an additional indorser, obtained plaintiff's indorsement after his own, and had it discounted. Upon its protest for non-payment, plaintiff, as indorser, paid and obtained possession of it: *Held*, that in the absence of any evidence that plaintiff assumed the liability of a guarantor, or was jointly liable with defendant, he was entitled to recover from defendant as an indorser for value. — *Reinhart v. Schall*, Md. Ct. App., Nov. 22, 1888; 16 Atl. Rep. 126.

181. NEW TRIAL — Vacation. — An extraordinary motion for a new trial, if made in vacation, without a previous order granted in term, derives all its efficacy and standing from what is subsequently done respecting it in term-time. — *Blaock v. Waggoner*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 48.

182. NUISANCE—Railroad Company—Damages. — In an action against a railroad company for damages to an adjacent land owner caused by noise and smoke arising from the unlawful management of defendant's road, evidence as to the difference between the value of the property with and without the railroad is irrelevant. — *Thompson v. Pennsylvania R. R. Co.*, S. C. N. J., Nov. 20, 1888; 15 Atl. Rep. 533.

183. PARTITION—Mortgage. — One who has sold his interest in lands, taking a mortgage for the purchase money, which also he has assigned, cannot maintain a bill for partition and sale of the lands, under Code Md. art. 16, § 99 (Code 1878, art. 66, § 13), authorizing partition at the suit of a joint-tenant, tenant in common, parcener, or concurrent owner. — *Bannon v. Comagys*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 127.

184. PARTITION — Laches. — One who claims land under partition proceedings in the court of ordinary, and who, knowing how the land has been divided, fails to object at the time to the return of the appraisers appointed to make division, cannot, after the lapse of 14 years, object to the return, and have a new division made, on the ground that she received less than her share. — *Leverett v. Stephenson*, S. C. Ga., Dec. 3, 1888; 8 S. E. Rep. 72.

185. PARTNERSHIP. — Where partners borrow money for partnership purposes upon their joint and several note, with the wife of one partner as indorser, she, having paid the note, is entitled to recover the amount from a deceased partner's estate as a separate debt. — *In re Gray's Estate*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 719.

186. PARTNERSHIP — Dissolution — Evidence. — A partnership formed for manufacture of a patent plow, to continue during the life of the patent: *Held*, a dissolution of the firm under the facts of the case. — *Richardson v. Gregory*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 777.

187. PARTNERSHIP—Settlement—Mistake. — Where partnership settlement is made a mere production of a check six years thereafter, tending to show error in the settlement, was not sufficient to overthrow the formal settlement. — *Appeal of Varner*, S. O. Penn., Nov. 5, 1888; 16 Atl. Rep. 98.

188. PARTNERSHIP—Receiver—Attachment. — Where upon suit between partners for a dissolution, the partnership property comes into the hands of a receiver, before one claiming a special lien levies his attachment upon it, and such claimant desires to vacate the order appointing the receiver, he must proceed by filing a petition setting forth the facts upon which he relies to obtain a vacation of the appointment. — *Jacobson v. Landolt*, S. O. Wis., Dec. 4, 1888; 40 N. W. Rep. 636.

189. PATENTS — Infringements. — Question of infringement of a patent machine for attaching heel-plates to rubbers. — *Hunnington v. Hartford, etc. Co.*, U. S. C. C. (Conn.), Nov. 12, 1888; 36 Fed. Rep. 689.

190. PATENTS—Infringement—Preliminary Injunction. — The validity of letters patent, not having been adjudicated or recognized by the public, a preliminary injunction to restrain their infringement will not be granted in a suit in which the patentable novelty of the invention is fairly contested. — *Upton v. Wayland*, U. S. C. C. (N. Y.), Nov. 8, 1888; 36 Fed. Rep. 691.

191. PATENTS—Infringement—Depositions. — Depositions taken for the applicant for a patent in interference proceedings pending in the patent-office may, upon a proper showing of inability to retake them, be read upon the hearing of a bill by the successful applicant to declare invalid a patent issued to the contestant, though one of the defendants, assignee of part of contestant's rights, received his assignment before the interference proceedings were had, and was not a party thereto. — *Clow v. Barker*, U. S. C. C. (Iowa), Nov. 13, 1888; 36 Fed. Rep. 692.

192. PAYMENT — Evidence. — Where the decisive question in an action to quiet title is whether a note given for the purchase of the land was intended as an absolute payment, or as an evidence of debt, and the evidence is conflicting, a finding that it was merely evidence of debt will not be disturbed. — *Frankish v. Smith*, S. C. Cal., Dec. 4, 1888; 19 Pac. Rep. 701.

193. PAYMENT—Negotiable Securities. — One F borrowed from G money, giving a certificate for shares of stock in a company worth about \$3,000, as collateral security, it being agreed that if the note was not paid F was to "transfer such certificate" in payment of the note: *Held*, that the non-payment of the note at maturity and the receipt by G of monthly dividends on the stock did not effect such transfer of the certificate as to cancel the note. — *Fullerton v. Mobley*, S. C. Penn., Oct. 9, 1888; 15 Atl. Rep. 856.

194. PAYMENT—Taxes—Presumption. — The unsupported testimony of a person alleged to have paid taxes for seven successive years under color of title is not sufficient to establish such payment, where he has no positive recollection of the fact, but presumes they were paid from the fact that his agent was instructed to pay all taxes. — *Perry v. Burton*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 653.

195. PENAL ACTIONS—Repeal. — Gen. St. Colo. ch. 93, § 15, provided that a railroad company should file with the county clerk notice of a station, at which a book should be kept for entering a description of animals killed, under a penalty of double damages for any stock killed. Act March 31, 1885, amended the statute, omitting the section requiring notice: *Held*, that the omitted section was repealed. — *Denver & R. G. Ry. Co. v. Crawford*, S. C. Col., Nov. 16, 1888; 19 Pac. Rep. 673.

196. PLEADING—Damages. — Breach of contract gives a right of action, whether special damages be alleged or not, and, therefore, excluding from the declaration all averments of special damages, will not warrant the court in dismissing the action. — *Kenny v. Collier*, S. C. Ga., Nov. 1, 1888; 8 S. E. Rep. 58.

197. PLEADING—Evasion—Partnership. — The statement, in an affidavit of defense, "that defendant company is not a general partnership, but a limited partnership," is evasive, as a denial of the allegation that "at the time the indebtedness was contracted defendants were doing business as a general partnership, and had not then become a limited partnership association." — *Laferty v. Sheriff*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 90.

198. PLEADING—Evidence—Variance. — Sufficiency of evidence to sustain declaration against a city for personal injuries. — *City of Rock Island v. Cuijnely*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 753.

199. PLEDGE—Notice. — As to what facts constitute sufficient notice to put upon inquiry a pledgee of stock certificates stolen by pledgor. — *Appeal of Giren*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 75.

200. PLEDGE—Prior Liens. — The right of retention of the thing pledged by the pledgee is not affected by the session of his property by the debtor, and the fact that the thing pledged is subject to a lien of the purchase money does not preclude another creditor from acquiring possession; in such case it takes the pledge subject to prior liens. — *Haynes v. Their Creditors*, S. O. La., May 26, 1888; 5 South. Rep. 68.

201. PRACTICE—Contempt—Mandamus. — The judge of a district court at chambers cannot legally hear, and

determine a prosecution in the nature of contempt for an alleged violation of the writ of *mandamus*. — *In re Price*, S. O. Kan., Nov. 10, 1888; 19 Pac. Rep. 751.

202. PUBLIC LANDS—Swamp Lands—Parol Evidence. — Under the provisions of the act of congress of September 28, 1850, conferring swamp lands, and the Michigan act of June 28, 1851, evidence *in pais* that a parcel of land was at the date of the first named act of the quality therein described, is incompetent after the secretary of the interior has discharged his duty thereunder. — *Chandler v. Caulmet, etc. Co.*, U. S. C. C. (Mich.), Nov. 14, 1888; 86 Fed. Rep. 665.

204. QUIETING TITLE—Evidence. — A complaint to quiet title, alleging a fraudulent conveyance from husband and wife, shows no cause of action where plaintiff admits that no conveyance was made. — *Turner v. White*, S. O. Cal., Nov. 22, 1888; 19 Pac. Rep. 683.

205. RAILROAD COMPANIES—Statute. — The exception, by implication, to the statute imposing upon railway companies the duty of fencing their tracks, by which such places as are necessary and convenient for the use of the public may be left open, cannot be extended to a siding used merely for the loading of ties, wood, and piling purchased by the company, and for the passing of trains, at a point where no depot is maintained, no employee stationed, and where persons desiring to take passage are obliged to flag the trains themselves. — *Hurt v. St. Paul, etc. Co.*, S. O. Minn., Dec. 6, 1888; 40 N. W. Rep. 613.

206. RAILROAD COMPANIES—Contract—Notice. — A written agreement by the grantor of the right of way to a railroad company, to fence it on each side through his lands, will not affect the right of a subsequent purchaser to require the company to fence its road, under the provisions of §§ 3324 and 3325, Rev. St., where the purchase was made without actual or constructive notice of the existence of such agreement. — *Pittsburg, C. & St. L. Ry. v. Bosworth*, S. O. Ohio, Nov. 13, 1888; 18 N. E. Rep. 533.

207. RAILROAD COMPANIES—Bonds—Mortgages. — A railroad company employed a construction company to build some of its track, agreeing to issue bonds therefor to a certain amount per mile of track, in installments, as sections of the work should be completed. By a subsequent agreement the bonds were delivered in advance of the building of the track, the construction company agreeing to take care of and pay all interest accruing before the railway became in a condition for traffic, and the former agreed to reimburse the latter for all interest paid, not properly chargeable to it, out of the first earnings of the road: *Held*, that the construction company was only bound to pay interest on so many of the bonds as it received and used to which it was not entitled under the construction contract. — *Foster v. Mansfield, etc. Co.*, U. S. C. C. (Ohio), Aug. 24, 1888; 36 Fed. Rep. 627.

208. RAILROAD COMPANIES—Injury to Stock—Statute. — Code Ala. 1876 §§ 1699, 1702, which renders a railroad company liable for injuries to stock where such injuries result from its failure to comply with the statutory requirements or other negligence of the company do not require such negligence to be the sole cause. — *Western Railway v. Sittrunk*, S. O. Ala., Dec. 4, 1888; 5 South. Rep. 79.

209. RAILROAD COMPANIES—Railroad Commissioners—Powers. — A power conferred by the legislature upon a board of commissioners, required to be exercised with reference to the affairs of certain corporations will, not be extended by implication; and the acts which the board attempts to do under the power will not be upheld, unless the authority to do them is affirmatively shown to be included in it. — *Board of Railroad Comrs. of Oregon v. Oregon, etc. Co.*, S. O. Oreg., Nov. 5, 1888; 19 Pac. Rep. 702.

210. RECORDS—Certificate—Stock-brand. — The description of a horse-brand, followed by a certificate of the clerk of the county court that it is a true copy of the record of the brand, shows, with reasonable cer-

tainly, that it was recorded in that county. — *Thompson v. State*, Tex. Ct. App., Nov. 28, 1888; 9 S. W. Rep. 760.

211. REFEREE—Discretion of Court. — Under Code N. C. § 274, providing for relief against an order in case of mistake, inadvertence, or surprise, a refusal to reopen a report of a referee, and recommit the case, where a party had knowledge that his counsel had ceased to act for him, and employed no other, is within the court's discretion, and is not error. — *Smith v. Smith*, S. O. N. Car., Dec. 3, 1888; 8 S. E. Rep. 131.

212. REMOVAL OF CAUSES. — Where the petition for removal is filed too late, an order of the State court purporting to remove the cause to the United States circuit court is erroneous. — *Lambin v. Cox*, S. O. Kan., Nov. 7, 1888; 19 Pac. Rep. 709.

213. REMOVAL OF CAUSES—Procedure—Filing Bond. — Under the act of congress for the removal of causes (March 3, 1867), a filing of the petition and bond with the clerk of the State court is not sufficient, as the court itself has a right to pass upon them. — *Shedd v. Fuller*, U. S. C. C. (Ill.), Nov. 5, 1888; 86 Fed. Rep. 609.

214. REPLEVIN—Bond—Evidence. — As to what constitutes efficient proof in such a replevin bond, that the goods mentioned therein were those taken. — *Kellogg v. Boyden*, S. O. Ill., Nov. 15, 1888; 18 N. E. Rep. 770.

215. RESULTING TRUST—Evidence—Improvements. — Evidence admissible to enforce an alleged resulting trust. — *Kelly v. Kelly*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 785.

216. SALE—Confirmation—Bona Fide Purchaser. — It is not necessary to make *bona fide* purchasers of property parties to a meritorious working to vacate a judgment and set aside a sale under which the property was irregularly sold. — *Welch v. Marks*, S. C. Minn., Dec. 6, 1888; 40 N. W. Rep. 611.

217. SALE—Brokers—Commissions. — Contract of sale, negotiated by brokers, is not fraudulent because of an agreement by the seller's broker, unknown to the seller to share his commissions with the purchaser's broker. — *Louisville N. A. & Ry. Co. v. Diamond State Iron Co.*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 735.

218. SALES—False Representations. — Where a contract for the sale and placing of machinery in a mill specifies no time within which it is to be so placed, and the work is to be done at the purchaser's expense, he cannot for the purpose of setting off the extra expense show that an agent of the seller represented that it would take but four weeks and that it in fact took nine, where it appeared that the representation was made after the signing of the contract. — *Marsh v. Nordyke v. Mormon Co.*, S. C. Penn., Oct. 29, 1888; 15 Atl. Rep. 875.

219. SCIRE FACIAS—Presumption—Payment. — In *scire facias* on a judgment it is proper to instruct that finding the bond on which the judgment was rendered among the papers of the deceased obligor, raised a presumption that he obtained it by payment. — *Pater v. Nelson*, S. O. Penn., Oct. 1, 1888; 15 Atl. Rep. 852.

220. SCHOOL LANDS—Forfeiture. — In order to forfeit the rights and interest of the purchaser of school lands on account of his default to pay annual interest, or the balance of the purchase money when the same becomes due, the notice must be given and served in accordance with the provisions of section 2, ch. 161, Sess. Laws, 1879. — *Hansen v. Wilson*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 717.

221. SCHOOL DISTRICTS—Annexation. — Act Pa. April 18, 1876, authorizing the court of quarter sessions to annex the lands of persons resident in one township or borough to another township or borough for school purposes, does not authorize the annexation of land to a township to which it is not adjacent. — *In re Heidler*, S. O. Penn. Nov. 5, 1888; 16 Atl. Rep. 97.

222. SHIPPING—Carriage of Passengers—Statute. — Rev. St. U. S. §§ 4461, 4466, respecting the number of passengers that may lawfully be carried by a passenger steamer, have no application to a ferry-boat, though temporarily employed as an excursion boat. — *Schwerin*

v. North Pac. C. R. Co., U. S. D. C. (Cal.), Oct. 23, 1888; 36 Fed. Rep. 710.

223. SHIPPING—Carriage of Goods.—Upon libel for damage alleging negligence and want of proper care in stowing cargo, no recovery can be had for damage by coal dust not resulting from improper stowage. — *The Thomas v. Melrose*, U. S. C. C., (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 708.

224. SHIPPING—Carriage of Goods—Negligence.—It is the ship's duty to take all the precautions that experience shows to be necessary to avoid injuries to cargo liable to arise on the voyage. If the best customary means are not employed, it is at her risk. — *Hills v. Mack-ill*, U. S. D. C. (N. Y.), Nov. 24, 1888; 36 Fed. Rep. 702.

225. SHIPPING—Carriage of Goods.—Facts stated to show that the ship was liable for injury to cargo on account of latent defects in stowage and for inexperience and mistake of one of its officers. — *The Bergen-reen*, U. S. D. C. (N. Y.), Nov. 20, 1888; 36 Fed. Rep. 700.

226. SHIPPING—Delivery—Notice.—The provision of the bill of lading that the ship may discharge fruit when she is ready, and that the goods shall thereafter be at the consignee's risk, is a reasonable stipulation and valid, so far as to permit the discharge of so much green fruit as can be removed by the consignee during the day out of danger from frost at night, providing the consignee is given timely notice of the discharge and opportunity to take care of his goods. — *Bonamro v. The Boskenna Bay*, U. S. D. C. (N. Y.), Nov. 24, 1888; 36 Fed. Rep. 697.

227. SHIPPING—Charter Party—Agent's Commission.—Where a ship's charter provided that the steamer was to be consigned to charterer's agents at ports of loading, paying one commission of two and a half per cent. to charterer's order at the first loading port, and to be reported at the custom house by the said agents on customary terms: *Held*, the agents were not entitled to a commission at a port of discharge. — *The Serapis*, U. S. D. C. (N. Y.), July 27, 1888; 36 Fed. Rep. 707.

228. SHIPPING—General Average—Baggage.—A passenger's baggage, stowed in the baggage compartment of a steamship, and damaged by water in an attempt to extinguish a fire which threatened the safety of the vessel, is a subject of average contribution. — *Heze v. North German Lloyd*, U. S. C. C. (N. Y.), Nov. 14, 1888; 36 Fed. Rep. 705.

229. SHIPPING—Master—Arbitration.—The captain of a vessel has no authority by virtue of his position to appear as attorney for the owners before arbitrators chosen to settle the liability for a collision. — *Vessel Owners' Co. v. Taylor*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 663.

230. SPECIFIC PERFORMANCE—Contract.—A party who, upon the consideration of a promissory note and a mare, has entered into a written contract for the conveyance of certain real estate, cannot avoid the specific performance of such contract by destroying the note and attempting to return the mare. — *Avery v. Morrison*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 715.

231. SPECIFIC PERFORMANCE—Purchase Money.—Specific performance of a contract for the sale of land will not be decreed where, at the time of filing the bill and at the time of trial, the complainants are indebted to defendant for the balance of purchase money, which they had not offered to pay. — *Asken v. Carr*, S. C. Ga., Dec. 3, 1888; 8 S. E. Rep. 74.

232. STATUTE—Lien.—Under Laws Wis. 1885, ch. 469, §§ 1, 2, supplies actually used in getting out logs, if sold for that purpose, constitute a lien on the logs, though they were placed in the store of the purchasers as part of their stock, to be sold in the usual course of trade at a profit to their employees and others. — *Stacy v. Bryant*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 632.

233. STATUTE OF LIMITATIONS—Acknowledgment of Debt.—An admission of a debt made by defendants in their answer to a bill to set aside their assignment is not such an acknowledgment as will take it out of the statute of limitations. — *Holberg v. Jafray*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 94.

234. SUPERVISORS—Election—Cities and Towns.—The city of A was included within the town of A, in the county of H, which was under township organization. An election for the selection of a supervisor was held in the township, which included the city of A, and at which the electors of the whole township voted. It was held that the relator was not elected as a supervisor from the city of A, another candidate who resided outside the city boundaries, within the town, having received a greater number of votes at the election so held. — *State ex rel. Oyle v. Supervisors*, S. O. Neb., Nov. 23, 1888; 40 N. W. Rep. 593.

235. SURETIES—Administrator.—Defendants are not liable for the failure of the administrators to collect a debt from a debtor who has been insolvent ever since the war, though one of his creditors by dividing a debt owed by the same person individually into small notes, succeeded in collecting it, as his success resulted from the willingness of the debtor to pay, rather than his financial responsibility. — *Gray v. Grant*, S. C. N. Car., Nov. 19, 1888; 8 S. E. Rep. 103.

236. TAXATION—Assessment.—A farm which was formerly two farms, with buildings on each, is divided by the line between two townships. The owner resides on and tills the land in one township; while by agreement with him, another person resides on and tills the land in the other township, on shares: *Held*, that the entire farm is taxable to the owner in the township where he resides. — *State v. Washer*, S. C. N. J., Nov. 22, 1888; 16 Atl. Rep. 49.

237. TAXATION—Tax-deed—Limitation.—A tax-deed that has been recorded in the proper county for more than five years, and under which the tax-deed claimant has been in the actual possession and occupancy of the land, where the land sold for taxes was subject to taxation, and the taxes have not been paid, or the land redeemed, as provided by law, cannot be overthrown by evidence not contained within or upon the face of the deed. — *Edwards v. Sims*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 710.

240. TENDER—Tax-deed—Payment into Court.—It is error on bills set aside tax deed not to require payment into court of the money tendered to reimburse defendant for his outlay in costs for tax-sale with interest. — *Johnson v. Haling*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 786.

241. TRADE-MARK—Assignment.—Assignment of a business with the plant, includes trade-marks used in the business and gives the assignee the exclusive right thereto. — *Merry v. Hoopes*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 714.

242. TRUSTS—Declaration.—A written instrument, executed in form to be recorded, by which the grantee of land declares that he holds it "in trust for the Indians whose names are hereunto attached, they having paid towards the purchase of the said lands the sums set opposite their names, respectively," to which is attached the list of names and amounts paid, is a sufficient declaration of a trust, in Michigan, in favor of the persons whose names appear in the list. — *Obermiller v. Wythe*, U. S. C. C. (Mich.), Oct. 2, 1888; 36 Fed. Rep. 641.

243. UNITED STATES ATTORNEY—Statute.—The general authority to prosecute delinquents given to United States district attorney by Rev. St. § 771, authorizes him to employ a stenographer in criminal cases, and to render the United States liable to pay a reasonable compensation for services rendered, without first obtaining the authorization of the attorney general of the United States. — *Fish v. United States*, U. S. D. C. (N. Y.), Oct. 29, 1888; 36 Fed. Rep. 677.

244. WATER-COURSES—Real Property—Quietting Title.—Under Civil Code Cal. § 668, providing that real property shall consist of that which is incidental or appurtenant to land, and section 662, providing that a thing is deemed to be incidental or appurtenant when it is used with the land for its benefit, a right to use an iron pipe, through which water is conducted from a reservoir to a mill, and to the water itself, is real property, and the subject to an action to quiet title. — *Standard v. Round, etc. Co.*, S. C. Cal., Dec. 2, 1888; 19 Pac. Rep. 689.

245. WILLS—Construction—Devisees. — Under a devise to "the children of my mother, the grandchildren of my mother to receive their parent's share should that parent not be in life," two living grandchildren take their deceased mother's share to the exclusion of the issue of their sister, who died before testator. — *Talbert v. Burns*, S. C. Ga., Nov. 28, 1888; 8 S. E. Rep. 79.

246. WILLS—Legatees—Ademption. — A testator bequeathed to his two daughters \$500 each. They subsequently married, and testator gave their husbands \$500 each, without stating whether it was in lieu of the legacies or not; but subsequently he stated to third persons that the money was advanced for that purpose: *Held*, not an ademption to the legacies. — *Hart v. Johnson*, S. O. Ga., Dec. 3, 1888; 8 S. E. Rep. 73.

247. WILLS—Construction—Alienation. — Testator gave property in trust for his son for life, and directed the trustees to pay the income to the son semi-annually, "on his personal receipt therefor, without the said son having any power to sell, assign, or pledge the same previous to the payment thereof to him," which receipt should be the trustees' acquittance: *Held*, that neither accrued income in the possession of the trustees, nor the accruing income, could be reached by the son's creditors, or be assigned by him. — *Partridge v. Cavender*, S. C. Mo., Nov. 28, 1888; 8 S. W. Rep. 785.

248. WILLS—Construction—Devisee. — Will provided that residue of estate should be divided equally among the children of testator's brothers and sisters. A son of one of the brothers died before the making of the will leaving a son surviving: *Held*, that under Gen. Stat. Ky. ch. 50, art. 2, § 1, and ch. 113, § 18, the son of the deceased nephew would take the share his father would have taken. — *Chenault v. Chenault*, Ky. Ct. App., Nov. 22, 1888; 9 S. W. Rep. 775.

249. WILL—Construction. — Construction of will providing that "after the death of my said wife the said principal fund of \$5,000, and the securities and properties which may constitute the same shall form and be a part of my estate for distribution and disposal as herein and after provided." — *Stout v. Stout*, N. J. Ct. Chan., Oct. 31, 1888; 15 Atl. Rep. 843.

250. WILLS—Construction—Nearest Relations. — A gift to the testator's "nearest relations" means brothers, to the exclusion of nephews and nieces. — *Locke v. Locke*, N. J. Ct. Chan., Nov. 22, 1888; 16 Atl. Rep. 49.

251. WILLS—Construction.—Construction of ambiguous will in which testator bequeathed to his son "the sum of \$4,000, and \$2,300 to be deducted out and interest paid from date, to be deducted out of the \$2,300, the balance to be paid." — *Haines v. Haines Exr's.*, N. J. Ct. Chan., Nov. 13, 1888; 15 Atl. Rep. 839.

252. WILL—Construction—Space. — Construction of a will where a father gave his daughter property absolutely and by codicil gave her power by will to devise her share which in case of her death in his life-time should be paid to her executors: *Held*, not to lapse. — *In re Piffard's Estate*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 718.

253. WILLS—Construction—Contingent Remainders. — Where there is a gift to one person, and, in case of his death, then to another, the gift over is construed to take effect only in the event of the death of the first legatee before the period of payment or distribution. — *Bishop v. McClelland's Exr's.*, N. J. Ct. Chan., Nov. 23, 1888; 16 Atl. Rep. 1.

254. WILLS—Construction—Conditions. — Where there is a bequest to on person, and "in case of his death," or "in case of his death without issue," to another person, such and similar expressions, unexplained by the context of the will, are to be confined to the event of death happening before the period of payment or distribution, i. e., the death of the testator. — *Burdge v. Walling*, N. J. Ct. Chan., Nov. 20, 1888; 16 Atl. Rep. 51.

255. WILL—Deed—Equity. — A conveyance by a married woman of her separate estate to her husband and a son which is a nullity for want of joinder therein by the husband and which has not been probated as a will in the proper forum cannot be upheld as such

when set out as a deed in a bill by an heir to set it aside where defendant asserts that it is a will. — *Travick v. David*, S. C. Ala., Dec. 6, 1888; 5 South. Rep. 83.

256. WILL—Mental Capacity—Evidence. — Facts discussed and authorities reviewed as to mental capacity to make a will and the evidence admissible to prove or disprove same. — *Keithley v. Stafford*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 741.

257. WILLS—Reservation—Mining. — *Held*, that the reservation of "mining privileges" in a will of devising land included the use of the entry thereto. — *Appeal of Rankin*, S. O. Penn., Nov. 15, 1888; 16 Atl. Rep. 82.

258. WILLS—Construction—Property. — Where decedent purchased land after making a will giving his wife a certain interest in all of his property, the after-acquired property is conveyed by the will, as it is to be presumed that the testator did not intend to die intestate as to any part of his estate. — *Patty v. Goolbey*, S. O. Ark., Nov. 7, 1888; 9 S. W. Rep. 846.

259. WILLS—Probate. — Where evidence was conflicting as to proof of legal execution of will: *Held*, not sufficient to overcome the presumption arising from the attestation. — *Riordan v. O'Hagan*, S. O. Wis., Dec. 4, 1888; 40 N. W. Rep. 649.

260. WILLS—Devisees—Charges on Land. — Where a will, after certain bequests, devises the residue of the estate to specified devisees, "they paying out of the same all my just debts," the testator's creditors may proceed directly against the devisees, though under Pub. St. E. I. ch. 189, §§ 1, 2, the entire estate is liable. — *Woonsocket Inst v. Ballou*, S. O. E. I., Nov. 10, 1888; 16 Atl. Rep. 144.

261. WITNESS—Competency—Transactions with Deceased Persons. — In an action against a corporation for trespass, plaintiff is not rendered incompetent to testify to a parol lease, made by a director of the corporation, by the fact that the director is dead. — *South Bolt Co. v. Muhlbach*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 117.

262. WITNESS—Credibility—Impeachment. — Where a witness denies having made a certain statement, it is error not to allow plaintiff to prove by another witness that he was present and heard defendant's witness make the statement, as it would tend to impeach defendant's witness. — *Bray v. Latham*, S. O. Ga., Nov. 12, 1888; 8 S. E. Rep. 64.

263. WITNESS—Competency. — In an action by the executor of the payee of a bond which it is alleged improperly came into possession of defendant, the latter is incompetent to testify whether or not he obtained possession of it since the testator's death. — *Schultz v. Boehme*, S. O. Penn., Nov. 3, 1888; 16 Atl. Rep. 89.

264. WITNESS—Privilege—Communications—Physicians—Attorney. — Construction of Code Civil Proc. N. Y. § 639, rendering incompetent certain persons in their own interest as against representations of deceased persons and making privileged communications of attorney and physicians. — *Loder v. Whelpley*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 874.

265. WITNESS—Competency. — Code Iowa, § 3639, making a party to an action incompetent to testify against the personal representative of a deceased person does not disqualify an heir and distributee from testifying for the defendant in an action by a creditor of the estate, who is also heir and distributee, against the executor. — *Harron v. Brown*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 708.

266. WITNESS—Examination. — *Held*, no error to allow a witness on behalf on trial of case of liquor nuisance to be recalled to testify after State had closed its case it being disputed as to what his testimony was on a certain point. — *State v. Huff*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 720.

267. WITNESS—Competency—Eminent Domain. — In an action to recover damage for real estate condemned for right of way for a railway company, a witness who testifies that he resides near the land condemned is, *prima facie*, a competent witness to prove the amount of damages sustained by the land owner. — *Northeastern, etc. Co. v. Frasier*, S. O. Neb. Nov. 28, 1888; 40 N. W. Rep. 609.

The Central Law Journal.

ST. LOUIS, FEBRUARY 1, 1889.

CURRENT EVENTS.

OUR readers will, we trust, pardon a few words of a personal nature, which seem appropriate in view of some recent changes in the editorial management of this JOURNAL. In what we shall say, it is not our intention to reflect unfavorably upon its past management, which has been of a high order, the best evidence of which is seen in its extended reputation, its large circulation—the largest, probably, of any law journal in the world—and the constantly increasing demand for the JOURNAL.

But there is an old Irish bull, which applies as well to law journals as to individuals that, "if you want to be as good a man as your father, you have got to be a better one." So, we recognize the fact that, if we want to publish as good a journal as that edited, in successive periods, by Judge Dillon, Judge Thompson and Mr. Lawson, we must, at least, endeavor to prepare a better one. All of these considerations challenge our greatest effort. And this, at least, we propose to give. Our aim will be to extend the value and usefulness of the JOURNAL, by elevating its editorial standard, by presenting, in the most attractive and readable shape, the current legal thought of the country, and by the publication only of that, which is peculiarly the province of a law journal—fresh legal news. We propose, as far as possible, to give our readers that which they cannot find in text-books, of which we might claim to be the forerunner or advance sheets, and to place weekly in the hands of the busy practitioner a rich compendium of current law.

AN article on the "local prejudice" clause of the new Removal of Causes act, prepared by Judge Maxwell of the Supreme Court of Nebraska, will be found on another page of this issue. It is readable, not only on account of the ability of the writer, but also by reason of the very great interest in the sub-

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ject, induced by the general ignorance, or at least misapprehension of the profession as to the meaning, scope and proper construction of that act. Indeed, the universal belief among federal practitioners is, that the authors and framers of that law know even as little about it. The practice under the clause referred to is considerably changed from the old law, especially in regard to the mode in which prejudice or local influence need be alleged and shown, as Judge Maxwell clearly points out.

It will be borne in mind, that the act as passed in March, 1887, was, on its enrollment, found seriously defective in many particulars of spelling, punctuation, etc., such as the repeated substitution of "controversary," for the word "controversy." The errors were such and so numerous as to materially interfere with a proper interpretation of the act. In response to the outcry on the part of the profession congress, in August, 1888, passed an act to correct the enrollment of the former act, but which is substantially the same act. This act of August, 1888, and which is the one now in force, we print in full, following the article of Judge Maxwell, thinking that our readers are interested in knowing its exact phraseology and provisions.

WE have received from a number of our readers inquiries as to the scope, effect and general construction of the late act of congress of September 26, 1888, making it an offense to prepare and put in the mail a postal card or envelope upon which anything of a defamatory or objectionable nature appears, in other words, the law aimed principally at improper public "dunning;" and as the act is of general interest, and its interpretation unsettled, we are led to offer some observations in reference to it. The act in question provides: "That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which any delineations, epithets, terms or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display, and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed, or other-

wise impressed or apparent, are hereby declared non-mailable, etc., and any person knowingly depositing for mailing * * * shall be fined," etc. We are aware of but one ruling under this law, and that by Judge Blodgett, of the United States District Court at Chicago. The indictment was against Sprague—president of a collection agency—and charged him with mailing a certain letter, upon the envelope of which was printed in large black letters, "Sprague's Collection Agency." The judge held this did not come under the law.

Of course it will be impossible to say, except upon the facts of each case, what would or would not be considered as within the meaning of the law. But a study of the language of the statute will enable one readily to determine, in a general way, the underlying principle that ought to govern. There is, undoubtedly, a proper, gentlemanly and decent way of reminding a debtor of his obligation. This, the law, certainly does not aim at. Any language or device, printed or written, which is threatening in character and liable to bring a man into bad odor or disrepute, or intended to reflect injuriously upon his character, is contemplated by the statute.

The law, we feel sure, has not in mind to discountenance the proper collection of debts, but seeks only to prevent the disseminator of libels on unfortunate debtors.

THE Supreme Court of the United States will doubtless be called on shortly to determine the legal *status* of the interstate commerce commission, and define the scope of its powers. The opportunity will be afforded in the case of the Kentucky & Indiana Bridge Company v. L. & N. Ry. Co., recently decided by the United States circuit court at Louisville, reviewing the previous ruling of the commerce commission. The bridge company's charter authorized it to construct railroad tracks over its bridge, to connect with other railroad lines, and to do a transportation business with its own locomotives as a connecting link between those lines. The company itself claims to be a common carrier, and actually engaged in such transportation business as is authorized by its charter. A clause in the interstate com-

merce law provides that the term railroad, as used in that act, "shall include all bridges and ferries owned or operated in connection with any railroad." The interstate commerce commission, through chairman Cooley, one member dissenting, decided that the bridge company was a common carrier, and, as such, was entitled to equal facilities with those furnished to other common carriers.

Judge Jackson, of the United States court, holds that the bridge company is not a common carrier, and he also declares, that the commission does not constitute a court for any purpose, but is merely an advisory body, whose findings are to be regarded merely as recommendations. As to the first point, and the one really at issue, the supreme court will probably find little difficulty in reversing Judge Jackson. On the question of the *status* of the commission, the profession will look eagerly for an enunciation from the court of last resort.

NOTES OF RECENT DECISIONS.

IN the case of *Metcalf v. City of Watertown*, 9 S. C. Rep. 173, the Supreme Court of the United States restrict somewhat, as compared with former rulings, the jurisdiction of the United States circuit court. It was there held that an action on a judgment of a court of the United States, is not necessarily an action arising under the constitution or laws of the United States, and therefore the circuit court cannot take original cognizance of it on that ground. To bring it in that class of cases, there must be some averment showing that a federal question will really be involved.

A still more important point for the attention of the practitioner, is presented in the same case, viz: that, although often decided by that court that a suit may be said to arise under the constitution or laws of the United States, within the meaning of the act, even where the federal question upon which it depends, is raised, for the first time in the suit, by the answer or plea of the defendant, yet such ruling was made in removal cases in which the grounds of federal jurisdiction were disclosed, either in the pleading or petition for removal; and that the case at the time the jurisdiction of the circuit court at-

tached, by removal, clearly presented questions of federal nature (citing *R. R. Co. v. Miss.*, 102 U. S. 135; *Ames v. Kansas*, 111 U. S. 449; *Removal Cases*, 115 U. S. 1, 11). But where the original jurisdiction of the circuit court of the United States is invoked, upon the sole ground, that the determination of the suit depends upon some question of a federal nature, it must appear, at the outset, from the petition of the party suing, that the suit is of that character. In other words, it must appear, in that class of cases, that the suit was one, of which the circuit court at the time its jurisdiction is invoked could properly take cognizance.

IN the case of *Deshon v. Wood*, 19 N. E. Rep. 1, the Supreme Judicial Court of Massachusetts pass upon an interesting question of fraudulent conveyances. This was a bill in equity brought by an assignee of an insolvent, to apply for the benefit of the insolvent estate, certain bonds conveyed by the insolvent to his wife, the defendant. The bonds were delivered by the husband to the wife before the marriage, to become her property on the consummation of the marriage as a settlement. The court holds that it was simply an executory contract to transfer them on the marriage; made in consideration of it, and not being in writing, it could not, under the statute of frauds, be enforced, and its performance by the husband after marriage was, therefore, voluntary and void as against his creditors; that the transfer was also void as an antenuptial contract under statute providing for such contracts, and which statute requires that the contract shall be recorded, and if not recorded it shall be void. When the bonds were given he was insolvent, and the agreement having been made without any valuable consideration it was void, though she did not participate in any actual intent to hinder and defraud. The dissenting opinion of Allen, J., concurred in by Devens and Knowlton, JJ., is worthy of notice, and will undoubtedly commend itself to many. He takes the position that the transfer was not an executory contract, but a prior delivery of the property to take effect as a full transfer at the very instant of the marriage; that the statute cited by the court does not apply to this case. Independently of the statute, the transfer to the wife would be valid unless she participated in her hus-

band's fraudulent intent. Even an unfulfilled promise to marry is held a valuable consideration — *a fortiori* — marriage itself. And the contract being executed, is not within the statute of frauds.

A CASE, interesting for its novelty, and instructive because of the ability and exhaustiveness of the opinions filed, is that of *Baker v. Stewart*, 19 Pac. Rep. 904, recently decided by the Supreme Court of Kansas. It was there held that a deed conveying real estate to a husband and wife, conveys the same to them in entirety, and that on the death of one, the survivor takes the entire estate, and it was further held that neither the statutes relating to married women, nor to descents and distributions have changed this rule of law. The reasoning of the court was about as follows: A deed might be executed to a husband and wife which would convey to them, as tenants in common, provided it appears in express words or words strictly implying in such an intention. But by the common law and the weight of authority, a deed to husband and wife conveys the estate in entirety with right of survivorship in either as to the whole of the property. The cases cited from Iowa, Illinois and New Hampshire, as holding a contrary view, were decided under special statutes, and, therefore, are not authority. That the married woman's act does not change this rule, because that act was passed presumably for the benefit of married women, and as, according to the statistics, the expectancy of life for women is greater than that for men, and if the married woman's act transforms an estate in entirety into an estate in common, then it will, in a great majority of cases, divest married women of one-half their estates. That the weight of authority is against such a construction of the married woman's act.

Chief Justice Horton, dissenting in an elaborate opinion, takes issue with the court as to the first premise, viz: that an estate in common could be, by the common law, conveyed to husband and wife, claiming that upon reasoning and the weight of authority husband and wife cannot, at common law, by any words of grant, be made either joint tenants or tenants in common. For that reason he opposes recognizing estates in entirety, inasmuch as that determines the incapacity

of husband and wife to take either as joint tenants or tenants in common.

IN *Lindsey v. State*, 5 South. Rep. 99, recently decided by the Supreme Court of Mississippi, the defendant was indicted for carrying concealed weapons while Code, § 2985, was in force. He was tried after the passage of the act March 9, 1888, amending the code by striking out the clause which excepted from the prohibition persons apprehending an attack, and by increasing the penalty. Appellant urged that he cannot be punished under the old law because it had been repealed, nor under the amended law because, as to him, it is *ex post facto*, both under State and federal constitutions. The court in adopting that conclusion, say:

As to him, the amended law was clearly an *ex post facto* law—First, because it abrogated the right which before existed of defending against the charge on the ground that he had good and sufficient reason to apprehend an attack, and made an act criminal which was not so at the time the amendment was passed; and, second, because it changed, but did not mitigate, the punishment for the offense. *Calder v. Bull*, 3 Dall. 386; *Hartung v. People*, 22 N. Y. 96; *Kring v. Missouri*, 107 U. S. 221; *Com. v. McDonough*, 13 Allen, 581. * * * Such being the nature of *ex post facto* laws, it is nevertheless true that the punishment for offenses already committed may be changed by statute, provided the punishment is mitigated, and not increased or aggravated, by the change. As the constitutional provision was enacted for protection against arbitrary and oppressive litigation, it is quite evident that it is not violated by any change in the law which goes in mitigation of the punishment. There has been much diversity of opinion as to what would constitute mitigation of punishment in such case, but the view best sustained by reason and authority is that a law changing the punishment of offenses committed before its passage is objectionable as being *ex post facto*, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or administration as its primary object. *Cooley, Const. Lim.* 329. It is enough for courts to render judgment according to law, without being required to determine the relative severity of different punishments, when there is no common standard in the matter by which the mind can be satisfactorily guided.

THE Supreme Court of California, in the case of *San Benito County v. Southern Pac. R. Co.*, 19 Pac. Rep. 827, gracefully acquiesces in the ruling of the United States Supreme Court, as expressed in *State v. Railroad Co.*, 8 S. C. Rep. 1073, and reversing a number of their former decisions, hold that an ordinance requiring the Southern Pacific R. Co. to take out a license, in order to continue its business of carrying freight or pas-

sengers for hire by means of railroad cars, is void, as a tax upon the use of a franchise granted by the United States. Thornton, J., says:

The rulings of the Supreme court of the United States, in the cases cited in the beginning of the foregoing opinion, on the question of the power of the State to tax the franchises granted by the United States government must control our action in this case. The question is federal; and on such questions the settled law requires that the courts of the State shall conform to the decisions of the highest federal judicial tribunal. The license tax in question herein is one that affects the franchises enjoyed by the defendant company under a grant or grants from the federal government. It is a tax on the right of this company to carry on its business under the federal grant, and comes within the judgments of the United States Supreme Court in the cases cited. Under the constitution of this State, which requires all taxation to be equal and uniform throughout the State, it must be supposed that the legislature would not impose or authorize the imposition of any taxes by any county or other political subdivision of the State, whether in the nature of property or license taxes, which would destroy or render valueless the business of any railroad corporation, or cripple such corporations by onerous burdens. The guaranty of fair and just taxation is found in the constitution of the State. Taxation by a county must be equal and uniform, at least as to all persons engaged in the same business in the county; and such a guaranty will protect railroads in a county from unfair or unjust or oppressive taxation which would tend to destroy their business or cripple it, or interfere with their right to do business, as it protects individuals on whom such taxes are imposed. The amount of the tax is so small in the case before us that it cannot be considered onerous. But in the view taken by the supreme federal tribunal, the foregoing considerations are of no weight. The power of the State to tax is held not to exist at all, without regard to the fact whether the tax is so trifling as not to in any degree be onerous, or equal or uniform on all persons, whether natural are artificial, engaged in the business of carrying persons or freight for hire, or by means of railroad cars. Following then the judgments of the Supreme Court of the United States in the cases above cited, we must hold that the license tax under consideration was levied without authority of law, and must be held void.

THE case of *Leahey v. Cass Ave., etc. R. Co.*, 10 S. W. Rep. 58, decided by the Supreme Court of Missouri, aptly illustrates what evidence is admissible as part of the *res gestæ*. This was an action for the death of a boy caused by injuries received by him under a horse-car, and it was held that his declarations, made at the scene of the accident and when first picked up, as to how he got under the car, are admissible in evidence; but that his declarations made after he had been removed and the persons connected with the accident had separated, and in answer to questions as to how he got in-

jured, are admissible, even though made only a short time after the accident. The court says:

Care must be taken not to make the field of *res gestæ* too large or too contracted. The better reasoning is that the declaration, to be a part of the *res gestæ*, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause. The declaration is, then, a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Much, therefore, depends upon the nature and character of the transaction in question; for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will of itself furnish a sufficient connecting circumstance. Applying these principles to the present case, it is clear that what the boy said as to how he got under the car, when first picked up, was properly received as evidence of the cause of his injuries. He was then at the scene of the accident, surrounded by persons who witnessed the calamity, and his declaration then made were verbal acts, though made after the accident had happened. But what he said after he had been removed to the house of Mr. Keating, after the persons connected with the accident had separated, and in answer to questions as to how he got hurt, should have been excluded. These answers were but narratives of what had transpired, made and intended as such. The time between the accident and making these declarations is short, it is true, but they are disconnected from the main fact. We do not understand any of the cases before cited to go far enough to admit these declarations unless it be that of *Harriman v. Stowe*, 57 Mo. 68.

THE case of *Byam v. Collins*, 19 N. E. Rep. 75, decided by the New York Court of Appeals, furnishes an interesting disquisition on the law pertaining to privileged communications in the law of libel and slander. It was there held that a libelous letter concerning the suitor of the person addressed, not written at the latter's request, but written to prevent a marriage, is not privileged by reason of previous friendship, nor by reason of a request made four years before, for information of anything concerning any young man the person addressed "went with." The court, after an exhaustive review of the authorities, says:

The general rule is that in the case of a libelous publication the law implies malice, and infers some damage. What are called "privileged communications" are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made *bonæ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a correspond-

ing interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." * * * Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury. It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties—the one making and the one receiving the communication—are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith, and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation, but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

REMOVAL OF CAUSES FOR PREJUDICE OR LOCAL INFLUENCE.

In view of the conflicting decisions of the federal courts relating to the removal of causes, under the act of 1887, for prejudice or local influence, and the question not having been decided by the Supreme Court of the United States, it is proposed briefly to consider four questions relating to the procedure in such cases, viz: 1st. The amount involved in the suit. 2d. In what court the petition for removal is to be filed. 3d. What showing of prejudice or local influence is necessary; and 4th, the procedure to remand the cause.

The first section of the act of 1887, as corrected by the act of August 13, 1888, provides: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of

all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." In *Mallon v. R. & D. R. R. Co.*,¹ Harlan, J., in construing the above section, says: "I think it is equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds \$2,000 exclusive of interest and costs. The clauses of the second section of the act of 1887, defining the different kinds of suits that may be removed, preserve the same element of the value of the matter in dispute as is found in the first section relating to the original jurisdiction of circuit courts. This is done by the provision giving the right of removal in suits of which the circuit courts of the United States are given original jurisdiction by the preceding (first) section. As by the first section the circuit court may take original cognizance, concurrent with the State courts, of all suits therein described, where the matter in dispute, exclusive of interest and costs, exceeds \$2000, the clauses in the second section, giving the right of removal in suits, of which the circuit courts of the United States are given original jurisdiction by the preceding section, necessarily restricts the right of removal to suits in which the value of the matter in dispute, exclusive of interest and costs, exceeds the above amount." Jackson, J., in *Whelan v. N. Y. etc., R.R. Co.*,² seems to have reached a different conclusion. There is but little doubt, however, of the soundness of Judge Harlan's reasoning, and that to au-

thorize a removal the amount involved must exceed \$2,000.

2d. The 12th section of the judiciary act of 1789 requires the party seeking to remove a cause to file a petition in the State court, and offer in said State court good and sufficient surety for his entry in such circuit court on the first day of its session, copies, etc. This procedure has been substantially observed in all the acts of congress. In *Hills v. R. & D. R. R. Co.*,³ the action was originally brought in the superior court of Fulton county, Georgia, the petition for the removal of the cause, under the local prejudice act of 1887, being filed in that court, and the cause removed.

On a motion being filed to remand the cause the motion was overruled. In *Fisk v. Henaire*,⁴ it was held that the provision of the statute authorizing the removal of a cause, on the ground of prejudice or local influence, did not change the procedure. It is said, page 232, "the plain purpose of the act, so far as the removal of causes on the ground of prejudice or local influence is concerned, is to provide who may remove a suit for such cause and within what time, and not to prescribe the procedure or manner of taking the removal." In *Short v. Chicago, Minneapolis, etc. R. R. Co.*,⁵ Judge Brewer held that the showing of local prejudice may be made by affidavit filed in the State court, and a certified copy thereof filed in the United States circuit court. So far as we are aware no case has been decided holding it improper to file the petition for removal in the State court, although in *Malone v. Richmond, etc. R. Co.*⁶ and *Whelan v. N. Y., etc. R. Co.*, *supra*, the petition for removal was filed in the United States circuit court; no particular objections seems to have been made on that ground, and the question as to the propriety of filing the petition there does not appear to have been raised. The circuit court of the United States, in causes properly removable to that court, has merely *concurrent* jurisdiction. This fact sometimes appears to be lost sight of. A State court, therefore, having jurisdiction of the subject-matter, and the parties may no doubt proceed with the case until

¹ 35 Fed. Rep. 626.

35 Fed. Rep. 849.

³ 33 Fed. Rep. 81.

⁴ 35 Fed. Rep. 230.

⁵ 35 Fed. Rep. 227.

⁶ 35 Fed. Rep. 626.

some matter is brought to its attention which will deprive it of jurisdiction. The ordinary mode is by petition which performs the office of a pleading. The petition, therefore, should state the essential facts not otherwise appearing in the record which the law has made a condition to the change of jurisdiction.⁷ The necessity for this statement of facts is very clearly set forth in *Grafton v. Nongues*,⁸ by Sawyer, J.: "I think it of the highest importance to the rights of honest litigants, and to the due and speedy administration of justice, that a petition for transfer should state the exact facts and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself from the facts whether the suit does really and substantially involve a dispute or controversy properly within its jurisdiction." The exceptions referred to in section three of the act of 1887, evidently refer to the time of filing the petition in the State court, and do not exempt a party who desires to remove a cause, on the ground of prejudice or local influence, from filing a petition in that court; that is, in ordinary cases the petition must be filed at any time before the defendant is required by the laws of the State or the rule of the State court to plead or answer, while in cases of prejudice or local influence the petition for removal may be filed at any time before the trial.

3d. The third subdivision of section 639 of the Revised Statutes of the United States provides, that when a suit is between a citizen of a State in which it is brought and a citizen of another State, it may be removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit; if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

The second section of the act of 1887 provides, "that where a suit is now pending or may be hereafter brought in any State court

in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, any defendant being such citizen of another State may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it should be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such State court, or in any other State court to which the defendant may under the laws of the State have the right, on account of such prejudice or local influence, to remove said cause, etc.; and when a cause has been removed on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof," etc.

It is apparent that the third subdivision of § 639 of the revised statutes was materially modified by the act of 1887. Some controversy has arisen as to the mode in which it shall be made to appear in said circuit court that, from prejudice or local influence, he (the defendant) will not be able to obtain justice in said State court, etc. In *Hills v. Rich. & D. R. Co.*,⁹ it was held that an affidavit of the defendant, stating in substance what was required under the third subdivision of § 639, and in addition "that he will not be able to obtain justice in any other State court to which the defendant under the laws of the State had the right under the laws of said State to remove said cause, was sufficient. Substantially the same ruling was made by Judge Deady in *Fisk v. Henarie*,¹⁰ and Judge Jackson in *Whelan v. N. Y., L. E. & W. R. Co.*¹¹ In *Short v. C., M. & St. P. Ry. Co.*,¹² Judge Brewer says, "all that is required is that it shall be made to appear to the circuit court that, from prejudice or local influence, the party will not be able to obtain justice in such State court, and this showing may be made by affidavit; and if this contains a specific averment, while it may not be conclusive, it is *prima facie*

⁷ *Gold Washing Co. v. Keyes*, 96 U. S. 139. It is not sufficient to present the petition and bond to the clerk, who is the court's mere ministerial officer. *Shedd v. Fuller*, 36 Fed. Rep. 609.

⁸ 4 Cent. L. J. 230.

⁹ 33 Fed. Rep. 81.

¹⁰ 35 Fed. Rep. 231.

¹¹ 35 Fed. Rep. 849.

¹² 34 Fed. Rep. 227.

evidence of the fact and throws the case into this court, leaving the other party to challenge its truth." In that case, the affidavit was made under the act of 1867, and the Judge said, "it is no affidavit at all."

In *Malone v. Rich. & D. R. Co.*,¹³ Mr. Justice Harlan says: "I think it competent for the circuit court to receive evidence upon the point by affidavits, or by depositions, or by means of an oral examination of witnesses in its presence." The want of uniformity in the decisions in this regard is a matter of regret, but in no case, so far as the writer is aware, has it been held that an affidavit of a defendant, stating in positive terms "that, from prejudice or local influence, he will not be able to obtain justice in such State court, or in any other State court to which the defendant under the laws of the State may have the right, on account of such prejudice or local influence, to remove said cause," when filed in the State court with the petition for removal, and a certified copy thereof filed in the United States circuit court was insufficient on the face of the papers to authorize a removal of the cause. This, therefore, would seem to be the proper procedure.

4th. The mode in which prejudice and local influence shall be made to appear to the circuit court is not prescribed in the act. In *Short v. C., M. & St. P. Ry. Co.*,¹⁴ Judge Brewer, after stating that a cause may be removed upon the filing of an affidavit in the State court, "alleging in plain and unequivocal terms that such local prejudice does exist, and that a fair trial cannot be had," says: "After the affidavit has been presented and a removal ordered, the party opposing it may come in and traverse the allegation of prejudice the same as any other averment of fact, and this need not be done by a plea of abatement."¹⁵

The ordinary mode challenging the truth of the grounds upon which a cause has been removed is by a plea in abatement, and there

would seem to be no good reason why this procedure should not be followed where the removal was had on the ground of prejudice or local influence. The fact that no procedure is provided in the act tends to show that congress intended the former procedure to continue in force. There is another fact which seems to have escaped attention, and that is that the act of 1887 is not one enlarging the powers of the United States circuit courts. In other words, it is not a remedial act conferring new authority upon such courts, but was intended to restrict and limit the jurisdiction. Thus, the matter in controversy must exceed \$2,000 in value, and the right of removal is restricted to defendants being non-residents of the State, etc., while the act of 1867 is so far modified that the right of removal for prejudice or local influence depends not on the belief of the party making the oath, but on the actual facts that such prejudice or local influence does exist in such a degree as to prevent a fair trial. This question involves the construction of the statutes of the State, granting a change of venue. Suppose the State statute authorizes a change of venue in any case where it is made to appear that a fair and impartial trial cannot be had in the county where the action is pending, and the court is authorized to change the place of trial to some adjoining county where the objections do not exist, or if the objections apply to all the counties of that judicial district, then to some county in an adjoining district where the objections do not apply. To warrant a change of venue, it is not sufficient to show that one of the parties has a number of enemies in that county who are prejudiced against him, if there is no general bias or prejudice against him, so as to affect a jury. In other words, if a fair and impartial jury can be impaneled, and a fair trial had in the county where the action is pending, the place of trial will not be changed.¹⁶ To warrant the United States circuit court in retaining a cause against the objection of the adverse party, therefore, it must be made to

¹³ 35 Fed. Rep. 628-9.

¹⁴ 34 Fed. Rep. 228.

¹⁵ In *County Court v. B. & O. R. Co.*, 35 Fed. Rep. 166, it was held that a plea in writing "that it is not true that the Baltimore & Ohio Company has reason to believe, and does believe, that from prejudice and local influence it will not be able to obtain justice in the circuit court of Taylor county, or in any other State court," was insufficient, as it merely denied the existence of a belief, and not the fact of prejudice or local influence.

¹⁶ In *Southworth v. Reid*, 36 Fed. Rep. 454, Bunn, J., in remanding a case said: "I apprehend that in this State (Wisconsin) it would rarely happen that a proper case for removal would be made under this law." He also said that where "no case for removal has been shown to exist, the court cannot take jurisdiction by consent of the parties."

appear that in no State court to which a cause may be removed by a change of venue can a fair and impartial trial be had. The right of the circuit court to proceed in the case is dependant on this fact, and the investigation thereof should be full and exhaustive. As a general rule, there is but little interest taken in a civil action outside of the immediate parties to the suit, and the case will be rare indeed in which either prejudice or local influence will prevent a fair court and impartial jury from rendering to a litigant, that which is justly his due. But few cases can properly be removed under the prejudice or local influence clause of the act of 1887.

SAMUEL MAXWELL.

REMOVAL OF CAUSES ACT.

Enacted August 13, 1888.

CHAP. 886.—An act to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, and three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March third, eighteen hundred and seventy-five."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, approved March third, eighteen hundred and seventy-five," be, and the same is hereby, amended so as to read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of an act entitled 'An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes,' approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of in-

terest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

That the second section of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 2. That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that, from prejudice or local influence, he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so

far as relates to such other defendants, to the State court, to be proceeded with therein.

"At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

"Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

That section three of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or

more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

SEC. 2. That whenever any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

SEC. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of congress of which this act is an amendment, or in the act of congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

SEC. 6. That the last paragraph of section five of the act of congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

SEC. 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

Approved, August 18, 1888.

COPY-RIGHT—STATE REPORTS—PREREQUISITES—VIOLATION—DAMAGES.

CALLAGHAN V. MYERS.

United States Supreme Court, December 17, 1888.

Copy-right—Law Reports.—The reporter of a volume of law reports, although he be a public officer, appointed by the authority of the government which creates the court of which he is the reporter, can obtain a copy-right for it as an author, in the absence of a prohibitory statute, and such copy-right will cover the parts of the work of which he is the author, namely, the head-notes, and the statement of facts and the arguments of counsel, although he has no exclusive right in the judicial opinions published. The question of salary of the reporter is immaterial.

Bill in equity, to perpetually enjoin defendants from publishing or selling certain Illinois Reports, upon which complainant claims a copy-right, also for a decree that all so published by defendants be forfeited to plaintiff, and that they be delivered to him, and for an account of all published and sold, and for a decree for damages. The circuit court rendered a decree in favor of plaintiff from which defendants appealed.

Opinion¹ by Mr. Justice BLATCHFORD:

The volumes of law reports of which the plaintiff claims a copy-right are in the usual form of such works. Each volume consists of a title page, of a statement of the entry of copy-right, of a list of the judges composing the court, of a table of the cases reported in the volume, in alphabetical order, of a head-note or syllabus to each opinion, with the names of the respective counsel, and their arguments in some cases, and a statement of facts, sometimes embodied in the opinion and sometimes preceding it, and of an index, arranged alphabetically, and consisting substantially of a reproduction of the head-notes. Of this matter, all but the opinion of the court and what is contained in those opinions is the work of the reporter, and the result of intellectual labor on his part.

The broad proposition is contended for by the defendants that these law reports are public property, and are not susceptible of private ownership, and cannot be the subject of copy-right under the

legislation of congress. It is urged that Mr. Freeman, the reporter, was a public officer, whose office was created by chapter 29 of the Revised Statutes of Illinois of 1845, which enacted as follows, in regard to the supreme court and the reporter.

"Sec. 20. The court shall appoint some person learned in the law to minute down and make report of all the principal matters, drawn out at length, with the opinion of the court, in all such cases as may be tried before the said court; and the said reporter shall have a right to use the original written opinion after it shall have been recorded by the clerk.

"Sec. 21. The reporter, before entering upon his duties, shall be sworn by some one of the justices of the supreme court faithfully to perform the duties of his said office. He may, for misconduct in office, neglect of duty, incompetency, or other cause shown, to be entered of record, be removed from office.

"Sec. 22. It shall be the duty of the reporter to deliver to the secretary of State, as soon as convenient after publication, such number of copies of the respective volumes of the reports of said court as may be necessary to enable the said secretary to distribute the same in the manner provided in the following section, together with one hundred copies in addition, to be deposited in the secretary's office for the use of the State." Section 23 provided for the distribution of the volumes by the secretary of State, and section 24 provided that, upon the delivery of the requisite number of any volume, the secretary of State should deliver to the reporter a certificate specifying the number of copies which had been so delivered, and that such certificate should entitle the reporter to a warrant drawn by the auditor of public accounts upon the treasury for an amount, for those volumes, at the price for which the books should be sold to individuals, provided, the price should not exceed the ordinary price of law books of the same description, to be determined by the auditor, treasurer, and secretary of State. These statutory provisions were amended in 1863, by making the term of office of the reporter six years, and in 1865 it was enacted that the price of the volumes to be delivered to the secretary of State should be \$6 each. The reporter was given a salary, by law, in 1877, of \$6,000 a year.

It is further contended that Mr. Freeman, in preparing the official edition of the reports, was not an author, within the meaning of the act of congress, and that it was not intended by that act that he should assert a monopoly in the result of his official labors.

But, although there can be no copy-right in the opinions of the judges, or in the work done by them in their official capacity as judges (*Banks v. Manchester, ante, 36*), yet there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copy-right

¹ The entire opinion in this case is very long. Much of it is taken up with interesting questions bearing on procedure in obtaining copy-right. We have eliminated all except that which pertains to the main question at issue, viz: the right of a State reporter to obtain a copy-right.—[ED. CENT. L. J.]

for the volume which will cover the matter which is the result of his intellectual labor. In the present case there was no legislation of the State of Illinois which forbade the obtaining of such a copy-right by Mr. Freeman, or which directed that the proprietary right which would exist in him should pass to the State of Illinois, or that the copy-right should be taken out for or in the name of the State, as the assignee of such proprietary right. Even though a reporter may be a sworn public officer, appointed by the authority of the government which creates the court of which he is made the reporter, and even though he may be paid a fixed salary for his labors, yet, in the absence of any inhibition forbidding him to take a copy-right for that which is the lawful subject of copy-right in him, or reserving a copy-right to the government as the assignee of his work, he is not deprived of the privilege of taking out a copy-right which would otherwise exist. There is, in such case, a tacit assent by the government to his exercising such privilege. The universal practical construction has been that such right exists unless it is affirmatively forbidden or taken away, and the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary, under the governments both of States and of the United States.

This question was, it is true, not directly adjudged in *Wheaton v. Peters*, 8 Pet. 591. In that case the owners of the copy-rights of Wheaton's Reports of the Supreme Court of the United States brought a suit in equity against Mr. Peters for publishing and selling a volume of his Condensed Reports of the Supreme Court. The bill was dismissed by the circuit court. On an appeal by the plaintiffs to this court one of the points urged by the defendants was that reports of the decisions of this court, published by a reporter appointed under the authority of an act of congress, were not within the provisions of the law for the protection of copy-rights. This court held (1) that the plaintiffs could assert no common law right to the exclusive privilege of publishing, but must sustain such right, if at all, under the legislation of congress; (2) that, under such legislation, there must have been, in order to secure the copy-right, a compliance with the provisions of the statute in regard to the publication in a newspaper of a copy of the record of the title of the book, and in regard to the delivery of the copy of it, after publication, to the secretary of State. The court remanded the case to the circuit court for a trial by a jury as to whether there had been a compliance with the above named requisites of the act of congress. In a note by Mr. Peters, at page 618 of the report of the case, he states that he has been informed that the court did not consider the point whether reports of the decisions of the court, published by a reporter appointed under the authority of an act of congress, were within the provisions of the law for the protection of copy-rights. When the suit was brought, Mr.

Wheaton had published the twelve volumes of his copy-righted reports. The allegation of the bill was that the volume complained of, published by Mr. Peters, contained all the reports of cases found in the first volume of Wheaton's Reports. It appears from the report of the case, and the record in it, that Mr. Wheaton had published his first volume in 1816, and his twelfth volume in 1827. From March 3, 1817, for three years, the reporter had a salary of \$1,000 a year, and the same salary from May 15, 1820, to March 3, 1826, and for three years from February 22, 1827. The decree of this court, providing for a trial by a jury (page 698), covered the entire twelve volumes of Wheaton's Reports.

If this court had been of opinion that there could not have been a lawful copy-right in the volumes of Wheaton's Reports, it would have been useless to send the case back to the circuit court for an inquiry whether the conditions precedent to the obtaining of a lawful copy-right, under the act of congress, had been complied with, especially in view of the fact that the opinion of the court concludes (page 668) with this statement: "It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copy-right in the written opinions delivered by this court, and that the judges thereof cannot confer on any reporter any such right." Therefore, the only matter in Wheaton's Reports which could have been the subject of the copy-rights in regard to which the jury trial was directed was the matter not embracing the written opinions of the court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index. Such work of the reporter, which may be the lawful subject of copy-right, comprehends also the order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions (where such table is made), and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist. A publication of the mere opinions of the court, in a volume, without more, would be comparatively valueless to anyone. The case of *Wheaton v. Peters* was decided at January term, 1834. In *Gray v. Russell*, 1 Story, 11, in 1839, Mr. Justice Story, in speaking of the question: as to how far a person was at liberty to extract the substance of copy-righted law reports, says (page 20:) "In the case of *Wheaton v. Peters*, 8 Pet. 591, the same subject was considered very much at large. It was not doubted by the court that Mr. Peters' Condensed Reports would have been an infringement of Mr. Wheaton's copy-right, supposing that copy-right properly secured under the act, if the opinions of the court had been or could be the proper subject of the private copy-right by Mr. Wheaton. But it was held that the opinions of the court, being published under the authority of congress, were not

the proper subject of private copy-right. But it was as little doubted by the court that Mr. Wheaton had a copy-right in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the circuit court for the purpose of further inquiries as to the fact whether the requisites of the act of congress had been complied with or not by Mr. Wheaton. This would have been wholly useless and nugatory unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copy-right (for that was the work which could be the subject of a copy-right); so that, if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress." This seems to us to be a proper view of the decision in *Wheaton v. Peters*, and that decision is as applicable where a reporter receives a compensation or salary from the government as where he does not, in the absence of any restriction against his obtaining a copy-right.

In the present case, although Mr. Freeman, during the period of his preparation of volumes 32 to 46, received no direct salary from the State; it is contended by the defendants that he received from the State compensation for his services, through the purchase by it, under a statute, of copies of his volume at a stated price of \$6 per copy for 553 copies of each volume, and that this was substantially the payment of a salary to him by the State. But, as stated before, in the view we take of the case, the question of a salary or no salary has no bearing upon the subject. The general proposition that the reporter of a volume of law reports can obtain a copy-right for it as an author, and that such copy-right will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published, is supported by authority. *Curt. Copyr.* 131, 132; *Butterworth v. Robinson*, 5 Ves. 709; *Cary v. Longman*, 1 East, 358, and note, 362; *Mawman v. Tegg*, 2 Russ. 385, 398, 399; *Hodges v. Welsh*, 2 Ir. Eq. 266, 287; *Lewis v. Fullarton*, 2 Beav. 6; *Saunders v. Smith*, 3 Mylne & C. 711; *Sweet v. Benning*, 16 C. B. 491; *Jarrold v. Houlston*, 3 Kay & J. 708, 719, 720.

NOTE.—The principal case is the first and only direct adjudication by the Supreme Court of the United States, sustaining the right of a law reporter to a copy-right of a volume of law reports. Although such right was clearly intimated in *Wheaton v. Peters*,¹ yet the court in the principal case expressly states that that question was "not directly adjudged in *Wheaton v. Peters*."

The right of the reporter to secure his copy-right, springing wholly from the constitution and laws of congress, is based on the ground that his work in preparing the *syllabi*, statements of the cases, index, etc., is "the result of intellectual labor on his part," and that he can obtain a copy-right "for the volume which will cover the matter which is the result of his intellectual labor," although he is a sworn *public officer*, receiving a fixed salary for his labors! While the

English decisions recognize the right of a reporter of law reports to protection by copy-right,² yet, as was stated by the learned counsel for appellants, "in all these cases the reporter was a private citizen, occupying no official relation, and owing no duty to the public," and therefore they are "not in point upon the question under consideration."³

That there can be no such proprietary interest in the reporter or judges of the opinions of the court as will entitle them to a copy-right thereof is well settled.⁴

The reasons are aptly stated in *Drone on Copy-rights*, p. 161, as follows: "It is obvious that the copy-right in an opinion written or delivered by a judge cannot be acquired by a reporter or the first publisher on the ground of authorship, for the reason that he is not the author. It is not less clear that the judge who pronounces the decision is not entitled to the copy-right therein, because he is not the owner of the property. Hence, neither in the judge nor in the reporter will a valid copy-right vest, except by a derivative title. The copy-right must be secured by the owner of the property; and all difficulty disappears when it is determined who is the owner. Elsewhere it is shown that any person who employs another to prepare a work, may, by virtue of the contract of employment, become the owner of the literary property therein. On this principle, the people who employ and pay judges are the rightful owners of the literary property in the opinions written by them. Hence, the United States government may secure to itself the copy-right in the decisions pronounced in the federal courts, and each State may do the same with the opinions of its own judges. And the government may confer upon any person the right of securing, or the copy-right after it has been secured."

The doctrine is also clearly stated in 2 *Morgan's Law of Literature*, p. 569: "An examination of all the reported cases warrants us in the conclusion that the reason why a judge can have no literary property in opinions pronounced by himself, upon legal questions presented or discussed before him, is simply and solely because he is but the mouth-piece of the State, paid by the people of the State, to utter and construe their law. We have seen that the courts are the distributors of the justice of the people, and that, by the theory of the law, the State hears all disputes of its citizens."

In the recent case of *Banks v. Manchester*,⁵ it is held that (1) a copyright, obtained by a reporter on a volume of the reports published by a contractor in accordance with the Ohio statute, which, in effect, provides that a reporter of the supreme court shall be appointed, to report and prepare for publication its decision, and to receive therefor a certain compensation, and to secure a copy-right for the use of the State for each volume when published, and also for the publication of the reports under a contract with the Secretary of State of the State, and that "such contractor shall have the exclusive right to publish such reports, so far as the State can confer the same," does not cover the *syllabi*, statements of the cases, and opinions, which were the

² *Carter*, p. 89; *Bacon's Abridg.*, title *Prerogatives*, F 5; *Skinner*, 234; *Millar v. Taylor*, 4 Burr. 324, 2383; *Beckett v. University of Cambridge*, 1 W. Black. 106; *Manners v. Blair*, 3 Bligh (N. S.), 391. See also authorities cited in opinion.

³ See *Heine v. Appleton*, 4 Blatchf. 125.

⁴ *Wheaton v. Peters*, 8 Pet. 591; *Gray v. Russell*, 1 Story, 11.

⁵ *Affirming* s. c., 23 Fed. Rep. 143; 9 S. C. Rep. 38.

¹ 8 Pet. 591.

work of the judges; and (2) a State cannot properly be called a citizen, within the meaning of Rev. Stat. U. S. §§ 4952, 4954, which confers the copyright on any citizen, "who shall be the author, inventor, designer, or proprietor of any book," and upon his representatives or assigns; and (3) so a copy-right is denied a judge who, in his official capacity prepares the *syllabi*, statements of the cases and opinions under § 4952, for the reason that he cannot be considered an author or proprietor within the provisions of those sections, so as to confer any title by assignment on the State or other person, sufficient to authorize a copy-right to it or him as the assignee of the author or proprietor.

Respecting the latter point, the court observed (per Blatchford, J.): "Judges, as it is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labor. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head-notes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*,⁶ that no copy-right could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duty. The work done by the judges constitute the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute."⁷

This quotation clearly shows the ground upon which judges are denied a copy-right, to-wit: Because they are public officers, laboring for the State, and receiving "from the public treasury a stated annual salary;" hence, the fruits of their labor, "extending to whatever work they perform in their capacity as judges, as well to the statement of cases and head-notes prepared by them as such, as to the opinions and decisions themselves," belong to the public.

If it is conceded that this view is sound, and it is believed that it is unquestionably so, there appears to be no good reason why it should not with equal propriety be applied to a reporter who holds his office by virtue of the same authority—is a public officer, laboring for the State, and "receives from the public treasury a stated annual salary, fixed by law." Why should he have a "pecuniary interest or proprietorship, as against the public at large," in the fruits of his labors as a public court reporter, when it is held that no such right belongs to the judge who prepares the opinion for him to report? Why should that "judicial consensus," which has existed from the time of the decision of *Peters v. Wheaton*, "that no copy-right could, under the statutes passed by congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties," be limited to "judicial officers?" It is because their work is public property, constituting the "authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all," and the work of the reporter in rendering their judicial labors available to the public, in the discharge of his official duty, by preparing the title page, table of cases, head-notes, statements of facts, arguments of counsel

and index (for, as said by the court in the principal case, "a publication of the mere opinions of the court in a volume, without more, would be comparatively valueless to any one)," is private labor, in which he possesses a "pecuniary interest or proprietorship?" Can any good reason be conceived why that "judicial consensus" should not also include the labors of a public officer discharging the duties of a reporter, as well as the labors of a judicial officer? The reason of the discrimination in favor of the reporter does not seem clear. Though one possessed "the metaphysics of Hudibras, though he were able

"to sever and divide
A hair 'twixt north and northwest side."

yet he could not insert his metaphysical scissors" between the public office and duties of a court reporter and those of the judges, respecting the question under consideration.

Mr. Morgan, in his *Law of Literature*, vol. 2, p. 569, after stating the reasons which deny the judges proprietary interest in judicial opinions, says: "But, if the reason is a good one, it would seem to apply equally to a reporter, who also receives a salary from the people, to catch the opinions as they fall from the lips of the judges appointed by the people, and to arrange and publish them for the use of the people, and that there would, therefore, be no copy-right in the labors of an official reporter, appointed by the court or elected by the people, provided his salary or the compensation for his services be paid from the public treasury. In *Little v. Hall*,⁸ it was held that, under the statute of the State of New York, by virtue of which Judge Comstock was appointed reporter of the decisions of the court of appeals, no copy-right could be had in the reports."

Mr. High, in his able argument in the principal case, challenged the existence of any literary property in law reports, and denied that they are or can be the subject of copy-right under the act of congress, for the power of congress to legislate, under the constitution, is limited to authors, and it does not extend to officers of the government engaged in public or official duties. He argued that the test is, whether a writer is engaged in a private business, and, therefore, an author, within the meaning of the constitution, or whether he is engaged in a public service, which forever dedicates the result of his labors to the public, whom he serves. Unquestionably this is the true criterion.

The decision of *Banks v. Manchester*, *supra*, respecting judicial opinions, clearly rests upon this distinction, and, therefore irreconcilable with the principal case.

EUGENE MCQUILLIN.

8 18 How. 166.

QUERIES AND ANSWERS.*

QUERY NO. 5.

A appeals from judgment of justice court, and by erroneous advice of his attorney he fails to pay docket fee in appellate court within twenty days' limit, as provided by statute. Case was dismissed by motion of B, appellee, and motion of A's to permit payment of fee and have case docketed overruled by appellate court. Has A no remedy? Cite authority, if any.

C. M. R.

⁶ 8 Pet. 591.

⁷ *Nash v. Lathrop*, 142 Mass. 20, 35.

QUERY No. 6.

A makes a contract in writing with B to buy land. Under said agreement A goes in possession and pays purchase money, except \$100. A being unable to meet the last payment, goes to C, in whom he reposes confidence. C agrees to lend the money, on being secured by mortgage, the land to be sold on thirty days' notice to A if the same is not paid at maturity, to which A assents. A being ignorant and unlettered, accompanies C to B, and on payment B makes C a deed. This was in 1872. A continues in possession under the belief that his agreement had been carried out, until September, 1873 (before the expiration of the time of payment), when he flees the State. A paid C about \$60, at different times, as a credit on amount due, and before left he requested C to attend to his land. A, unable to return, wrote to C several letters but received no reply, but was informed by others that his land was vacant and uninclosed. In 1880 he wrote his brother to attend to the same, who agreed to do so, but did not take possession. A, under the belief that the land is his, returned in December, 1888, and finding the land vacant, takes possession; C turns up and claims the land; A institutes suit, discovering for the first time that C had a deed. As a matter of fact, soon after A's departure C sold the land to D, who paid a large part of purchase money, but reconveyed the same to C for balance due. D was in possession two years. The possession of D was the only actual possession. What rights have A, and does the statute of limitations apply? Give authorities.

J. M. M.

QUERIES ANSWERED.

QUERY No. 1.

[To be found in Vol. 28, Cent. L. J., p. 51.]

A power of sale in a mortgage is a power coupled with an interest: *Varnum v. Meserve*, 8 Allen, 168; *Hunt v. Rousmanier*, 8 Wheat. 175. C was by the assignment placed in B's shoes, and could sell the property under the power of sale contained in the mortgage: 1 *Hilliard on Mortgages*, 531; *Allen v. Chatfield*, 8 Minn. 435; *Montague v. Dawes*, 12 Allen, 397; *Speer v. Haddock*, 31 Ill. 439. As to whether the second heir can claim the benefit of the suit from its institution, is a proposition upon which the decisions are conflicting: *Angell on Lim.* (6th ed.) § 317, and note.

W. R.

QUERY No. 3.

[To be found in Vol. 28, Cent. L. J., p. 51.]

If the first judgment was merged in the second, the lien of the first judgment ceased. *Freeman on Judg.*, § 388. The decisions are conflicting upon the question of merger. *Idem*, § 216, and note. The lien being only in favor of the first judgment, it, in any case, has run out by the lapse of two years without its enforcement by an execution under such judgment. C has the title so far as the question of lien is concerned.

J. J. F.

QUERY No. 4.

[To be found in Vol. 28, Cent. L. J., p. 92.]

In this case the parties concerned are usurping corporate franchises after their right thereto has expired. We find no Minnesota decision on the subject. We think the proper process is for the attorney-general of the State to proceed against them for unlawfully exercising corporate franchises, and after judgment of ouster to have a receiver appointed to dispose of the assets, under chap. 59, Gen. Stat. Minn. 1881, pp. 831-2-3.

L. R.

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ABATEMENT AND REVIVAL—Foreign Administrator.

An action against a resident of another State should not be revived, on his death, against his administrator appointed in that State, administration not having been granted in this State. — *Lyons v. Parr*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 863.

2. ABATEMENT AND REVIVAL—Special Administrator.

On the death of the plaintiff in an action to restrain a sale of land for taxes, a special administrator cannot continue the suit, and the heirs are the parties in interest in such case.—*Driver v. Hays*, S. O. Ark., Nov. 17, 1888; 9 S. W. Rep. 853.

3. ACTION—Promise.—Findings that defendant employed plaintiff to do certain tunneling at a specified price per foot; that it inadvertently let the same work to L on the same terms, and, on discovery of the mistake, "arranged with plaintiff and L to do the work together, which they did;" that defendant, on the termination of plaintiff's contract, measured the work done, and promised to pay plaintiff his share, an amount stated—show a separate cause of action for the amount found due plaintiff. — *Sullivan v. Grass Valley, etc. Co.*, S. O. Cal., Dec. 6, 1888; 19 Pac. Rep. 757.

4. ADMINISTRATOR—Waste.—Administrator *de bonis non* cannot call the administrator in chief to account for waste or conversion. — *Brice v. Taylor*, S. O. Ark., Nov. 10, 1888; 9 S. W. Rep. 854.

5. AGRICULTURAL LANDS.—Lands adapted to the growth of fruits are agricultural lands within the statute Pol. Code Cal. § 3495.—*Reeves v. Hyde*, S. C. Cal., Nov. 27, 1888; 19 Pac. Rep. 685.

6. ALIENS—Constructive Trust—Lien.—While aliens cannot, in Texas, claim a resulting or constructive trust in lands purchased by a citizen partly with funds paid him by the aliens through mistake, yet they are entitled to a lien on the land for the amount so furnished. — *Zundell v. Gess*, S. O. Tex., Dec. 4, 1888; 9 S. W. Rep. 879

7. **APPEALS—Justice of the Peace—Jurisdiction.** — Gen. St. Colo. § 3222, provides that appeals from any decision of a justice of the peace in the city or incorporated town where a superior court is held, or from the decision of any police magistrate of said city or town, in any case involving the violation of a city ordinance, may be allowed to the superior court of such city or town: *Held*, that the superior court has jurisdiction of appeals from justices in cases not involving the violation of an ordinance.—*Cochran v. Cowan*, S. C. Colo., Nov. 30, 1888; 19 Pac. Rep. 764.

8. **APPEAL—Guardian—Discretion of Court.** — The power vested in the probate court to appoint a guardian of the estate of a minor is largely a discretionary one, and no appeal lies from the exercise of such power.—*Adams v. Specht*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 812.

9. **APPEAL—Dismissal—Attorney.** — A plaintiff, residing at a great distance from the capital of the State, employed certain attorneys at the latter place to attend to his case, pending in the supreme court, which they neglected to do, and the case was dismissed for want of prosecution: *Held*, that the plaintiff was entitled to have the case reinstated.—*State v. Gaslin*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 601.

10. **APPEAL—Error—Exception.** — Error assigned upon instructions given to a jury, upon a trial before the district court, cannot be considered by the supreme court, unless the proper exception was taken at the time the instructions were given.—*Schroeder v. Ruehard*, S. C. Neb. Nov. 28, 1888; 40 N. W. Rep. 598.

11. **APPEAL—Transcript—Justice of the Peace.** — Where an appeal is taken from the judgment of a justice of the peace of the district court, the appellant or his agent must deliver a transcript of the proceedings to the clerk of the court to which the appeal may be taken, within 30 days next following the rendition of the judgment.—*Converse Cattle Co. v. Campbell*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 594.

12. **APPEAL—Record—Jurisdiction.** — Where a cause is tried before a justice of the peace, and on an appeal in the district court, and the want of jurisdiction does not appear on the face of the papers, the objection will not be considered in the supreme court.—*McClure v. Campbell*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 595.

13. **APPEAL—Review—Presumptions.** — In a suit to enjoin the obstruction of a right of way and for damages, the latter question was submitted to a jury, and a verdict rendered for plaintiff. The judgment thereon was set up in an amended petition, and defendant was enjoined: *Held*, that it would be presumed that the injunction was properly granted.—*Hunt v. Kemper*, Ky. Ct. App., Nov. 24, 1888; 9 S. W. Rep. 808.

14. **APPEARANCE—Plea to the Jurisdiction—Effect.** — Under Civil Code Ky. § 118, the filing a pleading to the jurisdiction, on the ground of want of proper service, such defect not being patent in the return of summons, is not a general appearance, such as will waive service.—*Chesapeake, etc. Co. v. Heath's Admr.*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 832.

15. **APPEAL—Judgment.** — The court entered judgment against an executor for a debt in favor of B. Later the court entered another judgment, awarding execution in favor of all persons who had previously obtained judgments, including B's judgment: *Held*, the time for appealing began to run from the date of the later judgment.—*Boyd's Devises v. Boyd's Ex'rs.*, Ky. Ct. App., Feb. 2, 1888; 9 S. W. Rep. 842.

16. **APPEAL—Record—Abstract.** — Under the rules of the Iowa supreme court, an abstract which is a mere copy of the transcript in respect to the pleadings and written evidence, and which sets out in full promissory notes, deeds, mortgages, etc., will be stricken from the files.—*Leckell v. Norman*, S. C. Iowa, Dec. 20, 1888; 40 N. W. Rep. 726.

17. **APPEAL—Certificate of Judge.** — Construction of Code Iowa, § 3173, providing for certificate of trial judge, in case of appeal where amount is less than \$100.—

Beeler v. Garrett, S. C. Iowa, Dec. 20, 1888; 40 S. W. Rep. 724.

18. **ARBITRATION AND AWARD.** — The award of an arbitrator cannot be set aside for errors of judgments as to the law or facts, if in making it he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct.—*Masury v. Whiton*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 688.

19. **ARBITRATION AND AWARD—Revocation—Statute.** — Under Code Civil Proc. N. Y. § 2383, providing that a submission to arbitration cannot be revoked after final submission, such a submission is revocable at any time before finally submitting the cause for decision, although the parties have expressly agreed not to revoke.—*People v. ex rel. v. Nash*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 680.

20. **ARBITRATION AND AWARD.** — Although an agreement to arbitrate provides that the decision of two of the three arbitrators shall be binding, yet all three must be present at every stage of the hearing, or the award of two will not be binding.—*Kent v. French*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 718.

21. **ASSIGNMENT—Attachment.** — An attachment creditor, who presents his claim to his debtor's assignee for settlement, waives all objections to the regularity of the assignment, no actual fraud being charged.—*Lattlejohn v. Turner*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 621.

22. **ASSIGNMENT—Fraud.** — Assignment for benefit of creditors will not be set aside for fraud of assignor unless the assignee or creditors knew of the fraud.—*Hill v. Shuggley*, S. C. Ark., Nov. 3, 1888; 9 S. W. Rep. 845.

23. **ATTACHMENT—Non-residence—Evidence.** — Evidence upon which court justified in dissolving and dismissing attachment on ground of non-residence.—*Garlinghouse v. Mulvane*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 798.

24. **ATTACHMENT—Instruction.** — Where question on attachment is one of good faith in a purchase intervenor, an instruction which does not actually place burden of proof on the purchaser to prove such good faith is not erroneous.—*Martin v. Davis*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 712.

25. **ATTACHMENT—Intervenor.** — Question of facts and evidence under Code Iowa, as to rights of intervenor for money owing on attachment.—*Hozie v. Sutter*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 723.

26. **ATTORNEY AND CLIENT—Compensation.** — Question of fact as to how much of attorney's services were covered by a contingent fee.—*Gough v. Root*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 647.

27. **BASTARDY—Evidence—Corroboration.** — Under Pub. St. Mass. ch. 85, §§ 1, 16, providing that, on the trial of a complaint in bastardy proceedings, the fact that the woman in her travail accused the defendant of being the father of the bastard may be shown in corroboration of her evidence.—*Leonard v. Botton*, S. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 879.

28. **BLACKMAIL—Evidence.** — As to what constitutes blackmail under Code Iowa, § 3871.—*State v. Pierce*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 715.

29. **CARRIERS—Passengers—Injury—Negligence.** — A railroad company, in permitting the accumulation of snow and ice in moderate quantities on the platforms of its cars during a night run in a storm of snow and sleet, is not guilty of such negligence as would warrant a recovery for injuries in consequence thereof, particularly by one cognizant of the condition of the platforms.—*Palmer v. Penna. Co.*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 859.

30. **CARRIERS—Passengers—Round-trip Ticket.** — Liability of railroad company for damages in ejecting passengers holding round-trip ticket though detached.—*Wightman v. C. & M. Ry. Co.*, S. C. Wis. Dec. 4, 1888; 40 N. W. Rep. 689.

31. **CERTIORARI**—Review—Judgment. — In order to review a judgment rendered in the court for trial of small causes, which has been docketed in the court of common pleas, upon the ground of illegality in the proceedings of the trial court anterior to the judgment, the writ of *certiorari*, when allowable, should be directed to the court for the trial of small causes, not to the court of common pleas. — *State v. Davis*, S. C. N. J., Nov. 12, 1888; 16 Atl. Rep. 156.

32. **CHAMPERTY AND MAINTENANCE** — Contingent Fee—Attorney. — A contract to prosecute a claim before the court of commissioners of Alabama claims for a contingent fee is not illegal on the ground of champerty. — *Manning v. Sprague*, S. J. O. Mass., Nov. 23, 1888; 18 N. E. Rep. 673.

33. **CHATTEL MORTGAGES**—Filing—Notice. — A chattel mortgage, duly filed in the county where the mortgagor resides, is constructive notice of the existence of such mortgage, and will be constructive notice in any county to which the mortgagor may remove the property. — *Grand Island Banking Co. v. Frey*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 599.

34. **CHATTEL MORTGAGE** — Crop to be Grown. — A chattel mortgage of a crop to be grown in the future, and which has not been planted at the date of its execution, although made by one in possession of land, is void as against subsequent purchasers, or attaching creditors. — *Long v. Hines*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 796.

35. **CONSTITUTIONAL LAW** — Classification — Municipal Corporation. — Under classification act of 1882, population may be made the basis of classification in statutes relating to municipal bodies and their police powers, but such a classification cannot be made the means of evading the constitutional interdiction of local or special laws where the classification is plainly illusory. — *State v. Hoogland*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 166.

36. **CONSTITUTIONAL LAW** — Municipal Corporations — Street Assessment. — Act Ky. March 24, 1883, § 1, providing for reconstruction of streets and assessment of property therefor, does not infringe const. U. S. 14th Amend. § 1, prohibiting the taking of private property without due process of law. — *Walston v. Nevins*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 192.

37. **CONSTITUTIONAL LAW** — Injunction — Taxes. — Act Mich. 1885, No. 153, § 107, providing that no injunction shall issue to stay proceedings for collection of taxes, is not unconstitutional in view of § 42 of the act. — *Eddy v. Township of Lee*, S. C. Mich., Nov. 23, 1888; 40 N. W. Rep. 792.

38. **CONSTRUCTIVE TRUST**. — Evidence necessary to sustain a constructive trust. — *Curry v. Curry*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 831.

39. **CONTEMPT** — Commitment. — Code Iowa, § 2497, relating to contempt proceedings, is mandatory. — *Dorgan v. Granger*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 607.

40. **CONTRACT**—Performance—Mutuality. — A written agreement, signed by defendant only, promising to sell certain bonds for plaintiff by a day named at a fixed price, whenever he shall place them at his disposal, containing no promise by plaintiff to do anything, becomes mutually binding when performed by plaintiff by placing the bonds under defendant's control. — *Plumb v. Campbell*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 790.

41. **CONTRACT**—Evidence. — Weight of evidence on question of breach of contract to cut and haul timber. — *McDonald v. Miller*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 665.

42. **CONTRACTS** — Public Policy. — A contract that, in consideration of estimates furnished on the amount of timber on certain lands, one will, if he buy the lands, pay the land looker a commission, is not against public policy, because such estimates were made for the then owner of the lands paid for by him. — *Webster v. Bearinger*, S. C. Mich., Nov. 23, 1888; 40 N. W. Rep. 772.

43. **CONTRACTS** — Fraudulent Representations. — Weight of evidence on charge of fraudulent representations in procuring contract. — *Dennis v. Leaton*, S. C. Mich., Nov. 23, 1888; 40 N. W. Rep. 753.

44. **CORPORATIONS**—Insolvency — Receivers. — Revision N. J. p. 192, § 84, providing that where the property of an insolvent corporation in the hands of a receiver is incumbered with liens, "the legality of which is brought in question," and is of a character materially to deteriorate in value pending the litigation, the court may order a sale, is not limited to cases of liens assailed as void, but extends to contests as to priorities. — *Emons v. Davis*, N. J. Ct. Chan., Nov. 2, 1888; 16 Atl. Rep. 158.

45. **CORPORATIONS**—Officers — Liability to Stockholder — Pledge. — In an action on a note, defendant pleaded that certain shares of stock in a corporation of which plaintiff was an officer were delivered as security for the note; that by plaintiff's negligence and misconduct as such officer the stock subsequently greatly depreciated in value, to defendant's damage: Held, that this defense was not available. — *Palmer v. Hawes*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 676.

46. **COSTS**—Married Woman. — Facts under which court held married woman liable for costs. — *Pfueper v. Pully*, N. J. Ct. Chan., Nov. 24, 1888; 16 Atl. Rep. 172.

47. **COUNTIES**—Supervisors—Appeal. — Under Laws 20th Gen. Assembly Iowa, ch. 197, providing for designation, by board of supervisors, of official newspaper, an appeal lies from the board in all cases. — *Brown v. Lewis*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 698.

48. **COUNTERCLAIM** — Set-off. — Civil Code Ky. § 96, in an action by a wife for divorce, and to be protected in her rights to land, the husband cannot, by cross-petition, ask to have the deed of the land, which was made to the wife and her bodily heirs, reformed in favor of the husband and his child by former marriage, but such must be through counterclaim. — *Grimes v. Grimes*, Ky. Ct. App., Dec. 13, 1888; 9 S. W. Rep. 840.

49. **COVENANTS**—Running with the Land — Agreement to Fence. — A covenant in a deed granting a right of way to a railroad company, stipulating that whenever any portion of the land crossing the line of the railway should be inclosed and used for pasturage the railway company should construct a fence on each side of the right of way, is not a covenant that runs with the land. — *G. C. & S. F. Ry. Co. v. Smith*, S. C. Tex., Nov. 27, 1888; 9 S. W. Rep. 863.

50. **CRIMINAL LAW**—Homicide—Evidence. — On trial for murder, testimony given by the prisoner upon the examination before the coroner, as to his actions and whereabouts on the evening of the homicide, is admissible in evidence, where it appears that the prisoner gave such testimony voluntarily, after being cautioned by the coroner that he need not say anything unless he chose. — *State v. Coffee*, S. C. Conn., July 7, 1888; 16 Atl. Rep. 161.

51. **CRIMINAL LAW**—New Trial—Evidence. — Where motion for a new trial based on incompetency of juror, and there are disputed questions of fact, where a reasonable doubt of defendant's guilt, the motion for a new trial should be sustained. — *State v. Cleary*, S. C. Kan., Nov. 10, 1888; 19 Pac. Rep. 776.

52. **CRIMINAL LAW**—Rape—Child — Statute. — In a prosecution for rape under section 12 of the Criminal Code, it is not necessary to prove that the prosecutrix has not reached the age of puberty, if it be shown that she is under 15 years of age. — *State v. Wright*, S. C. Neb., Nov. 23, 1888; 40 N. W. Rep. 594.

53. **CRIMINAL LAW**—Appeal — Record. — The overruling of defendant's motion for a new trial in a criminal case, on the ground of surprise and newly-discovered evidence, will be presumed correct on appeal, where the affidavits upon which it was based were not made a part of the record by a bill of exceptions or by order of court, though copied into the transcript by the clerk. — *McClure v. State*, S. C. Ind., Nov. 27, 1888; 18 N. E. Rep. 615.

54. CRIMINAL LAW—Illegal Sale—Variance.— Though the complaint charges keeping a house for the illegal sale of liquors in a certain city, and the evidence shows the house to have been partly in the city and partly in an adjacent town, the appellate court will not reverse the case for variance, as there may have been evidence that the part in which the liquors were kept was wholly within the city.— *Commonwealth v. Dorney*, S. J. O. Mass., Nov. 27, 1888; 18 N. E. Rep. 584.

55. CRIMINAL LAW—Evidence—Instructions.— On an indictment for breaking into a depot with intent to steal, an instruction that the jury must believe the defendant guilty beyond a reasonable doubt, in order to convict, is properly given.— *Cox v. Commonwealth*, Ky. Ct. App., Nov. 24, 1888; 9 S. W. Rep. 804.

56. CRIMINAL LAW—Change of Venue.— Under the Kentucky statute which required the court to grant change of venue to an accused on the filing of a petition and two affidavits, a change will not be granted to one who merely files a petition, and offers neither affidavits nor witnesses.— *Wilkinson v. Commonwealth*, Ky. Ct. App., Sep. 13, 1888; 9 S. W. Rep. 826.

57. CRIMINAL LAW—Homicide—Abortion.— The common-law rule that if life be destroyed in the commission of an abortion, whether the woman be quick with child or not, it is murder, or at least manslaughter, is not changed by Gen. St. Ky. ch. 29, art. 4, § 2.— *Peoples v. Commonwealth*, Ky. Ct. App., Dec. 4, 1888; 9 S. W. Rep. 810.

58. CRIMINAL LAW—Forgery.— It is not necessary that one who signs the name of another should have express authority to do so to relieve him of the penalties of forgery. If it appears from the proof that he had reasonable ground for considering that he had authority, and acted upon that belief, it is sufficient.— *Claiborne v. State*, S. C. Ark., Nov. 17, 1888; 9 S. W. Rep. 851.

59. CRIMINAL LAW—Homicide—Self-defense.— Where, upon a trial for murder, the undisputed evidence shows that defendant was attacked by deceased with a loaded gun while in the public highway, and that deceased advanced after repeated warnings to desist until within three rods of defendant, threatening to kill him, and was in the position of firing when defendant shot him, there is no issue for the jury as to the necessity of a retreat, or the possibility of avoiding the assault by any other reasonable means than by taking life.— *People v. Macon*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 784.

60. CRIMINAL LAW—Larceny—Possession of Stolen Goods.— On a trial for larceny, an instruction that the unexplained possession of recently stolen property is presumptive evidence of guilt is erroneous.— *State v. Tucker*, S. C. Iowa, Dec. 20, 1888; 40 N. W. Rep. 725.

61. CRIMINAL LAW—Burglary—Possession of Burglar's Tools.— Upon an indictment for having in possession instruments of burglary, with intent to employ them, evidence that B was a burglar, safe-blower, pickpocket and thief, is competent as tending to prove the intent with which defendant had the tools.— *People v. Howard*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 789.

62. CRIMINAL LAW—Perjury.— On indictment for perjury, committed by a debtor on his examination in proceedings supplemental to execution, under Rev. Stat. Ind. 1881, § 815, allegations as to false statements as to property previously owned by him are immaterial, unless it is shown that such property still belonged to him.— *State v. Cunningham*, S. C. Ind., Nov. 27, 1888; 18 N. E. Rep. 613.

63. CRIMINAL LAW—Libel—Indictment.— An indictment for criminal libel, which avers that the defendant "did unlawfully and maliciously compose, write and cause to be printed and published of and concerning," etc., certain libelous matter, sufficiently informs the defendant of the offense with which he is charged.— *Tracy v. Commonwealth*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 822.

64. CUSTOM AND USAGE—Contract.— Question

whether parties in making contract dealt with reference to usage and custom of the petroleum exchange.— *Greeley v. Doran Wright Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 876.

65. DAMAGES—Negligence.— Where plaintiff was injured by being put off a train: *Held*, entitled to recover for fright and mental suffering, caused by defendant's negligence.— *Stutz v. Chicago, etc. R. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 658.

66. DECEIT—False Representations—Instructions.— In an action for false representations, an instruction that if defendant made positive statements, without knowing them to be true, on which plaintiffs relied, they are entitled to recover, is not prejudicial where the court subsequently instructs that the representations must have been made with intent to deceive, as it also fairly implies the necessity of such intent.— *Middleton v. Jerdee*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 629.

67. DEED—Covenant—Condition.— If it is doubtful whether a clause in a deed be a covenant or a condition, the court will incline against the latter construction.— *Woodruff v. Woodruff*, N. J. Ct. Chan., Oct. 16, 1888; 15 Atl. Rep. 4.

68. DEED—Description—Certainty.— A deed purporting to convey "the southeast corner" of a certain quarter section, without stating any dimensions, or one purporting to convey "the southwest fractional part of the north one-half" of a specified quarter section, not giving the dimensions, quantity or location, is void for uncertainty.— *Morse v. Stockman*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 679.

69. DEED—Acknowledgment—Attestation.— A deed executed in 1866 passes the legal title to land in Wisconsin, though not acknowledged or attested, as those formalities are only essential to entitle it to record.— *Leinenkugel v. Kehl*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 683.

70. DESCENT AND DISTRIBUTION—Legacy Tax—Contingent Legacy.— Question as to whether a contingent legacy is subject to taxation, under Laws N. Y. 1885, ch. 482, § 2.— *In re Cager's Will*, N. Y. Ct. App., Nov. 28, 1888; 18 N. E. Rep. 866.

71. DIVORCE—Cruelty—Single Act—Repentance.— A single act of cruelty, committed some time before final separation, will not entitle the complaining party to a divorce, when it appears by the testimony that he has been guilty of very gross misconduct on her part, especially when the husband shows that he has repented, and desires to regain the affections of his wife, and to live in peace with her.— *Lynch v. Lynch*, N. J. Ct. Chan., Nov. 30, 1888; 16 Atl. Rep. 175.

72. DOWER—Devise—Indemnity.— A widow is not entitled to indemnity from the estate for a mortgage executed before her marriage on lands devised to her in lieu of dower.— *Meyer v. Cohen*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 852.

73. DOWER—Release—Mortgage.— If a mortgagee, without the consent of a married woman, who united with her husband in a mortgage, conveying his real estate to indemnify an indorser of his note, take a new note, not signed by one of the makers of the original note, the inchoate interest of the wife in the land is thereby released, and cannot be sold under a foreclosure of the mortgage.— *Crawford v. Hazelrigg*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 603.

74. DRAINAGE—Improvements—Commissioners.— Commissioners appointed under Pub. Stat. Mass., ch. 189, for the direction of improvements on ponds and marshes, have authority only to do the work required of them by their appointment, and no continuous authority to renew such improvements or make others after they have once been completed.— *Smith v. Smith*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 593.

75. EJECTMENT—Evidence—Construction of Will.— Where the use of one-third of a house was devised to the widow and two-thirds to plaintiffs, and the resid-

uary estate to defendant and others, and defendant having taken possession of a part of the house, ejectment was brought against him, evidence that the widow waived the provisions for her in the will and claimed dower, and that provision in lieu of the will were made for her by the court, is admissible.—*Gilman v. Gilman*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 849.

76. ELECTIONS AND VOTERS—Bribery—Indictment.—Allegations in an indictment that the person bribed was a legal voter and entitled to vote at a legal election, and that defendant gave him two dollars, and he, influenced thereby, voted for a candidate for an office named, sufficiently describes the offense of bribery, under Gen. Stat. Ky., ch. 83, § 12, art. 12.—*Commonwealth v. Selby*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 879.

77. ELECTIONS AND VOTERS—Violation of Election Law—Poll Book.—When a clerk of election is indicted, under Gen. Stat. Ky., ch. 83, § 5, art. 12, for making a false entry on the poll book of votes actually cast, it is not material whether the persons whose votes he entered were or were not registered voters.—*Commonwealth v. Duff*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 816.

78. EMINENT DOMAIN—Decree.—The right of the judge to enter a preliminary decree in condemnation proceedings cannot be questioned by the petitioner after it has voluntarily appeared before such judge and offered testimony.—*Chicago, etc. Co. v. Ward*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 828.

79. EMINENT DOMAIN—Compensation—Right of Way.—On the assessment of damages for taking for a railroad pasture land not abutting on a highway, where there is appurtenant to the land a cartway to the public road, it is proper to refuse to charge that, if the way is through gates and bars for the passage of cattle, and if the pasture is converted into building lots, occupants of cottages on it will not be entitled to the right of way.—*Fitz v. Nantasket Beach R. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 592.

80. EMINENT DOMAIN—Evidence—Damages.—The taking for public use of land, which is already subject to a right of flowage, may be an injury to the adjoining land of the owner; and, it not appearing that he has no beneficial use in connection with the land so taken, evidence to show damage is properly admitted.—*Tyler v. Town of Hudson*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 582.

81. EQUIT—Master in Chancery—Report.—A report of a master in chancery, which is returned into court, sealed up and indorsed "fees to be paid before opening," is not filed.—*Donaldson v. Johnson*, S. C. R. I., Oct. 10, 1888; 16 Atl. Rep. 140.

82. EQUIT—Cancellation—Confidential Relations.—A deed procured by the grantee while acting as the grantor's counsel, made in trust for the grantor's children, containing no power of revocation, but under which the grantee represented that he would have power to reconvey, will be set aside, though the grantee did not intend to mislead.—*James v. Steere*, S. C. R. I., Dec. 6, 1888; 16 Atl. Rep. 143.

83. EQUIT—Rescission—Mental Incapacity.—Executive contracts of an imbecile, though voidable, can only be set aside at his instance by his doing equity, and placing in original condition the one who executed his contract with him.—*Gates v. Cornett*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 740.

84. EVIDENCE—Res Gestæ—Mental Condition.—Where the mental condition of the defendant is part of the *res gestæ*, his conduct pertinent to the inquiry, by being reasonably explanatory of it, is competent evidence in his own favor.—*Schlenner v. State*, S. C. N. J., Nov. 12, 1888; 15 Atl. Rep. 838.

85. EXECUTORS AND ADMINISTRATORS—Accounting.—On bill to surcharge and falsify, an administrator cannot be charged with notes and lumber of the estate which are not mentioned in his accounts.—*McLeod v. Griggs*, S. C. Ark., Nov. 28, 1888; 9 S. W. Rep. 858.

86. EXECUTORS AND ADMINISTRATORS—Insolvent Estate.—Construction of Pub. Stat. R. I., ch. 188, § 13, providing for the appeal of any person dissatisfied with the allowance by commissioner.—*Harris v. Angell*, S. C. R. I., Oct. 20, 1888; 16 Atl. Rep. 142.

87. EXECUTORS—Laches.—Court refused to open executor's accounts confirmed some time theretofore, upon the petition of the representatives of two legatees, who claimed misconduct and fraud, it appearing that plaintiff's intestates were of full age at the passing of the accounts and lived for some time thereafter without making any complaint.—*Richardson v. Billingslea*, Md. Ct. App., Nov. 28, 1888; 16 Atl. Rep. 65.

88. EXECUTORS AND ADMINISTRATORS—Appointment—Renunciation.—An action will not lie by an heir to compel the person named as executor in the will to qualify or formally renounce the appointment, and to compel the filing of an inventory of decedent's property in his possession.—*Cable v. Cable*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 700.

89. EXECUTION—Levy—Abandonment.—Where one pays and takes an assignment of an execution which has been levied on real estate, and which is afterwards returned, and neglects to enforce the levy for more than two years, and agrees to be responsible for the rent of the property to the purchaser under a subsequent execution if the latter will refrain from ejecting the debtor, his levy, as to third persons with or without notice, must be considered abandoned.—*Cook v. Clemens*, Ky. Ct. App., Dec. 1, 1888; 9 S. W. Rep. 890.

90. EXECUTION—Sale—Redemption.—Construction of Code Iowa, §§ 8112-8115, providing for redemption of land after execution sale.—*Tharp v. Forrest*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 718.

91. FORCIBLE ENTRY AND DETAINER—Procedure.—The Illinois statute of forcible entry and detainer, prescribing the mode of procedure to obtain the remedy, excludes all other modes.—*French v. Willer*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 811.

92. GARNISHMENT.—Where the purchasers in a bill of sale agree to pay the amount of the consideration upon certain debts of the seller, as the seller shall direct, and they pay all of such debts except those of which payment is refused by the creditors, the balance remaining in their possession is subject to garnishment by creditors refusing to receive payment.—*Green & B. Co. v. Marshall*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 643.

93. GRANT—Use of Street.—The grant by a city to a street railway corporation upon a valuable consideration of the right to lay tracks and run cars on the city streets and to make traffic contracts with another company giving such other company the right to run cars over its tracks, without any condition in the grant in respect to the duration of such contract rights or otherwise, is not a license, but the conveyance of an estate in perpetuity.—*People v. O'Brien*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 692.

94. GUARANTY—Evidence—Waiver.—In an action on a guaranty, where the defense is negligent delay in bringing action to collect the debt guaranteed, evidence of acquiescence of defendant in the delay is admissible as showing a waiver of strict performance on the part of plaintiff, and the exercise of due vigilance by him.—*Mead v. Parker*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 727.

95. GUARANTY—Statute of Frauds—Judgment.—An accommodation indorser of a note who has an interest in a judgment against the maker, and who, being held as indorser, borrows money to pay the note, uniting with his co-owner in an assignment of the judgment to the lender to secure him, and guarantying its payment, makes the guaranty for his own benefit, and the undertaking is not within the statute of frauds.—*Little v. Edwards*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 134.

96. HIGHWAYS—Tax—Assessment.—Construction of How. St. Mich. §§ 1326, 1379, 1381, authorizing assessment for improving highways and bridges.—*Longyear Alpin*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 788.

97. HIGHWAYS—Taxation—Statutes—Construction.—Section 110 of the road act (Revision, 1015) does not apply to the county of Atlantic. Under the act of 1846 (Revision, p. 1194, § 11) the townships in said county may raise such sum for road purposes as may be required.—*State v. Veal*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 159.

98. HIGHWAYS—Statute—Assessment of Damages.—Construction of Pub. St. Mass., ch. 49, § 78, providing for the assessment of damages by jury in case of laying out or altering highways.—*Kelth v. City of Brockton*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 585.

99. HIGHWAY—Construction.—Power of road supervisor in reference to street improvement and grading under acts 21st Gen. Assembly Iowa, ch. 87.—*Randall v. Christiansen*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 703.

100. HOMESTEAD—Conveyance—Judgment.—One occupying land as his homestead conveyed it to his children, reserving a life estate: *Held*, on his death, that the land could not be subjected to the payment of a judgment recovered against him prior to the conveyance, and subsequent to its acquisition as a homestead.—*Richart v. Utterback*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 825.

101. HOMESTEAD—Occupation after Levy.—Occupancy of land as a homestead, after the levy of an attachment upon it, will not relieve it of the lien thereof.—*Reynolds v. Tenant*, S. C. Ark., Nov. 17, 1888; 9 S. W. Rep. 867.

102. HUSBAND AND WIFE—Judgment—Execution.—An execution may issue on a judgment in favor of a wife against her husband, without the husband's consent.—*Kinkade v. Cunningham*, S. C. Penn., Oct. 22, 1888; 15 Atl. Rep. 905.

103. INJUNCTION—Bond.—Where an injunction bond, given in a suit to restrain the funding and payment of county bonds, is conditioned to pay damages sustained by the person designated as defendants and all holders of the bonds, it is no defense to an action on the bond that plaintiffs were not designated defendants in the injunction suit.—*Alexander v. Gish*, Ky. Ct. App., Dec. 15, 1888; 9 S. W. Rep. 801.

104. INSURANCE—Waiver of Proofs.—Facts stated under which the court held that defendant had waived further proofs and had also waived a provision of the policy requiring suit to be brought within a certain time.—*Jennings v. Metropolitan, etc. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 801.

105. INSURANCE—Fire—Powers.—Acts. Mich., 1883, No. 175, having been declared unconstitutional, the provision of How St. § 4249, prohibiting mutual fire insurance companies from doing business in more than three counties, remains in force.—*Eddy v. Merchants', etc. Co.*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 775.

106. INSURANCE—Condition in Policy—Temporary Suspension.—A condition in a policy of fire insurance upon a shingle-mill that, "if the premises shall become vacant or unoccupied," without notice to and consent of the company, the policy shall be void, is not broken by a temporary suspension.—*City Planing, etc. Co. v. Merchants', etc. Ins. Co.*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 777.

107. INTERPLEADER.—Construction of Rev. St. Wis. § 2610, and amendment Laws 1883, ch. 41, providing for substitution of interpleader, in place of defendant.—*Baxter v. Day*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 675.

108. INTOXICATING LIQUORS—Licenses—Power.—The court of common pleas of Mercer county has no power to grant a license to keep an inn and tavern in the borough of Princeton. The common council of the borough has the exclusive power to grant license to sell intoxicating liquors within said borough.—*Cook v. Ct. Common Pleas*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 176.

109. INTOXICATING LIQUORS—Complaint—Variance.—complaint charging that defendant "did keep and

maintain a certain common nuisance, to wit, a building, to wit, a tenement in a building, used for the illegal sale and illegal keeping of intoxicating liquors," is not inconsistent in its description of the place, but charges the offense of keeping a tenement in a building for such illegal use.—*Commonwealth v. Lee*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 586.

110. INTOXICATING LIQUORS—Illegal Sale—Intent.—An allegation in a complaint that defendant had intoxicating liquor, with "intent unlawfully to sell the same within the commonwealth," is sufficient, though not alleging an intent to sell in the place where the liquor is kept.—*Commonwealth v. Gillon*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 592.

111. INTOXICATING LIQUORS—Married Woman—Coercion.—On the trial of a married woman for illegally selling intoxicating liquors, an instruction that the presence of defendant's husband on the premises and in the house, at the time of the sales, would be sufficient to raise the presumption of coercion, is properly refused.—*Commonwealth v. Daley*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 579.

112. INTOXICATING LIQUORS—Nuisance—Injunction.—Construction of Acts 21st Gen. Assembly Iowa, ch. 66, § 2, providing for temporary injunction against a liquor nuisance.—*Tibbets v. Bursler*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 707.

113. INTOXICATING LIQUORS—Civil Damage Law—Intoxicated Persons.—In an action under the Pennsylvania statute for damages for selling liquor to a person while drunk or to one of known intemperate habits, it is not error for the court to charge that, "whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated, though he can walk straight, though he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk.—*Elkin v. Buschner*, S. C. Penn., Nov. 5, 1888; 16 Atl. Rep. 102.

114. INTOXICATING LIQUORS—Sale—Minors.—Construction of How St. Mich. § 2263, providing amount of damages recoverable of one selling liquors to minors.—*Thaisen v. Johns*, S. C. Mich., Nov. 1, 1888; 40 N. W. Rep. 727.

115. IRRIGATION DITCH—Real Property.—Facts stated showing abandonment and claim by uses of irrigation ditch but held such interest is real property and only to be acquired by deed, prescription or condemnation.—*Bonnham v. Freeman*, S. C. Colo., Nov. 30, 1888; 19 Pac. Rep. 761.

116. JAILS AND JAILERS—Bail-bonds—Escape.—Under Pub. St. R. I. ch. 225, §§ 1, 6, providing for forfeiture of bail-bond of one imprisoned for debt, it is not only a breach of the bond but an escape for a person to fail to render himself up or make an assignment as required by the statute.—*In re McManusman*, S. C. R. I., Nov. 24, 1888; 16 Atl. Rep. 148.

117. JUDGE—Jurisdiction.—Where a judge acting in a matter within his jurisdiction enters such order without notice he is not liable to the party aggrieved thereby, though the act was in excess of his jurisdiction.—*Hughes v. McCoy*, S. C. Cal., Oct. 26, 1888; 19 Pac. Rep. 674.

118. JUDGMENT—Mistake—Amendment.—Mistake in the form of the judgment may be amended in that court or ordered on appeal.—*Hood v. Speath*, S. C. N. J., Nov. 20, 1888; 16 Atl. Rep. 163.

119. JUDGMENT—Divorce.—A judgment in a divorce suit granting a divorce, is a final judgment; and a modification thereof by incumbering land given to plaintiff with a lien for the payment of a sum to defendant, and providing for the sale of the land unless plaintiff mortgage it to a trustee to secure the sum, made more than one year after its rendition, is without jurisdiction, and void.—*Thompson v. Thompson*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 671.

120. JUDGMENT.—Facts sufficient to justify court in setting aside judgment obtained through mistake

inadvertence, surprise or excusable neglect, under Rev. Stat. Wis. § 2832.—*Black v. Huribut*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 678.

121. JUDGMENT—Fraudulent Entry—Innocent Purchasers.—A judgment for money rendered by agreement, in an action against a railway company for obstructing a water-course and injuring plaintiff's land, which the clerk, by plaintiff's fraudulent misrepresentations, has entered with an agreement added that defendant shall construct a culvert of certain dimensions, cannot be amended as against the grantee, who is an innocent purchaser for value without notice.—*Indiana, etc. R. Co. v. Bird*, S. C. Ind., Dec. 11, 1888; 18 N. E. Rep. 837.

122. JURISDICTION—Mechanic's Lien.—The superior court of Denver has jurisdiction both over the cause of action and person of the defendant in an action to foreclose a mechanic's lien, brought by a material man against a non-resident of the county who contracted for the erection of certain buildings in said city, the material having been furnished with the knowledge and consent of defendant, and process served upon him within the territorial jurisdiction of the court.—*Weiner v. Rumble*, S. C. Colo., Nov. 30, 1888; 19 Pac. Rep. 764.

123. JURY—Commissioners.—In impanelling of jury by county commissioners, a motion to quash panel on ground that one of the commissioners had an action in court to be determined by a jury will be overruled, in the absence of showing partiality or unfairness.—*Northwestern R. Co. v. Frasier*, S. O. Neb., Nov. 28, 1888; 40 N. W. Rep. 604.

124. JURY—Competency.—On a trial for forging and uttering discharges for money payable from a town and county treasury, the inhabitants of that town and county are not disqualified to serve as grand or trial jurors, there being no provision for finding or trying an indictment for such offense in another county.—*Commonwealth v. Brown*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 587.

125. LANDLORD AND TENANT—Lease—Construction.—A lease gave the lessee the privilege of purchasing the leased premises at any time before the expiration of the term. The lessee failed to tender the purchase money and demand a deed until two years after the expiration of the term: *Held*, that the lessee had forfeited his right to a conveyance.—*Kruegel v. Berry*, S. C. Tex., Nov. 18, 1888; 9 S. W. Rep. 868.

126. LANDLORD AND TENANT—Assignment—Mortgages—Recording.—Indexing and recording a mortgage which contains an assignment of rents, as a real estate mortgage only, is not a constructive notice of such assignment to third persons.—*Trulock v. Donohue*, S. O. Iowa, Dec. 18, 1888; 40 N. W. Rep. 696.

127. LANDLORD AND TENANT—Tenancy at Will.—Code Iowa, § 2014, changes the common law rule of tenancy from year to year to that of tenancy at will.—*O'Brien v. Troxel*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 704.

128. LANDLORD AND TENANT—Leases—Property Covered.—Where a store covers the whole of the lot upon which it stand, a lease of the building, "together with all and singular the benefits, liberties and privileges to the said premises belonging," covers the entire premises, and not the building alone.—*Chesebrough v. Piaggee*, S. O. Mich., Nov. 28, 1888; 40 N. W. Rep. 747.

129. LIBEL AND SLANDER.—A charge that a butcher slaughters and sells diseased and unwholesome meats is *per se* actionable.—*Young v. Kuhn*, S. C. Tex., Nov. 2, 1888; 9 S. W. Rep. 860.

130. LIBEL AND SLANDER—Words Actionable.—Words spoken, that one "used" his daughter, are capable of the meaning ascribed to them by the innuendoes in a complaint for slander, and words, in connection with them, when spoken by the daughter's husband, that "the children are not mine; they are from him," may mean that the husband disclaimed the paternity

of his wife's children, and asserted that they were from plaintiff.—*Guth v. Lubach*, S. O. Wis., Dec. 4, 1888; 40 N. W. Rep. 681.

131. LIEN—Logs and Logging.—Question of sufficiency of evidence to sustain lien on logs, under Laws Mich. 1887, p. 279.—*Demars v. Conrad*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 799.

132. LIFE INSURANCE—Policy—Conditional Delivery.—Where one receives from an agent a policy of life insurance, giving his notes and a check therefor, and delivers to the agent policies in other companies, on the agreement that the agent shall obtain for them their surrender value or paid up policies, and the agent fails to accomplish his undertaking, the policy does not become operative, and it may be returned, and the notes and checks recovered.—*Harnickell v. New York, etc. Co.* N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 632.

133. LIFE INSURANCE—Application—Misrepresentation—Action on life policy. Defense misrepresentation in application, as to disease—vertigo:—*Held* that, as the vertigo was merely temporary, and the condition of the insured was fully restored, it cannot be regarded as material, and, under act Ky., Feb. 4, 1874, providing that such statements are to be held as mere representations, and not warranties, it cannot prevent a recovery.—*Mut. Ben. Life Ins. Co. v. Davless*, Ky. Ct. App., Nov. 23, 1888; 9 S. W. Rep. 812.

134. LIFE INSURANCE—Fraternal Societies.—An association organized for benevolent purposes, which secures its members by the lodge system, requiring an initiation fee and assessments, and which in case of accidental disability pays a weekly amount, is not a life insurance company, within the meaning of How. Stat. Mich. § 4225.—*Reesehouse v. Seeley*, S. O. Mich., Nov. 22, 1888; 40 N. W. Rep. 765.

135. LIMITATION.—A complaint in an action commenced in March, 1887, which alleges that the services sued for were performed between the months of September and December, 1878, but fails to allege that any time was fixed for payment, shows on its face that the cause of action did not accrue within the statutory period of six years.—*Tucker v. Lovejoy*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 627.

136. LIMITATION—Statute.—2 Rev. Stat. N. Y., p. 301, art. 6, §§ 49-51, making the statute of limitations applicable to cases where the law and equity courts had concurrent jurisdiction, was a re-enactment of the former rule, and is not repealed by Code N. Y. 1848 (Laws 1848, p. 511, § 66), repealing the Revised Statutes as to the limitation of actions.—*Buller v. Johnson*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 643.

137. LIMITATIONS—Adverse Possession.—Question of weight of evidence to sustain claim of title by adverse possession.—*Strutton v. Strutton*, Ky. Ct. App., Dec. 8, 1888; 9 S. W. Rep. 826.

138. LIMITATION OF ACTIONS—Adverse Possession.—Actual possession of one-quarter of a quarter section of land, under a registered patent for the whole, is not possession of the whole, as against a senior patentee of another part of the quarter section.—*Turner v. Stephenson*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 735.

139. LOTTERIES—Illegal Sale.—On indictment for selling lottery tickets the tickets were admissible, though purporting to be numbers in a horse race, leaving the main issue for the jury.—*Boylard v. State*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 182.

140. MANDAMUS—Supersedes.—Where a *supersedeas* would be useless, *mandamus* will not lie to compel its issuance.—*Middleton v. McCullough*, S. C. Ark., Nov. 3, 1888; 9 S. W. Rep. 844.

141. MARINE INSURANCE—Abandonment—Acceptance.—Where an insurer, upon notification of an abandonment of a vessel, gets it off, brings it to port, repairs it at great expense, and never offers to return it, the abandonment is thereby accepted, and the company must pay the full amount of the policy.—*Richelleu, etc.*

Co. v. Thames Ins. Co., S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 758.

142. MARRIED WOMAN—Husband and Wife.—Laws N. Y. 1882, ch. 172, § 7, providing for right of action against a married woman, does not abrogate the common law rule of the husband's liability for the wife's torts.—*Mangum v. Peck*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 617.

143. MASTER AND SERVANT.—The master is responsible for the act of his employee or servant, when the act is done in the prosecution of the business that the employee or servant was engaged by the master to do. When, therefore, the employee or servant, while engaged in the prosecution of the master's business, deviates from his instructions as to the manner of doing it, this does not relieve the master from liability for his acts.—*Atchison, etc. Co. v. Randall*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 783.

144. MASTER AND SERVANT—Negligence—Injury.—Facts reviewed with reference to liability of master for injury to servant where it was a question whether defective machinery or negligence of a fellow-servant caused the injury.—*Stringham v. Stewart*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 870.

145. MASTER AND SERVANT—Injury—Negligence.—Where a servant is injured in attempting to obey an order to move a heavy weight, with insufficient help, he cannot recover from the master therefor, when the latter's uncontradicted evidence shows that there were other men on the premises who might have been called to assist, and all necessary implements.—*Dunlap v. Barnaby, etc. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 599.

146. MASTER AND SERVANT—Injury—Negligence.—Plaintiff's duty being to clean a wheel, and an injury having occurred in attempting so to do, the jury are warranted in finding that such injury was caused by defendant's negligence, as if plaintiff had been properly instructed, the injury might not have occurred.—*Glover v. Dwight Manfg. Co.*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 597.

147. MASTER AND SERVANT—Negligence.—Under a contract to construct a tunnel for a city, binding defendants, the contractors, to furnish "all facilities" for inspection, they are not required to furnish the inspector transportation in and out of the tunnel, and are not liable for his death, caused by the negligence of their servant.—*Morris v. Brown*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 722.

148. MEASURE OF DAMAGES—Insurance.—The measure of damages for breach of contract to insure is the sum which the policy was to insure, if the property be insured, and which was destroyed by fire during the time of the life of the policy as it was agreed to be issued, was of that value.—*Campbell v. Amer. Fire Ins. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 661.

149. MECHANICS' LIENS—Pleading.—Where there is annexed to the complaint for foreclosure of a mechanic's lien the contract under which some of the articles were furnished, and a bill of particulars of the other articles and services for which the lien is claimed, a motion to make the complaint more definite is properly denied.—*Barnes v. Stacy*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 615.

150. MORTGAGES—Foreclosure.—Failure to produce the bond secured is not fatal to an action to foreclose a mortgage, where the mortgage itself expressly admits the indebtedness contains a covenant to pay the sum due, and authorizes foreclosure in case of default.—*Minney v. Wilson*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 835.

151. MORTGAGES—Foreclosure—Attorney's Fees.—Where, on foreclosure of a mortgage, the court makes an allowance for attorney's fees in addition to the sum stipulated for in the mortgage, but before appeal is taken plaintiff remits the excess, the error is cured.—

Killips v. Stephens, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 652.

152. MUNICIPAL CORPORATIONS—Defective Street Crossing—Notice.—A petition in an action against a municipal corporation for injuries received at a defective street crossing, which charges defendant with negligently making the crossing, is sufficient, without alleging notice of the defect; but where it is further alleged that defendant allowed the crossing to become out of repair, notice of its condition must be alleged.—*City of Austin v. Ritz*, S. O. Tex., Dec. 4, 1888; 9 S. W. Rep. 884.

153. MUNICIPAL CORPORATIONS—Public Improvements—Assessment.—Manner of assessing property with the cost of paving and curbing street, under the provisions of § 4, ch. 99, Laws 1887.—*Blair v. City of Atchison*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 815.

154. MUNICIPAL CORPORATIONS—Police Power—Statute.—Under § 61, ch. 19, Comp. Laws 1885, the police power of the city can only be extended outside of the corporate limits and within five miles therefrom, over such lands as are necessary for hospital purposes and water-works; and over these only to the same extent as over public cemeteries.—*State v. Franklin*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 801.

155. MUNICIPAL CORPORATIONS—Public Improvements—Ordinance.—Determination of sufficiency of ordinance under Rev. St. Ill. ch. 24, art. 9, § 19, providing for specifications in ordinance for local improvements.—*Pearce v. Hyde Park*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 824.

156. MUNICIPAL CORPORATIONS—Ordinances—Height of Buildings.—Laws N. Y. 1885, ch. 454, providing that "the height of all dwelling houses, and of all houses used or intended to be used as dwellings for more than one family," thereafter to be erected in New York city, shall not exceed 80 feet in streets exceeding 60 feet in width, do not apply to hotels.—*Kemp v. D'Oench*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 864.

157. MUNICIPAL CORPORATION—Assessment Notice.—Sufficiency of notice of protest under which defendant paid taxes assessed for grading street.—*City of Omaha v. Kountz*, S. C. Neb., Nov. 28, 1888; 40 N. W. Rep. 597.

158. MUNICIPAL CORPORATIONS—Public Improvements.—A contract whereby a city agrees to pay a certain sum in completion of certain water-works creates a debt against the city for the amount to be so paid from the time of execution of such contract.—*Culbertson v. City of Fulton*, S. O. Ill., Nov. 15, 1888; 18 N. E. Rep. 781.

159. MUNICIPAL CORPORATIONS—Police Commissioners—Mayor.—Construction of 2 Rev. St. Mo. 1879, p. 1528, establishing police commissioners, as to the powers and rights of the mayor, who is ex-officio president.—*Francis v. Blair*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 894.

160. MUTUAL BENEFIT ASSOCIATION—Insurance.—As to the right of a member of a mutual benefit society to change beneficiary named in the policy and assign same to a creditor as security for a debt.—*Martin v. Stubbings*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 657.

161. NEGLIGENCE.—Question of negligence on part of railroad in failing to restore a highway over which it had laid its track, and which caused injury to plaintiff.—*Dallas & G. Ry. Co. v. Able*, S. C. Tex., Nov. 30, 1888; 9 S. W. Rep. 871.

162. NEGLIGENCE—Defective Highway.—Though a person injured by a defect in a street, after dark, knew that such defect existed, but did not know that it was dangerous, he cannot be said, as a matter of law, to be guilty of contributory negligence in attempting to use the street; but the question is for the jury.—*City of Richmond v. Mulholland*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 882.

163. NEGLIGENCE—Railroad Company.—Facts reviewed under the question as to whether there was contributory negligence, on part of person injured while attempting to drive over railroad track in front of train.—*Hoag v. New York, etc. Co.*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 648.

164. NEGLIGENCE.—Question of fact as to contributory negligence on part of plaintiff, though defendant was negligent.—*Kreuzinger v. C. & N. W. R. R. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 667.

165. NEGLIGENCE—Evidence. — In action for negligence, held, improper to ask plaintiff, who stated he owned a mill, what amount of liens were on his mill. — *Berry v. C. & N. W. Ry. Co.*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 687.

166. NEGOTIABLE INSTRUMENTS—Drafts — Acceptance. — One who writes a draft directed to himself, payable to the drawer's order, and accepts it without the signature of the drawer, and delivers it to him to enable him to raise money, gives him authority to sign it, and is liable to an indorser for value before maturity, though it was not signed till after indorsement, on refusal of the acceptor to pay on that ground, and had been accepted without consideration. — *Hopps v. Savage*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 183.

167. NOVATION—Extinguishment. — To constitute a novation of parties there must be an extinguishment of the old debt by a mutual agreement between all parties, whereby it becomes the obligation of the new debtor. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor. — *Corawell v. Meigs*, S. C. Minn., Nov. 16, 1888; 40 N. W. Rep. 610.

168. NUISANCE—Action—Damages. — An action will lie against an individual or private corporation maintaining a nuisance, by one who has suffered special damage therefrom.— *Mehrof, etc. Co. v. Delaware, etc. Co.*, S. C. N. J., Nov. 12, 1888; 15 Atl. Rep. 12.

169. NUISANCE — Navigable Waters. — Under Code Iowa, § 2331, providing that whatever is "an obstruction to the free use of property" is a nuisance, action does not lie by owner of boat on a lake against proprietors of a bridge though it has materially injured business. — *Innis v. Cedar Rap. etc. Co.*, S. C. Iowa, Dec. 18, 1888; 40 N. W. Rep. 701.

170. PARTIES—Substitution—Amendment. — An action against a county treasurer and his sureties was brought at the relation of the board of commissioners, which was held not to be the proper relator. A new complaint was then filed, called an "amended complaint," in which the county auditor was substituted as relator: Held, an amendment, and not a new action. — *Fleener v. Taggart*, S. C. Ind., Nov. 28, 1888; 18 N. E. Rep. 606.

171. PARTNERSHIP — Dormant Partner — Withdrawal. — A dormant partner is liable for goods sold the firm subsequent to his withdrawal from it, if plaintiff had no notice of his withdrawal, and believed him to be still a member.—*Leib v. Craddock*, Ky. Ct. App., Nov. 20, 1888; 9 S. W. Rep. 838.

172. PENAL ACTION — Demand. — Under § 16, ch. 69, Comp. Laws 1885, a demand is necessary before an action can be maintained to recover the penalty therein named; and, where an action is brought without a demand first having been made, such action is prematurely brought.—*Hall v. Hurt*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 802.

173. PLEADING—Judgment—Default. — Sufficiency of statement under Md. act 1856, § 172, relating to judgments by defaults. — *Thillman v. Shadrick*, Md. Ct. App. Dec. 6, 1888; 16 Atl. Rep. 138.

174. POWERS—Testamentary—Administrator de Bonis Non. — An administrator de bonis non with the will annexed does not succeed to a discretionary power vested in the executor to pay, not exceeding a certain sum, to a grandson of the testatrix on his attaining the age of 21 years, for his advancement in business, in separate sums, or not to pay it at all, it not appearing from the will that the testatrix intended the administrator to exercise it.—*Rhode Island, etc. Co. v. Picher*, S. C. R. I., Oct. 20, 1888; 16 Atl. Rep. 141.

175. POWERS—Devise. — Effect of a devise of the use and improvement of all testator's property for life with

liberty to the devisee to use so much of the principal as she might deem necessary, empowering her to sell, dispose, and to change investments and reinvest with remainder over. — *Howe v. Finney*, S. J. O., Mass., Nov. 28, 1888; 18 N. E. Rep. 598.

176. PRACTICE—Amendment—Partnership. — Power to amend pleading under How. St. Mich. § 7631, where partnership was sued and there was misnomer of one of the firm.—*Weich v. Hull*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 797.

177. PRINCIPAL AND AGENT—Release. — Where the only authority of an agent is to receive rents, to make and enforce collections, and to sue when he thinks advisable, he does not have the power to bind his principal by taking the notes of a third person in payment of the rent of a tenant, and thereby releasing him from his indebtedness.—*Scully v. Dodge*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 807.

178. PUBLIC LANDS—Reservation. — Construction of act congress approved July 12, 1862, extending grant of lands to the State of Iowa. — *Whitehead v. Plummer*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 709.

179. QUIETING TITLE—Possession—Tax deed. — Facts giving actual possession of property such as to enable a person to maintain action under § 594 of the Civil Code to quiet his title thereto.— *Hoffman v. Woods* S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 805.

180. RAILROAD COMPANY—Negligence — Prima Facie Evidence. — The rule prescribed by chapter 155 of the Laws of 1885, that the occurrence of a fire caused by the operation of a railroad is *prima facie* evidence of negligence on the part of the railroad company, applies to all cases where the fire results from any step in the operation of the road. — *Mo. Pac. Ry. Co. v. Merrill*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 798.

181. RAILROAD COMPANIES—Stock killing—Venue. — In a statutory action to recover the value of a colt killed by a railroad company in the operation of its trains, the pleading must allege, and the evidence show affirmatively, that the action is brought in the county in which the animal was killed.— *Kansas City, etc. Co. v. Burge*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 791.

182. RAILROAD COMPANY—Negligence—Crossing. — Respecting the duty of a railroad company at crossing. — *Atchison, etc. Co. v. Walz*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 787.

183. RAILROAD COMPANIES — Statute—Municipal Aid. — Construction of Laws of Wis., 1878, ch. 155, 1879, ch. 197 and 1883, ch. 172, authorizing county to aid railroad building.—*State v. Harshaw*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 641.

184. RAILROAD COMPANIES—Fires — Evidence. — An action for damages for fire set by a locomotive, the fact that defendant's inspector has testified that the screen used on the engine alleged to have emitted the sparks was the same as was used on all the engines on the road, does not entitle the plaintiff to show in rebuttal that fires frequently sprung up after the passage of other engines. — *Allard v. C. & N. W. R. R. Co.*, S. C. Wis., Dec. 4, 1888; 40 N. W. Rep. 685.

185. RAILROAD COMPANIES—Taxation. — Under act Ky. 1864, taxing the railroads of the State specifically at the rate of \$20,000 per mile, each railroad is regarded as an entirety, and not subject to fragmentary local taxation. — *Commonwealth v. L. & N. R. R. Co.*, Ky. Ct. App., Nov. 27, 1888; 9 S. W. Rep. 805.

186. RECEIVERS—Solicitor — Corporation. — Independent counsel and solicitor for the receiver of an insolvent corporation should be appointed, instead of permitting the counsel and solicitor of the complainant, in the proceeding to wind up the corporation, to act for him. — *Emmons v. Davis*, N. J. Ct. Chan., Nov. 2, 1888; 16 Atl. Rep. 157.

187. RES ADJUDICATA—Railroad Company. — Where cinders from defendant's locomotive injured grass and wood in two lots owned by plaintiff, and on suit on com

plaint alleging injury to both lots judgment was rendered for plaintiff, and thereafter defendant was sued for the injury to one of the two lots by the fire, plaintiff claiming that in the first suit damages were only recovered for injuries to the other lot: *Held*, that the former judgment was a bar to this suit. — *Knowlton v. New York, etc. Co.*, S. J. C. Mass., Nov. 27, 1888; 18 N. E. Rep. 580.

188. SALE—Land—Payment. — In the absence of any stipulation, the price to be paid for land is payable at the office of the vendors or their agents or to them personally. — *Gresnawalt v. Este*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 883.

189. SALE—Payment. — *Held*, that title to personal property had passed upon delivery on board of vessel, under the facts where goods were sold plaintiff. — *Fagner's Phosphate Co. v. Gill*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 214.

190. SPECIFIC PERFORMANCE — Contract—Land. — Certainty of description required in contracts for sale of land, in order to entitle party to specific performance. — *Watson v. Baker*, S. C. Tex., Nov. 13, 1888; 9 S. W. Rep. 867.

191. SPECIFIC PERFORMANCE—Contract—Performance. — Facts under which court will grant specific performance of contract partly performed. — *Nunes v. Morgan*, S. C. Cal., Nov. 7, 1888; 19 Pac. Rep. 753.

192. SPECIFIC PERFORMANCE—Unilateral Contract. — Unilateral contracts for the purchase of lands may be enforced by the vendor. — *Müller v. Cameron*, N. J. Ct. Chan., Nov. 16, 1888; 15 Atl. Rep. 842.

193. STATUTE OF FRAUDS — Promise to pay Debt of Another. — Question whether agreement under facts of this case was in the statute of frauds. — *Bendon v. Scoy-smith*, S. C. Iowa, Dec. 13, 1888; 40 N. W. Rep. 683.

194. TAXATION—Assessment—Injunction. — In the absence of fraud, a court of equity will not enjoin the collection of a valid tax, on the ground that the assessment is excessive. — *LaSalle, etc. Co. v. Donaghue*, S. C. Ill., Nov. 15, 1888; 18 N. E. Rep. 827.

195. TAXATION — Corporation — Manufacturing Companies. — The business in which the capital of a corporation is invested, and not the objects for which the company was incorporated, as expressed in the certificate of incorporation, determines its liability to taxation, under the tax-law of April 18, 1884, Supp. Revision, 1017. — *Press Printing Co. v. State*, S. C. N. J. Nov. 30, 1888; 16 Atl. Rep. 173.

196. TAXATION—Assessment—Partnership. — Construction of Mich. Tax act of 1885, providing that for purposes of taxation a firm shall be treated as an individual. — *Hill v. Graham*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 779.

197. TOWNS—Claim. — Construction of Rev. St. Wis. § 824 and amendment 1882, ch. 162, prescribing procedure in filing of claim against towns. — *Schrider v. Town of Richmond*, S. C. Wis., Dec. 1, 1888; 40 N. W. Rep. 644.

198. TOWN OFFICERS — Election — Statute. — Construction of the act March 22, 1880, (Revision p. 209, § 45), providing for the election of town officers. — *State ex. rel. Brown v. Boden*, S. C. N. J. Nov. 20, 1888; 16 Atl. Rep. 58.

199. TRIAL—Instruction. — The court may refuse an instruction if satisfied that it is erroneous although it may have previously indicated that it may be given. — *Louisville, etc. Co. v. Hubbard*, S. C. Ind., Nov. 27, 1888; 18 N. E. Rep. 611.

200. TRUSTS—Beneficiary—Powers of Court. — Where a will leaves property in trust to the executors named therein, or such of them as might qualify, and the only person who qualifies as executor is also a beneficiary under the will, the court properly directs in detail the execution of the trust, through its own officers. — *Rogers v. Rogers*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 633.

201. TRUST—Parol Agreement. — Facts reviewed under which the court refused to enforce an alleged

trust under Rev. St. Ind., 1881, § 2069, providing that no trust concerning land except those arising by implication of law shall be created unless in writing, etc. — *Wright v. Moody*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 608.

202. TRUST—Evidence. — Sufficiency of evidence to establish a resulting trust on land of one whose mother had practically paid for it and though without her knowledge the title was in his name. — *Murphy v. Hamscome*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 717.

203. VENDOR AND VENDEE — Married Woman. — In an action by the married woman and her husband, after the reformation of the deed, against a purchaser, for the balance of the purchase money, a purchase by defendant of the remainder interest of the children, at a sale under a proceeding by their guardian, to which the married woman and her husband were not parties, and of which they had no knowledge, is no defense. — *Smoot v. Boyd*, Ky. Ct. App., Dec. 6, 1888; 9 S. W. Rep. 829.

204. VENDOR AND VENDEE—Rescission—Election. — A testator sold land, reserving a lien for the purchase money, and, default having been made in the payment, he obtained a judgment for the balance, and was seeking to collect it by execution, when he was enjoined by the purchaser: *Held*, that the testator had elected to enforce his right to the unpaid purchase money, and, it not appearing that he attempted to rescind the contract, and claim the land, on being enjoined, he had no title thereto. — *Sumnerhill v. Hanner*, S. C. Tex., Dec. 7, 1888; 9 S. W. Rep. 831.

205. VENDOR AND VENDEE—Purchase Price. — One sued for the price of land 13 years after its conveyance to him cannot defend on the ground that the transaction was in fraud of the grantor's creditors, he having had full control and enjoyment of the land ever since the conveyance. — *Allen v. Morriewether*, Ky. Ct. App., Dec. 1, 1888; 9 S. W. Rep. 807.

206. WILLS — Probate. — The probate of a will in another State affecting lands in Texas is not notice of its existence or contents to parties in the latter State, notwithstanding act March 22, 1887. — *Slaton v. Singleton*, S. C. Tex., Dec. 4, 1888; 9 S. W. Rep. 876.

207. WILL—Construction—Devisee. — Construction of will providing for the distribution "equally among the children I may then have or those who may be legally entitled thereto" and in another clause that "if any one of my said children or any person who may succeed to the interest of them interferes with the execution of the will he shall forfeit his share." — *In re Paton*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 623.

208. WILL — Construction. — A direction in a will that certain out-lands "shall be sold and the proceeds, together with my personal property, shall go to the payment of all my debts and legacies, and, if that should be insufficient, so much of the saw-mill pasture shall be sold as shall be necessary," operates a conversion of such out-lands into personal property at the time of the testator's death. — *Perkins v. Coughlin*, S. J. C. Mass., Nov. 28, 1888; 18 N. E. Rep. 600.

209. WILLS—Construction — Advancement. — Construction of will providing for deduction of advancements to children. — *In re Robert's Estate*, N. Y. Ct. App., Nov. 27, 1888; 18 N. E. Rep. 643.

210. WITNESS — Impeachment. — The prosecutrix testified that defendant was sober when he shot her. Defendant offered to show that soon after the shooting she said that it was not defendant, but a man crazy from the use of liquor, who shot her: *Held*, that, as defendant might have been crazy from liquor, and yet sober at the time of shooting, the offer was properly refused. — *Wagner v. State*, S. C. Ind., Nov. 26, 1888; 18 N. E. Rep. 833.

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CURRENT EVENTS.

THE perennial discussion of measures for the relief of the Supreme Court of the United States is upon us. It has afforded for years a theme for law writers and for the consideration of bar associations. Legislators have grappled it, and the offices of clerks of congress are the burying grounds of many bills, born of its agitation, and dead for want of sustenance.

The fact, as understood and appreciated by all, is that the business of the supreme court has outgrown its present capacity, that the docket of that court is too crowded. Judge Alfred C. Coxe, in an able article on this subject in *The Forum* for February, states that the court is between three and four years behind its docket. An appeal or writ of error taken in 1884 may be reached, argued and decided at the present term. An appeal taken now cannot, in the ordinary course, be disposed of until 1892 or 1893. To-day, although the amount necessary to confer jurisdiction was, in 1875, increased from \$2,000 to \$5,000, the number of cases on the docket is about 1,450. During the period from 1880 to the present year the average number of cases disposed of annually has been 431; the average number added to the docket 461. It will thus be seen that the business is gradually gaining on the court, and that, at the present ratio, the matter will each year grow more serious. It does not require any argument to convince one of the harmful results of such a condition of things and that to litigants, especially, it is a matter of grave concern, for which some remedy should be effected. But what?

The remedies proposed have been various and many, but sifted, they may be grouped under five heads:

First. To add three members to the present supreme court. This, however, has met with the objection that it would procrastinate rather than expedite the business of the court.

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Second. To add twelve judges, thus making the number twenty-one, and to divide the court into three sections (as is now the case in the supreme courts of France and England). As to this plan it is objected that it is cumbrous, is an adroit evasion of the constitutional provision providing for one supreme court and is in other respects objectionable.

Third. Without adding to the membership of the court, to divide that court into three sections.

Fourth. Increasing the number of judges to seventeen and divide them into two divisions, each of which should constitute a court of appeals.

Fifth, and perhaps the most generally approved bill, introduced by the Hon. David Davis, which provided for an intermediate court of appeals in each of the nine circuits, to consist of the circuit justice, three circuit judges and two district judges.

The latter, or "Davis bill," has met with more approval than any suggested, but well founded objections have been urged against it, and, in fact, it has been abandoned. Indeed, no one as yet has been able to formulate a measure which has met with general commendation, notwithstanding that for twenty years the necessity has been patent.

The suggestions of Judge Coxe, in the article before referred to, seem to us the most practicable. They are plain and simple at least, devoid of any complicated machinery, require no special legislation for their enforcement and even if not successful in accomplishing what is desired, their adoption can at least do no harm. He suggests: 1st. While the present emergency exists, let the justices of the supreme court give up holding circuit courts. 2d. Let the reading of opinions (in open court) be omitted, in order that another working day be added to the week. 3d. Where judgments are affirmed, dispense with long written opinions, except in suits involving constitutional questions or questions of general interest.

THE address of ex-Judge T. M. Cooley, president of the Interstate Commerce Commission, before the New York State Bar Association, at its recent meeting at Albany, is notable. The theme was "Comparative

Merit of Written and Unwritten Constitutions."

The subject was treated in a masterly manner and worthy the reputation of the great jurist. In considering the requisites of a good constitution, he said that it should be plain and certain, free from doubt and question. It must be of gradual formation and result from the history and experiences of the people and be the natural and deliberate expression of their thoughts, wishes and aspirations in government. It is in this particular that the unwritten constitution is likely to be superior. A good constitution should definitely apportion the powers of government between the several departments and draw such clear lines of distinction as to prevent collisions and usurpations. It is in this particular that the superior advantages of the written constitution are most conspicuous. A good constitution should be beyond the reach of temporary excitement and popular caprice and passion. And here again the superior advantage of the written constitution is manifest. The unwritten is at the mercy of the temporary popular passion. The written compels delay and there is thus time for temporary passions to cool. But a good constitution should provide for safe growth and expansion.

The able speaker concluded by saying:

"I now lay down the proposition that by reason of the facts already stated the constitution of the United States is the most conservative instrument of government known to the world. In the fact that the constitution, though at any particular time bending inflexibly, is nevertheless subject to safe amendment, is to be found our security for what we have and the possibility of anything better that time and experience may demonstrate the need for."

APROPOS of the subject of our leading article in this issue, we note from a recent decision, that in Michigan a dog cannot legally claim the one bite which the common law everywhere allows him, or in other words, that under the Michigan statute, in an action for an injury by a dog, it is unnecessary to prove that the owner knew that the dog was accustomed to bite.

We are also told, by an eastern exchange,

that Michigan is also the State where there was made some years ago a very humorous ruling in a dog case. It was an action brought by the owner of a dog killed in a dog-fight, against the owner of the victorious dog. The defense was that the slain dog had not been properly licensed, and, therefore, that he had no right to be about; in fact, he was outlawed. The court held, on appeal, that unless it could be shown that the victorious dog had been to the office of the register, and had examined the books to ascertain whether or not the tax had been paid on that dog and the license issued, the defense must fail.

NOTES OF RECENT DECISIONS.

THE somewhat familiar principle that a negotiable instrument can be made and delivered to the payee upon an oral condition that it shall not take effect except on a specified event, has been recently recognized by the Supreme Court of the United States as a general rule, applicable to all contracts. The case is *Ware v. Allen*, 9 S. C. Rep. 174. There a promissory note, executed in contemplation of a proposed transaction, and to be valid only on condition of its approval by a certain attorney, was held void upon his advising the maker to have nothing to do with it. The court says:

We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred; and that it is not a question of contradicting or varying a written instrument by parol testimony—but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered by a third person as an escrow, or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter. The present case is almost identical in its circumstances with that of *Pym v. Campbell* (in the court of Queen's Bench), 6 El. & Bl. 370. The defendants in that case had signed an agreement for the purchase of an interest in an invention, which the evidence showed was executed with the understanding that it should not be a bargain until a certain engineer, who was to be consulted, should approve of the invention. Earle, J., said: "The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. * * * The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that

there is not an agreement at all is admissible." In this view the other judges, including Lord Campbell, C. J., concurred, holding that, it having been explained to the plaintiff that the defendants did not intend the paper to be an agreement until the engineer had been consulted, and his approval obtained, and was signed only because it was not convenient for them to remain, it was therefore no agreement, the plaintiff having assented to this, and received the writing on these terms. The same principle was announced in the court of common pleas in *Davis v. Jones*, 17 C. B. 625, in which the distinction is clearly stated by Chief Justice Jervis between evidence which, although parol, shows the written agreement was not to take effect until certain other things were done, as that rent should not commence running until certain repairs were completed (although the instrument was signed and delivered), and evidence which contradicts or varies the meaning of the instrument itself. This is concurred in by Cresswell and Crowder, JJ. Later, in 1861, in *Wallis v. Littell*, 11 C. B. (N. S.) 366, the same court laid down the same doctrine in regard to an assignment of a lease of a farm which had been made by a tenant to a third party, and the instrument delivered, but with an agreement that it should not take effect until the consent of the landlord was procured. The latter refused his consent, and the court held the assignment of the lease, although executed and delivered, had never become operative. This principle was acted upon, and these authorities cited and affirmed, in the case of *Wilson v. Powers*, 181 Mass. 539, as late as 1881. The doctrine was asserted in this court as early as 1808, in the case of *Pawling v. United States*, 4 Cranch, 219, where it was held, in a suit upon a collector's bond, that the sureties who signed it could prove by parol evidence that they did so on an express agreement that they were not to be bound until other persons, who were named, became bound also by signing the bond.

THE case of *Medford v. Levy*, 8 S. E. Rep. 302, decided by the Supreme Court of West Virginia, is one of rare occurrence. "No case like it has been cited in the argument of counsel," says the court, and from a perusal of the facts we are inclined to think that another just like it cannot be found. Therein the occupants of a portion of a second-story tenement house file a bill in equity to restrain a nuisance caused by the occupants of another portion of the same story. The nuisance consisted in innumerable acts, claimed to be wantonly and maliciously done, and calculated to destroy the peace and quiet of complainant's home, such as slamming of doors, using objectionable language, opening of doors and filling the whole house with objectionable odors of cabbage, onions, etc., and untidy habits in the use of a common hall. The court held:

If anyone does a lawful act on his own property the motive by which the act is done is a matter of indifference, still every family possesses under the law the legal right to security in their home; to have peace, quiet, and comfort against purely wanton and needless

attacks from those whose hostility they may have in some way incurred. Other families, even those whose hostility they may have incurred, have also the right to the privileges of a home, the right to talk, even loudly, and to sing loudly, and dance; to open and shut doors; and it may be that they would not always be expected to use great care in the manner of opening and closing doors; to cook their food, and, for their comfort, to even keep the door of the kitchen open while the food was being cooked and prepared for the table; but they have no right, wantonly and needlessly, to do any or all these things, in an unusual manner, for the mere purpose of annoying and rendering uncomfortable their neighbors; and while under other circumstances the doing of these things in the manner indicated would not amount to a private nuisance, yet, when done for the malicious or willful purpose of annoying their neighbors, and it does have such effect, and makes their home uncomfortable, it would amount to a nuisance. * * * It is the first case I have ever seen where there was trouble between two private families, originating between the mothers, respectively, and a court of equity asked to interfere with its strong arm to protect one against the other. It is to be hoped no such case will again occur; and while, as we have held, the bill presents a case of which the court, under the established principles of equity, must take cognizance, yet it would not perpetuate the injunction unless the proof was clear and strong. The court will discourage, as far as it can, a resort to its power for the purpose of interfering in mere domestic broils. We do not wish the idea to obtain that if there is a quarrel between two women, and both become excited and nervous, and things are done and said which are unseemly, and their domestic peace and happiness is thus destroyed, that either can, with ease and dispatch, prevail upon a court of equity, that is busy over more weighty matters, to interfere, and preserve the peace and quiet of the homes of either.

THE statute, common in its general features to most of the States, making a party incompetent as a witness in his own behalf in a suit against an administrator, involving matters in decedent's life-time, has recently been construed by two courts—the Supreme Court of Indiana, in the case of *Durham v. Shannon*, 19 N. E. Rep. 190, and the Supreme Court of Colorado, in the case of *Levy v. Dwight*, 20 Pac. Rep. 12. In the Indiana case, the bar of the statute was invoked by a third party, in a suit with one who claimed a mare, in possession of the former. The claimant contended that the mare was given him by the decedent. The mare was sold by decedent's administrator to the third party. The latter insisted that the claimant was, under the statute, an incompetent witness, to prove a gift of the mare to him by the decedent. The court held that, under the statute, three things must concur in order to exclude the testimony of the surviving adversely interested party:

1. The transaction, or the subject-matter thereof,

must be in some way directly involved in the action or proceeding, and it must appear that one of the parties to the transaction about to be proved is dead. 2. The rights of the deceased party must have passed, either by his own act or that of the law, to another, who represents him in the action or proceeding in the character of executor, administrator, or in some other manner in which he is authorized by law to bind the estate. 3. It must appear that the allowance to be made, or the judgment to be rendered, may either directly or indirectly affect the estate of the decedent. * * * The cause of action in the present case is the wrongful taking and unlawful detention of the property described in the complaint. The parties to this cause of action are both living. The transaction between the plaintiff and Patrick Shannon arises incidentally only, and is collateral to the real cause of action. Neither of the parties to the action in any sense represent the estate of Patrick Shannon, nor will the judgment bind or conclude the estate. True, the plaintiff predicates his title to the property in dispute upon the gift alleged to have been made to him by the decedent; and, if the estate of the latter was in any way represented in the action or interested in the controversy so as to be concluded by the judgment, the policy of the statute would exclude the plaintiff's testimony. Such, however, is not the fact, and the case is therefore neither within the reason nor the letter of the statute. *Downs v. Belden*, 46 Vt. 674; *Bradley v. West*, 68 Mo. 69.

In the Colorado case, under a statute somewhat different from that in force in Indiana, and which allows a party, under such circumstances to testify, where the depositions of the deceased shall be read in evidence, it was held that it was not sufficient merely to show that the deposition of the deceased had been taken, but such deposition must be introduced in evidence by the representative of the deceased, in order to entitle the opposite party to testify, distinguishing *Coughlin v. Dillon's Executors*, 50 Mo. 126.

A VERY curious case was recently decided by the Supreme Court of Michigan—*Roszal v. Roszel*, 40 N. W. Rep. 858—involving the question as to what constitutes a marriage. In this case a girl about eighteen years old appeared before a magistrate, in obedience to the commands of her parents, who sought to force her into a marriage with X, a farm hand. When the justice attempted to perform the ceremony she said that if he tied the knot forty times it would not stay tied, for she did not like him and would not live with him; that they made her stand up, and "when the man asked me if I would take him to be my husband I said 'no, I won't,' and to every question asked me that I ought to have said 'yes,' I said 'no' plain, and the next

day I ran away." It also appeared that she had never cohabited with X. The court held that the ruling principle as to the constitution of the marriage is, that a mutual contract to the formation of which the consent of both parties must be really, deliberately, definitely and irrevocably given, and that this was not, therefore, a valid marriage.

In the recent case of *Fitzgerald v. Barker*, 10 S. W. Rep. 46, the Supreme Court of Missouri extend somewhat the rule, as to who is a holder of negotiable paper for value. There the testimony showed, that the plaintiff took the notes in part satisfaction of a larger debt, and also released valuable liens on property of one Thomas, and that the latter on this consideration gave him the notes. The court said:

Whether a transferee of notes, in such circumstances, who takes them before maturity without notice, and in absolute payment of an antecedent debt, is to be regarded in the same light as one who pays cash for them in the ordinary commercial way, has, it seems, never been directly adjudicated by this court, though it was intimated in *Hodges v. Black*, 76 Mo. 537, affirming the judgment of the St. Louis Court of Appeals in the same cause (8 Mo. App. 389), that the correct rule in such cases is that such a transferee is to be regarded as a *bona fide* purchaser for value, in the ordinary acceptance of the term, though the debt discharged be but a simple contract debt, and no security be surrendered. In an earlier case in this court a similar intimation was given. *Goodman v. Simonds*, 19 Mo. 106. This is believed to be the true rule, and is certainly supported by sound reason and ample judicial authority. This has long been the view taken by the Supreme Court of the United States (*Railroad Co. v. Bank*, 102 U. S. 14, and cases cited), and is the principle asserted in most of our sister States, in England, and by the text-writers. 1 Daniel, Neg. Inst. (3d ed.) § 827 *et seq.*, and cases cited; 3 Kent, Comm. (13th ed.) 81; Story, Bills, § 183; Story, Prom. Notes, § 186; 1 Pars. Notes & B. 221, and cases cited. In the circumstances presented by the case at bar the plaintiff would be regarded as a holder for a valuable consideration, and therefore not subject to precedent equities of which he was unaware, even in New York (*Insurance Co. v. Church*, 81 N. Y. 226), whose adjudications upon commercial paper differ, in some respects, from those of the Supreme Court of the United States, as well as from those of many State courts. 1 Daniel, Neg. Inst. § 831c. Following this line of authorities, it must be held that the plaintiff's title is as free from flaw as if he had purchased in open market, and in the usual course of trade.

THE power of a court of equity to interfere in matters of church government as between conflicting portions of a congregation, is illustrated in the case of *Fadness v. Braunborg*, 41 N. W. Rep. 84, decided by the Supreme Court of Wisconsin. The case

involved primarily a dispute as to the violation and perversion of a trust by the trustees of a Norwegian Evangelical Lutheran Church, though the court incidentally hold that religious corporations, in Wisconsin, are civil corporations, and a court of equity has no authority to oust persons claiming to be regularly in possession of the corporate offices, for which the proper remedy is by *quo warranto*. On the main question of perversion of the trust by reason of a departure from doctrine and faith of the synod, the court, after reviewing the testimony of a technical denominational nature, says:

We cannot say, however, from the testimony, that such negative portions of such specific articles are in conflict with the articles of faith contained in such constitutions. They may be inconsistent with certain portions of such articles of faith, but it is equally apparent that such portions are equally inconsistent with other portions of the same articles. It is not the province of courts of equity to determine mere questions of faith, doctrine, or schism, not necessarily involved in the enforcement of ascertained trusts. In fact, the doctrine here controverted seems to be too refined and subtle to be clearly comprehended even by learned theologians, much less by laymen. Courts deal with tangible rights, not with spiritual conceptions, unless they are incidentally and necessarily involved in the determination of legal rights. Such trusts, when valid and so ascertained, must, of course, be enforced; but, to call for equitable interference, there must be such a real and substantial departure from the designated faith or doctrine as will be in contravention of such trust. *Miller v. Gable*, 2 Denio, 492; *Happy v. Morton*, 33 Ill. 398; *The Dublin Case*, 38 N. H. 459; *Watson v. Jones*, 13 Wall. 723, 724; *Eggleston v. Doolittle*, 33 Conn. 396; *Keyser v. Stansifer*, 6 Ohio, 363. The specific articles here so adopted by the majority do not seem to constitute such radical departure as to be a diversion of the trust.

An interesting case, involving questions of elections and ballots, has lately been decided by the Supreme Court of Oregon—*Hartman v. Young*, 20 Pac. Rep. 17. It was a proceeding to contest the right to an elective office, in which the petitioner sought to have the ballots counted. The court lays down the following propositions of law:

It is admitted that, in determining a contested election, the evidence of the ballots actually cast, will control that furnished by the official canvass, provided the ballots have been duly preserved, and protected from the reach of any unauthorized intermeddling or tampering. But it is insisted, unless it is made to affirmatively appear that the ballots have been so carefully kept and protected as to place their identity beyond all reasonable doubt, they ought not to be allowed to overturn the official count. Hence, it is earnestly urged that where the evidence in the record discloses that the ballots have not been kept and protected with that vigilant care which the law contemplates, or

where they have been so exposed as to afford such opportunity for handling or tampering with them as to cast suspicion on their purity, they lose their character as the best evidence, and are not to be relied on in determining the result of an election, and therefore ought not to be admitted to overturn the official count. At the outset it may be said that the official return or canvass, when duly certified, is *prima facie* evidence that the result is as declared. As against ballots not properly kept, and the identity of which is not shown, such official canvass, although secondary, is the better evidence. But the official canvass, unless made so by statute, is never conclusive. As a *quasi* record it is entitled to the presumption of regularity, and *prima facie* evidence of the integrity of the result of the election as declared. But as between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the best evidence. "It is a primary rule of elections that the ballots constitute the best—the primary—evidence of the intention and choice of the voters." *Hudson v. Solomon*, 19 Kan. 177; *Reynolds v. State*, 61 Ind. 423; *McCrary, Elect.* 291, 439; *Cooley, Const. Lim.* 625. When, therefore, it is shown to the satisfaction of the court that it has before it the identical ballots cast by the voters, as between the ballots themselves and canvass of ballots by the election officers, the ballots are controlling. To show that they are the genuine ballots cast by the voters, any evidence tending to show that they have been so kept and protected from tampering as to place their identity beyond reasonable doubt, is admissible. The burden rests on the plaintiff. He must establish to the satisfaction of the court or jury, as the case may be, that the ballots are the genuine ballots cast at the election; otherwise they will receive no credence.

THE Court of Appeals of Texas, in the case of *Comer v. State*, 10 S. W. Rep. 106, say that a room in a tavern, occupied temporarily for the purpose of gaming and for no other use, is not a private room within the meaning of art. 356 of the Penal Code, providing that "a private room in an inn or tavern is not within the meaning of public places" in which playing cards and gaming is prohibited by statute.

FOLLOWING upon the decision of the Kansas Supreme Court as to the right of the "Salvation Army" to parade streets, to which we called attention in a late issue, comes a case from the Supreme Court of Massachusetts—*Commonwealth v. Plaisted*, 19 N. E. Rep. 224—where a similar question was involved, but in which a contrary decision was rendered. In the Massachusetts as in the Kansas case the question arose on the legality of an ordinance aimed at "itinerant musicians" and the validity of rules regulating street parades. It was contended that the parading was done as a matter of religious worship only and that the rules, under the guise of regulating,

virtually prohibit. The court, in sustaining the ordinance, held that the provisions of the constitution which are relied on, securing freedom of religious worship, were not designed to prevent the adoption of reasonable rules and regulations for the use of streets and public places; and a religious body, however earnest and sincere, cannot avail itself of these provisions, as an authority to take possession of a street in a city, in violation of such rules, for the purpose of public worship therein. And further, that the rules do not restrict any one in the ordinary use of his own property, but merely affect the use which may be made of the streets and public places of the city. Nor is the reasonableness of the rules to be tested by their possible application to extreme cases, as, for instance, singing or playing in a low tone, not intended to be heard by others, for a short time in a street or place not occupied by dwellings. No police rules or regulations are to be tested in this manner, and, if such a case were to present itself, perhaps the rule might by construction not be deemed to include it.

In the case of *McWhorter v. Pensacola & A. R. Co.*, 5 South. Rep. 129, the Supreme Court of Florida discusses the question as to whether an injunction against State railroad commissioners, to enjoin them from promulgating rates for transportation and procuring institution of suits for violation of rates theretofore fixed, is in effect a suit against a State and therefore untenable. The objection springs from the rule that a suit against officers of a State founded on any claim or complaint, the adjudication of which against the officers would be, in effect, an adjudication against the State, is a suit against the State. In *Osborn v. Bank*, 9 Wheat. 738, and *Davis v. Gray*, 16 Wall. 203, the court announced that it would look only to the record to determine whether the State was a party. But in subsequent cases this test is treated as too narrow and cases against officers were held to be cases against the State, although not named in the record. In the Virginia coupon case (14 U. S. 270) it was so held. And conversely in the cases of *New Hampshire and New York v. Louisiana*, 108 U. S. 76, the court refused to sustain the suit of one State against another, although

the United States constitution authorizes such a suit, because it appeared that while on the record the States suing were the nominal parties, yet they were acting for some of their citizens who were the real parties in interest. Therefore it cannot be said that the case under consideration is not a case against the State, simply because the record does not bear her name, and the question, therefore, is whether the case comes within any class in which a suit against officers is of such a character that a judgment or decree cannot be given in it without affecting some right or interest of the State, so that the effective operation of the judgment or decree is really against the State, rather than the officers sued. The court, after discussing this question and citing *Louisiana v. Jumel*, 107 U. S., 711, *Cunningham v. R. R. Co.*, 109 U. S. 446, *Hagood v. Southern*, 117 U. S. 52, *In Re Ayers*, 123 U. S. 443, *State v. Burke*, 33 La. Ann. 498, *Weston v. Dana*, 51 Me. 461, *R. R. Co. v. Randolph*, 24 Tex. 317, and *Printrop v. R. R. Co.*, 45 Ga. 365, concludes:

"It appears, so far as we can find in the reported cases, that the rule which forbids a suit against officers, because in effect a suit against a State, applies only where the interest of the State is through some contract or some property right of hers, or where her interest is in a suit brought or threatened by her officers in her own name to enforce some alleged claim of hers. And it is important to observe the character of the interest. It is not enough that the State should have a mere interest in the vindication of her laws, or in their enforcement as affecting the public at large, or as they affect the rights of individuals or corporations, but it must be an interest of value to herself as a distinct entity—of value in a material sense. * * *

The bill herein founds a complaint against the commissioners in connection with section 17 of the act which provides a penalty against any railroad company for violating the rules and regulations prescribed by them, and direct that they shall institute action through the attorney-general to recover the penalty admitting violation of the rate regulations prescribed for it, the company preys that they be enjoined from instituting the action authorized. A further direction of the act is that the suit "shall be in the name of the State of Florida." It needs no argument to show that in such a suit the State is a party, and that the injunction asked against the commissioners to stay the suit would be an injunction in fact against her. It is precisely the case which led to *In re Ayers*, where officers were enjoined from bringing suits in the name of the State, which was held to be void because in fact an injunction against the State, the court saying, if "officers, attorneys and agents are personally subjected to the process of the court so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

ACTIONS FOR INJURIES BY VICIOUS ANIMALS.

- I. General Principles.
- II. Who is Liable.
- III. *Scienter*—Knowledge of Viciousness.
- IV. *Scienter*—Servant's Knowledge.
- V. Actions under Statutes.

I. *General Principles*.—At common law, in order to maintain an action against the owner or keeper of domestic animals, or those which are not in their nature ferocious, for injuries inflicted or damage done by them, it must be shown that such owner or keeper had knowledge of the mischievous propensity of the animals to do harm. In the language of the cases no action can be sustained without proof of the *scienter*.¹ But a different rule applies to animals *feræ naturæ*, or those of a savage and ferocious disposition, such as lions, tigers, etc. Here the liability arises without proof of the *scienter*. In the latter case, the animal being of a wild, fierce and untamable nature, a knowledge of its disposition to do mischief is conclusively presumed.² Certain animals *feræ naturæ*, as the bear, deer, etc., may doubtless be domesticated to such an extent as to be classed, in this respect, with tame or domestic animals; but inasmuch as they are liable to relapse into their wild habits and to become mischievous the rule is, that if they do and the owner has knowledge of the fact, they are regarded as never having been domesticated.³ The liability does not rest upon the classification of animals into those *feræ naturæ* and those *domitæ naturæ*, but rather upon the well known habits of the particular animal to do mischief. This distinction if always borne in mind, will materi-

ally assist in the proper understanding of the apparent discord in some of the adjudications. When it appears that a domestic animal is vicious and inclined to do hurt, of which fact the owner or keeper have notice, either express or implied, the law imposes the duty of keeping such animal secure, and creates a liability on the part of the owner or keeper to any person who, without fault on his part, is injured by it. This rule is entirely reasonable and fully accords with legal and moral obligation. It is sanctioned by the soundest reasoning and supported by an almost unbroken line of English and American authorities. It has been enforced by the earliest cases as well as the most recent ones. Various expressions, declarations, distinctions and *dicta* (often abounding in ambiguity), are to be found in the decisions and literature upon this subject, and yet there is always apparent the clearest tendency to establish and enforce the sound principles of the common law, that society imposes the duty upon every one to so keep and use his property as not to wrong and injure others. This is the foundation of the rules.⁴ It will be observed that the only difference between the two classes of cases is, that in case of an injury caused by a domestic animal of a mild and gentle nature, knowledge that the animal was dangerous must be alleged and proved, for such animals are not generally so; while in the other class, such knowledge is presumed from the well known nature of the animal. This knowledge, however established, whether by evidence or by presumption, is the same in substance and produces the same results.⁵

II. *Who is Liable*.—The liability for injury by the vicious animal attaches either to the owner or keeper.⁶ Ownership is not necessary to establish responsibility. A person having in charge a dangerous animal, known to be such, is responsible for its safe keeping, so far as the public is concerned, as much as if he were the owner.⁷ Hence, it is not necessary, in order to make a case for the plaintiffs to show that the defendant was the owner. It is sufficient if it is shown that he

¹ *Murphy v. Preston* (S. C. D. C.), 9 Cent. Rep. 146; *Kinnon v. Davies*, Cro. Car. 487; 2 Chitty, 217; *Smith v. Donohue*, 49 N. J. L. 548; s. c., 60 Am. Law Rep. 652; 8 Cent. Rep. 621; 10 Atl. Rep. 150; 28 Am. Law Reg. 769, n. 773; *State v. McDermott*, 49 N. J. L. 163; s. c., 60 Am. Rep. 602; 6 Atl. Rep. 638; *Cox v. Burbridge*, 13 C. B. (N. S.) 439; *Hewes v. McNamara*, 106 Mass. 281; *Mason v. Keeling*, 1 Ld. Raym. 606; *Moak's Underhill on Torts*, 294-306.

² *Applebee v. Percy*, L. R. 9 C. P. 650; *Moss v. Parbridge*, 9 Ill. App. (Bradw.) 490; *Spring Co. v. Edgar*, 99 U. S. 654; *Verdenburg v. Beham*, 33 La. Ann. 634; *Besozzi v. Harris*, 1 Fost. & Fin. 92; *Whitaker's Smith on Neg.* 99; 1 Hale's P. C., Part I, ch. 33.

³ *Spring Co. v. Edgar*, 99 U. S. 653; *Decker v. Gammon*, 44 Me. 322; *State v. McDermott*, 49 N. J. L. 163; s. c., 60 Am. Rep. 602; 6 Atl. Rep. 653; *Whart. on Neg.* 1 922.

⁴ *Reynolds v. Hussey* (N. H.), 5 Atl. Rep. 458; s. c., 22 Reporter, 563; *Godeau v. Blood*, 52 Vt. 251; s. c., 36 Am. Rep. 751; *Stumps v. Kelley*, 22 Ill. 140, 142.

⁵ *Laverone v. Mangiantl*, 41 Cal. 138; s. c., 10 Am. Rep. 269; *Earl v. Van Alstine*, 8 Barb. (N. Y.) 635.

⁶ 1 *Thomp. on Neg.*, p. 196, §§ 1 and 2.

⁷ *Frammell v. Little*, 16 Ind. 251.

was the keeper.⁸ Nor is actual custody necessary.⁹ Harboring an animal is a sufficient keeping;¹⁰ but if the animal—as a dog—is only casually upon the defendant's premises, without being harbored as owners usually harbor dogs, no liability arises.¹¹ In the case of joint-owners, either may have custody of the animal, and the custody of one is the custody of all, all being alike liable.¹² A joint interest is necessary, or consent to its use and management, to hold all.¹³ But a joint injury, done by dogs owned by separate individuals, does not create a joint action against such owners.¹⁴

III. *Scienter—Knowledge of Viciousness.*—The indispensable condition in actions of this nature is the proof of the *scienter*, or, in other words, to establish knowledge on the part of the defendant of the vicious habits or propensities of the trespassing animal. In accordance with the doctrine of many authorities it is not necessary to aver in the declaration that the injury complained of was received through the defendant's negligence in keeping the animal; for it is said, that the *gist* of the action is *the keeping* the animal after knowledge of its mischievous propensities. The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the individual, without any allegation of negligence or want of care.¹⁵ In this respect there is no dis-

⁸ *Wilkinson v. Parrott*, 32 Cal. 102; *Marsel v. Bowman*, 62 Iowa, 57; *Schaller v. Connor*, 57 Wis. 321; *Corliss v. Smith*, 53 Vt. 532; *Burnham v. Strother* (Mich.), 33 N. W. Rep. 410.

⁹ *Marsh v. Jones*, 21 Vt. 378; *Grant v. Richer*, 74 Me. 487.

¹⁰ *McKone v. Wood*, 5 Car. & P. 1; *Cummings v. Riley*, 52 N. H. 368; 1 *Thomp. Neg.* 197, § 6.

¹¹ *O'Harra v. Miller*, 64 Iowa, 462.

¹² *Oakes v. Spaulding*, 40 Vt. 347; s. c., 94 Am. Dec. 404. There can be no contribution among wrongdoers: *Spaulding v. Oakes*, 42 Vt. 343.

¹³ *Adams v. Hall*, 2 Vt. 9; s. c., 19 Am. Dec. 690; *Denny v. Correll*, 9 Ind. 73; *Little Schuylkill N. Co. v. Richards*, 57 Pa. St. 147; *Yeazel v. Alexander*, 58 Ill. 263; *Auchmuty v. Ham*, 1 Denio (N. Y.) 501; *Partenhemer v. Van Orden*, 20 Barb. (N. Y.) 479; *Van Steenburg v. Tobias*, 17 Wend. (N. Y.) 562.

¹⁴ *Adams v. Hall*, 2 Vt. 9; s. c., 19 Am. Dec. 690.

¹⁵ *Poppewell v. Pierce*, 10 Cush. 509. The uniform ruling has been that the omission constitutes no valid objection to the right of recovery: *Spring Co. v. Edgar*, 99 U. S. 651; *Partlow v. Haggarty*, 35 Ind. 178; *Durden v. Barnett*, 7 Ala. 169; *Card v. Case*, 5 Man. G. & S. 622; *Kelley v. Ward*, 12 Irish L. Reg. 424; *Jackson v. Smithson*, 15 M. & W. 653; s. c., 15 L. J. Ex. 311; *Twigg v. Ryland*, 62 Md. 380; s. c., 24 Am. L. Reg. 191; 50 Am. Rep. 226.

inction between the case of an animal which breaks through the tameness of its nature and is fierce, and known by the owner to be so, and one that is *feræ naturæ*.¹⁶ According to these authorities, when knowledge of the ferocious and savage disposition of the animal comes to the defendant, he is bound at his peril to see that it does no harm. The question of negligence, as to keeping, is excluded, and it is no defense in such case that the animal was safely kept, "the *gravamen* is the keeping the ferocious animal, knowing its propensity."¹⁷ Other authorities base the liability on negligence. The doctrine may be thus summarized: (1) That one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part. (2) That it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief. (3) That proof that the animal is of a savage and ferocious nature is equivalent to express notice. In such cases notice is presumed.¹⁸ But whether it is negligence, or otherwise, to keep a ferocious animal, the rule of these apparently conflicting authorities is substantially the same if the presumption of negligence is regarded as a *presumptio juris et de jure* against

¹⁶ *May v. Burdett*, 9 A. & E. Q. B. (N. S.) 101; *Spring Co. v. Edgar*, 99 U. S. 651.

¹⁷ *Card v. Case*, 57 Eng. Com. L. R. 622; *Partlow v. Haggarty*, 35 Ind. 180; *May v. Burdett*, 9 Ad. & El. (N. S.) 112. In the case of a dog of that character, it is the duty of the owner, having notice of his dangerous habits, to kill him: *Smith v. Pelah*, 2 *Strange*, 1264; *Bolton v. Banks*, Cro. Ch. 254; *Jenkins v. Turner*, 1 *Ld. Raym.* 110; *Twigg v. Ryland*, 62 Md. 380; *Laverone v. Mangianti*, 41 Cal. 138; *Mann v. Weiland*, 81 1-2 Pa. St. 243; *Muller v. McKesson*, 73 N. Y. 19; s. c., 29 Am. Rep. 126; *Wheeler v. Brant*, 23 Barb. (N. Y.) 824; *Putnam v. Payne*, 13 Johns. (N. Y.) 312; *Brown v. Carpenter*, 26 Vt. 638; *Wolf v. Chalker*, 31 Conn. 180; *Barrington v. Turner*, 2 *Lewrling*, 28; *Dunlap v. Snyder*, 17 Barb. (N. Y.) 561; *Sherfey v. Bartley*, 4 *Sneed* (Tenn.), 58; *Lynch v. McNally*, 73 N. Y. 347; *Vredenburg v. Behar*, 33 La. Ann. 627; *Whittaker's Smith on Neg.* 99; 1 *Hillard on Torts* (2d ed.), 645.

¹⁸ *Earl v. Van Alstine*, 8 Barb. (N. Y.) 631; *Koney v. Ward*, 36 How. Pr. (N. S.) 256; *Glidden v. Moore*, 14 Neb. 84; s. c. 45 Am. Rep. 98; *Williams v. Moray*, 74 Ind. 26; s. c., 39 Am. Rep. 76; *Eberhart v. Reister*, 96 Ind. 478; *Munn v. Reed*, 4 Allen (Mass.), 431; *Logue v. Link*, 4 E. D. Smith (N. Y.), 63; *Brock v. Copeland*, 1 Esp. 203; *Hewes v. McNamara*, 106 Mass. 231; *Barlow v. McDonald*, 39 Hun (N. Y.), 407; *Meracle v. Downs*, 64 Wis. 323; 1 *Thomp. on Neg.* 222; *Cooley on Torts*, 346; *Shearm. & Red. Neg.* § 199.

which no averment or proof is receivable; that is, if it is not considered a presumption in the ordinary sense, raising a *prima facie* case which may be rebutted—the liability springs from keeping the dangerous animal after knowledge of its proneness to do mischief. The propensity to commit injury and notice thereof constitute, in both classes of cases alike, the ground of the action. A mischievous propensity in an animal is a propensity from which injury is a natural result.¹⁹ The onus of proving the *scienter* is on the plaintiff.²⁰ How is the *scienter* of knowledge of such propensity to be shown? It is important to bear in mind that it is the ferocity or the proneness of the animal to do harm that constitutes the danger, and it is the notice of this fact by the defendant that fixes his liability.²¹ Thus, where the owner of a horse suffers it to go at large in the streets of a populous city, he is liable to a person kicked by it, without proof of the viciousness of the horse, he being chargeable with a knowledge of the disposition of a horse to gambol, plunge and kick up its heels, and the consequent danger therefrom to persons on the street.²² So, where a bull goes into the field of a neighbor and gores a horse, a liability on the part of the owner is created, without regard to his being aware of any vicious propensity in the bull.²³ But no action can be maintained for injury committed by a horse running at large in a public highway, without proof of the *scienter*.²⁴ So, where it escapes from a close and runs upon the streets of a city and does injury, no action will lie without proof of negligence.²⁵ It is not always indispensable to show previous instances of injuries inflicted.²⁶ It is sufficient if the

owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries of which complaint is made.²⁷ Would an ordinarily prudent man have anticipated the particular injury which really happened?²⁸ Proof that he had good cause to assume that the animal would do the mischief is all that is necessary.²⁹ "The question in each case is whether the notice was sufficient to put the owner on his guard, and to require him as an ordinarily prudent man to anticipate the injury which had actually occurred. Hence, it is unnecessary to prove more than that he had good cause for supposing that the animal may so conduct."³⁰ Thus, the owner of a savage and ferocious dog is liable for injuries inflicted by it without proof that he ever did mischief before.³¹ A few authorities hold that at least one previous similar act must be shown,³² but evidence of notice of one attack of a dog is sufficient,³³ or one attempt of a bull to gore.³⁴ Yet the better rule is as above stated, and the keeper of a ferocious animal is not exempt from all duty of restraint until the animal has at least inflicted one injury, or effectually mangled or killed at least one person.³⁵ Where previous viciousness is shown, the act complained of need not be exactly similar.³⁶ If it is proved that the owner had notice of the inclination of the animal to commit injury substantially like the one forming the basis of the cause of action, this is all that is required.³⁷ If the rule

²⁷ Reynolds v. Hussey (N. H.), 5 Atl. Rep. 458; Eightlinger v. Egan, 65 Ill. 235; Buckley v. Leonard, 4 Denio (N. Y.), 500; Applebee v. Percy, 9 L. R. (C. P.) 647; Abb. Trial Ev. 645; Shearm. & Red. on Neg. (3d ed.) § 190.

²⁸ Cooley on Torts, 344.

²⁹ Kettridge v. Elliott, 16 N. H. 82.

³⁰ Reynolds v. Hussey (N. H.), 5 Atl. Rep. 458; s. c., 22 Reporter, 568; 2 N. Eng. Rep. 722.

³¹ Earl v. Van Alstine, 8 Barb. (N. Y.) 652; Godeau v. Blood, 52 Vt. 251; s. c., 36 Am. Rep. 751. See Hartley v. Harriman, 1 Barn. & Ald. 622.

³² Judge v. Cox, 1 Stark. 285; Arnold v. Norton, 25 Conn. 92; Jenkins v. Turner, 1 Ld. Raym. 118; Smith v. Black, 1 Sw. Dig. 551; Jones v. Perry, 2 Esp.

³³ Keteridge v. Elliott, 16 N. H. 77; Mann v. Weland, 87 1-2 Pa. St. 243; Loomis v. Terry, 17 Wend. (N. Y.) 469.

³⁴ Cockerham v. Nixon, 11 Ired. (N. C.) 269.

³⁵ Godeau v. Blood, 52 Vt. 251; s. c., 36 Am. Rep. 751; Ryder v. White, 65 N. Y. 54; s. c., 22 Am. Rep. 600; Worth v. Gilling, 2 C. P. 1; Flansburg v. Basin, 3 Bradw. (Ill. App.) 531.

³⁶ 1 Thomp. on Neg., p. 202, § 16, and authorities above cited.

³⁷ Mann v. Weland, 87 1-2 Pa. St. 243.

¹⁹ State v. McDermott, 49 N. J. L. 163; s. c., 60 Am. Rep. 602; 6 Atl. Rep. 653.

²⁰ Twigg v. Ryland, 62 Md. 380; s. c., 24 Am. L. Reg. 191, n. 195; 50 Am. Rep. 226, n. 229.

²¹ McCaskill v. Elliott, 2 Stobh. 196.

²² Goodman v. Gay, 15 Pa. St. 193.

²³ Dolph v. Ferris, 7 W. & S. (Pa.) 369; Paff v. Slack, 8 Barr. (Pa.) 254; Hill v. Applegate (Kan.), 19 Pac. Rep. 315.

²⁴ Holden v. Shattuck, 34 Vt. 34 Vt. 336; Cox v. Burbridge, 13 C. B. (N. S.) 430; s. c., 11 W. R. 435.

²⁵ Fallon v. O'Brien, 12 R. I. 518, approving Goodman v. Gay, 15 Pa. St. 118, and Dickson v. McCoy, 39 N. Y. 400. See McIlvaine v. Lantz, 100 Pa. St. 586; s. c., 45 Am. Rep. 400.

²⁶ Rider v. White, 65 N. Y. 54; Godeau v. Blood, 52 Vt. 252; s. c., 36 Am. Rep. 751; Worth v. Gilling, L. R. 2 C. P. 1; Judge v. Cox, 1 Stark. 285; Cooley on Torts, 344; 1 Thomp. on Neg., p. 213, § 17; Moak's Underhill on Torts, 704.

were otherwise, there would be no actionable redress for the first injury of a particular kind committed by such an animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity.³⁸ But it is said that notice which will charge the owner with liability must be notice that the animal was inclined to do the particular mischief that had been done, "so as to admonish him to take the necessary precautions to prevent injury in the future."³⁹ Accordingly, it has been held, that notice that a dog is ferociously inclined toward cattle is no notice that he will attack persons,⁴⁰ or where he has attacked animals of one class it is not evidence from which knowledge may be inferred that he would attack animals of another and different class.⁴¹ So notice that a dog has a habit of bounding upon and seizing persons, in play, but not so as to hurt or injure them, although causing some annoyance and trivial accidental damage to clothes, will not sustain an action for biting.⁴² A few illustrations will be given. Proof that defendant had warned a person to beware of the dog lest he should be bitten, is evidence to go to the jury of the allegation that the dog was accustomed to bite mankind.⁴³ And whatever is calculated to establish the dangerous propensity of the animal is properly left to the jury, under an allegation that the defendant knew that the dog "was of a ferocious and mischievous disposition."⁴⁴ The fact that a dog is usually kept chained and muzzled, or confined, is evidence that he is dangerous, and known to be so, by defendant.⁴⁵ Where one leaves his dog with his team when hitched, and he has notice that such dog is accustomed to attack and

bite strangers, approaching the team so watched, he is liable to a person injured by such dog, who attempts to remove such team lawfully from where it is left.⁴⁶ So, where plaintiff, on entering defendant's house upon lawful business, and upon ascending the steps leading to it, under which was chained defendant's dog in such a manner that it could not reach anyone on the steps, one of the steps being loose, plaintiff slipped from his position, and his leg went through the opening, where it was seized and bitten by the dog, defendant was held liable.⁴⁷

IV. *Scienter—Servant's Knowledge.*—The knowledge of a servant of the animal's viciousness is imputable to the master, so far as the public is concerned, although the servant does not actually communicate such knowledge to him.⁴⁸ But the agent's knowledge must be with reference to the matter of his agency. The animal must have been put in his charge by the master, or he must be its appointed keeper or have the care, custody and control of it.⁴⁹ Hence, a servant's knowledge of the vicious character of a dog, accustomed to follow him about on the master's business, but not put in his charge by the master, is not imputable to the latter.⁵⁰ The question of notice to the servant is one of varying circumstances, and must depend upon the position of the person to whom the notice was given. Notice given to the wife of defendant, who attended to her husband's business in his absence, for the purpose of being communicated to the husband, has been held to be some evidence of the *scienter*, to be considered by the jury.⁵¹ So notice to persons who had charge of defendant's bar at a public house of the viciousness of certain dogs, has been held to be evidence of the *scienter*, to go to the jury, on the ground that where a certain business or the performance of a certain duty is deputed to the servant, a

³⁸ Reynolds v. Hussey (N. H.), 5 Atl. Rep. 459; s. c., 22 Reporter, 563; Neibus v. Dodge, 38 Wis. 31.

³⁹ Twigg v. Ryland, 62 Md. 380.

⁴⁰ *Ibid.*; Keightlinger v. Egan, 65 Ill. 235, 237; Wood on Nuisance, § 803.

⁴¹ Wood on Nuisance, § 803.

⁴² Line v. Taylor, 3 Fost. & Fin. 721. See McCaskill v. Elliott, 5 Strob. 196; Genenz v. DeForest, 2 N. Y. Sup. Ct. 152; Worthen v. Love (Vt.), 14 Atl. Rep. 461.

⁴³ Judge v. Cox, 1 Stark. 285.

⁴⁴ McCaskill v. Elliott, 5 Strob. 196.

⁴⁵ Godeau v. Blood, 52 Vt. 251; s. c., 36 Am. Rep. 751; Brice v. Bauer (N. Y.), 11 Cent. Rep. 327; s. c., 15 N. E. Rep. 695; Buckley v. Leonard, 4 Denio (N. Y.), 500; Good v. Martin, 57 Md. 606; s. c., 40 Am. Rep. 448; Montgomery v. Koester, 35 La. Ann. 1091; s. c., 48 Am. Rep. 253.

⁴⁶ Fairchild v. Bently, 30 Barb. (N. Y.) 147.

⁴⁷ Laverone v. Mangianti, 41 Cal. 188; s. c., 10 Am. Rep. 269. See Hudson v. Roberts, 6 Exch. 697.

⁴⁸ Brice v. Bauer (N. Y.), 11 Cent. Rep. 327; s. c., 15 N. E. Rep. 695; Baldwin v. Casella, L. R. 7 Exch. 325; s. c., 3 Eng. Rep. 434; Linehan v. Sampson, 128 Mass. 506; s. c., 30 Am. Rep. 692; 1 Thomp. on Neg., p. 204, § 18.

⁴⁹ Stiles v. Cardiff Steam Nav. Co., 38 L. J. (Q. B.) 310; Barrett v. Malden R. Co., 3 Allen (Mass.), 101; Corliss v. Smith, 53 Vt. 532.

⁵⁰ Twigg v. Ryland, 62 Md. 380; s. c., 24 Am. L. Reg. 191; 50 Am. Rep. 226.

⁵¹ Gladman v. Johnson, 36 L. J. (C. P.) 158.

notice of the servant so acting is notice to the master, because he has placed the servant in his stead to represent him *quoad* that particular business or duty.⁵²

V. Actions under Statutes.—The statutes usually confer a right of action in a few special cases without proof of the *scienter*,⁵³ as for injury to the person,⁵⁴ or animals, such as sheep, etc.⁵⁵ Yet proof of the *scienter* largely affects the question of damages.⁵⁶ But the right under statutes does not supersede the common law action.⁵⁷ The action under the statute must be distinctly set forth.⁵⁸ These statutes have no extraterritorial operation. Thus, where a dog is owned in Massachusetts, strays into another State and bites a person there, no statutory action against the owner will lie in Massachusetts.⁵⁹

B. E. BLACK.

⁵² *Applebree v. Percy*, 6 L. R. (C. P.) 649, per Lord Coleridge, C. J., and Keating, J., approving *Gladman v. Johnson*, *supra*, and *Stiles v. Cardiff Steam Nav. Co.*, *supra*. Brett, J., dissented, and thought that the notice to the servants was not sufficient, on the ground that they did not have the management of the master's business. He said: "A manager, whose knowledge is to fix the proprietor with notice, must be one who stands in the place of the master, and to whom the *general* control of the business is delegated in the master's absence."

⁵³ *Kertschocke v. Ludwig*, 28 Wis. 430; *O'rne v. Roberts*, 61 N. H. 110; *McCarthy v. Guild*, 12 Metc. (Mass.) 291; *Pressey v. Wirth*, 3 Allen (Mass.), 191; *Paff v. Stack*, 7 Pa. St. 254; *Goodman v. Gay*, 15 Pa. St. 193; 1 *Thomp. on Neg.*, p. 218, § 32.

⁵⁴ *Woolf v. Chalker*, 31 Conn. 132; *Gries v. Zeck*, 24 Ohio St. 329.

⁵⁵ Stat. 26, 27, 28 and 29 Vict., chapters 60, 100.

⁵⁶ *Swift v. Applebone*, 23 Mich. 252.

⁵⁷ *Monroe v. Rose*, 33 Mich. 347.

⁵⁸ *Id.*; *Mitchell v. Clapp*, 12 Cush. 278; *Searles v. Ladd*, 123 Mass. 580.

⁵⁹ *LeForest v. Tohman*, 117 Mass. 109.

MORTGAGE — ATTACHMENT — RENTS AND PROFITS.

DAVIS V. FLAGG.

New Jersey Court of Chancery.

1. The holder of two bonds, each of which is secured by a mortgage on the same premises, who procures an attachment to be issued on the amount due upon one bond, and has the goods of the obligor, which are in the dwelling on the mortgaged premises, levied upon by the sheriff, who leaves the goods where he finds them, but puts a man in charge of them, who, to do so, sleeps in the dwelling, and who is instructed to let Mrs. Flagg, the obligor, and husband, enter at all times, is not liable, as mortgagee, for rents and profits, and for waste, on a bill filed to foreclose the mortgage

to secure the other bond, although the creditor paid such watchman.

2. Where a non-resident asks the aid of the courts of this State, and then refuses to submit himself to examination as a witness, the court may dismiss his bill, or assume as true the material facts alleged, about which he refuses to appear and testify.

BIRD, V. C., delivered the opinion of the court:

There were two mortgages on the lands of the defendant, Mrs. Flagg; one of them was given to the Mutual Life Insurance Company for \$4,000, and one to Abram Baldwin for \$11,000. Baldwin procured an assignment of the former to himself, and filed a bill to foreclose the latter, and also, it is alleged, filed a bill to foreclose the former in the name of one McCoon, to whom it had formally been assigned. The bill filed in the name of McCoon was dismissed on motion of his counsel July 9, 1881. On March the 17th, 1881, Baldwin filed his bill to foreclose the \$11,000 mortgage. On the 24th day of the same month he procured an attachment to be issued against the goods of the defendant, Jennie E. Flagg, upon the bond which the \$11,000 mortgage was given to secure. The sheriff, by virtue of the writ so issued, seized upon the goods of Mrs. Flagg which were in the dwelling-house upon the premises covered by said mortgages. At the time of such seizure by the sheriff the goods were stored in said dwelling and packed as if in a condition for moving. The sheriff at once put the said goods in the custody of a person and authorized him to keep watch over them, leaving them, however, in the dwelling-house of Mrs. Flagg. This person, so deputed to watch over and care for the goods, continued in possession under said authority for several months, but was paid for his services by Baldwin through the sheriff. At length, however, an arrangement was made between the counsel of the plaintiff in the attachment suit and the sheriff, by which the person so left in charge by the sheriff should be relieved of his sole responsibility in part, only being required to occasionally visit the premises, and to that extent continue or maintain his authority, whilst another person was to be put in charge more constantly, the compensation therefor to be divided between the two. This continued until the close of the litigation between the parties with respect to their rights under said mortgage, with the exception that for about six weeks, during which period a man by the name of White (a sea captain, in the employ of Baldwin) with his wife, actually occupied the house on the premises in question, taking their meals elsewhere. The other persons in charge only slept in the house.

The attachment was pressed, the declaration was filed, bond was given, pleas were filed; the proceedings upon the foreclosure of the \$11,000 mortgage were pressed to a final determination in the court of errors and appeals, in which court it was decided that the said \$11,000 mortgage was void. The decree final was entered in the cause on the 29th day of May, 1884. On the 31st day of

May the attachment suit was discontinued. Out of these proceedings and this conduct of the mortgagee, Baldwin, springs the question which I am now called upon to consider. From these facts it is insisted that Baldwin was liable as mortgagee in possession, and obliged to account for the rents and profits during the period of time which elapsed between the 24th day of March, 1881, and the 31st day of May, 1884, and that, although the present proceedings are in the name of Davis it is only another name for Baldwin, and a device adopted for the purpose of avoiding the consequences which naturally or legally flow from the action of Baldwin under the said attachment proceedings, under which he had what is claimed to be possession of the mortgaged premises as mortgagee.

For the sake of the argument it will be admitted that Baldwin was the owner of both mortgages, and is now really the owner of the mortgage being foreclosed in this suit. Let it also be admitted that the possession, to the extent that there was actual possession of said mortgaged premises, was the possession of Baldwin and not of the sheriff, nor of the law. These admissions present the case, of course, most strongly in favor of the defendants, Flagg, and enable us to look at the law, as I understand it, in New Jersey as well as elsewhere. I think that in order to charge a mortgagee who is in possession of mortgaged premises, with rents and profits, and to hold him responsible for the proper management of the estate in a suit under the bill to foreclose the mortgage, it must appear that he is in possession under and by virtue of the mortgage against which such rents and profits are sought to be set off or recouped. This relation does not exist, nor can the rights which flow therefrom be enforced unless it appears his possession is under the mortgage. The case of *Onderdonk v. Gray*, 4 C. E. Gr. 65, seems to be conclusive authority to this effect, and this view is sustained, I think, by the reasoning in *Russell v. Ely*, 2 Black (U. S.) 575: and in *Bennett v. Austin*, 81 N. Y. 308; and in *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 73 N. Y. 82.

In the case before me, if Baldwin be the real actor, he was not pursuing any claim under the mortgage which is now being foreclosed. And in the attachment proceedings, he was not proceeding upon the mortgage, nor by virtue of any power or right therein given or existing, but by virtue of and under the bond which had been given by Mrs. Flagg, totally separate from the mortgage. The fact that the officer of the law found the goods of the defendant upon the premises which were covered by the mortgage, and took possession of those goods, and retained the possession of them in or upon the said mortgaged premises, cannot, it seems to me, by any possibility, create the relation of mortgagor and mortgagee between the occupant, whoever he may be, whether the sheriff by virtue of the law, or Baldwin and the Flaggs, so as to charge the former

with rents and profits, or to make him responsible for waste. I do not say that the sheriff may not so demean himself as to be liable to the owner of the premises; nor do I say that if Baldwin, the plaintiff in the attachment, had made use of the forms of law for the purpose of procuring an opportunity to commit a trespass or other wrong, that one or both might not be responsible to the owner for such injury. But however great the injury, in such case, might be, I know no rules of law, nor any method of reasoning, so far as we are permitted to go in determining the rights between mortgagor and mortgagee, by which the mortgage now in suit can be paid, in whole or in part, by set-off to the amount of such injury, or by recoupment. No such matters are permitted to be set-off as against the amount due upon the mortgage, however burdensome it may appear, and that has been repeatedly so decided in New Jersey, unless it be shown that it was at the time, or has been subsequently to the contract, incorporated in the contract, by an agreement of the parties to that effect. *Parker v. Hartt*, 5 Stew. Eq. 225; *Williamson v. Fox*, 3 Id. 488; *Williams v. Doran*, 8 C. E. Gr. 385; *Bird v. Davis*, 1 McCart. 467.

Again, as I look at this case, and the law which seems to be my guide, I cannot come to the conclusion that if what was done under the attachment and the possession was done in the name of and for Baldwin, that it can be said he had any lawful or rightful possession as against the mortgagor. As I have said, the claim was not under the mortgage, but under the attachment upon the bond. Baldwin could not possibly have made any resistance to the mortgagor had the latter demanded possession. Had the mortgagor actually put anyone else in possession, Baldwin would have been powerless. In such a case, Baldwin certainly could not have collected rents, nor in any lawful sense exercised any control over the property. This, it seems to me, must be decisive in this case against the claim of the defendants. *Bennett v. Austin*, 81 N. Y. 308, 316; *Russell v. Ely* 2 Black (U. S.) 575. For, as intimated, he cannot get the possession by a technical device and then claim that his possession is lawful. But in this case, possession was never claimed against Mrs. Flagg, except at the last moment, of which I will speak hereafter. When the sheriff authorized the first man he put in charge to care for the goods, he expressly told him to make no resistance to Mr. and Mrs. Flagg entering the premises. And this charge upon his servant was never withdrawn, nor was it ever violated until after the attachment had been dissolved, and Mrs. Flagg demanded possession, and then, she was delayed less than twenty-four hours in procuring possession, and obtained it through the sheriff. There is no evidence to show that Mrs. Flagg ever claimed possession before, during the pendency of the attachment proceedings. In any event, I cannot find a way by which I can take the case out of the rules laid down in the

foregoing cases. These distinctions, I think, are sustained in the cases of Lord Trimleston v. Hamill, 1 B. & B. 377, and Blennerhassett v. Day, 2 Id. 104, 125.

Although what I have said disposes of the merits of the case, another question of great importance presents itself. This arises from the fact that parties, by the law, are permitted to be witnesses, and not only in their own behalf, but may be called by the adversary. This suit was instituted in the name of Davis, and during its progress the defendant desired to examine him with respect to his interest in the mortgage, and the rights or claims of Baldwin, his alleged assignor. The counsel for Davis made every reasonable and proper effort to have him present, but, the residence of Davis being out of the State, it was impossible for the court, by the ordinary process of the court, to compel his attendance. Repeated delays took place, in order that Mr. Davis might be accommodated, and that his testimony might in some way be produced and presented in the cause. However, all efforts failing, counsel for the defendant insisted that it was their right to have the complainant suffer a dismissal of his bill of complaint because of his refusal to attend and be examined. Although the court believed it was competent in all respects to visit this, or any other similar pecuniary penalty, upon the complainant, it hesitated to do so, under the hope and in the belief that the generous efforts of his counsel would bring him before the court or would end in the production of his testimony; but, this failing, the court announced that, in case of his continued obstinacy, it would deal with the questions arising in the cause the same as though it were conceded that Baldwin was the real suitor. After this he submitted himself to examination in the city of New York, in his own dwelling-house, according to an agreement between the counsel. This examination continued for some time, when an altercation arose between the counsel for the defendant and Davis which ended in a separation and a discontinuance of the examination, notwithstanding Davis's apology and the expression of a desire upon his part that the examination should continue. I do not stop to inquire whether or not that examination might not have proceeded in the private dwelling of the complainant, but do assert that it was one of the inestimable rights of the defendant in the suit to have Davis, the complainant, present in court to be examined as other witnesses are obliged to be examined. He could not, nor can any suitor, escape this obligation by withdrawing himself from the jurisdiction of the court. Nothing would be more absurd, nothing could be more ridiculous, than for the court to say its arm is paralyzed, its efforts are hopeless, when a foreigner, having sought the jurisdiction of our courts, should say you have no longer any control over me because I am beyond the process of your tribunals. The penalty to be visited in such cases is discretionary, but, that it is, in such case, within the power and entirely

competent and proper for the court to say to the complainant that the penalty of your disobedience shall be the dismissal of your cause, there can be no doubt. Such a judgment could have been effectual—indeed it was the only judgment that could, at the time, have been pronounced with effect; all efforts at persuasion, all means of prudence were utterly unavailing; to say, therefore, that the court should be thus mocked would be making the law tribunals of the country the laughing-stock of the citizen.

But, instead of dismissing his bill, as I have intimated, it was announced that the court would assume the allegation that Baldwin was the real owner of the bond and mortgage in this suit as a fact, and would deal with the case accordingly. But, although I have given the defendants the benefit of this allegation, I find myself obliged to conclude that they have not made good their claim to charge Davis with rents and profits and for waste, as a mortgagee in possession. The petitioners are entitled to the costs of the petition and the order opening the decree, because the court decided that they had a right to be heard, but all other costs they are chargeable with, the same as though they had made their defense upon their answer before final decree and had failed. I will so advise.

NOTE.—It has been held that, although a complainant is in contempt, the defendant cannot, on that account, have the bill dismissed, *Ricketts v. Mornington*, 7 Sim. 200; *Gould v. Twine*, 22 W. R. 398; or prevent complainant's dismissing it, *Smith v. Smith*, 2 Blacks. 232; or oppose its amendment, *Chatterton v. Thomas*, 36 L. J. Ch. 592; or refuse to produce deeds relating to the matters in issue and admitted by defendant's answer to be in his possession, *Plumbe v. Plumbe*, 3 Y. & C. Exch. 622; or prevent a replication being filed, *Story v. National Ins. Soc.* 2 N. R. 351; or prevent complainant's moving for a stay of execution after he has appealed, *Herring v. Cloberry*, 12 Sim. 410; see *Brinkley v. Brinkley*, 47 N. Y. 40; *Heinlen v. Cross*, 63 Cal. 44; *Matthews v. Chase*, 41 Ind. 356; *Ross v. Griffin*, 53 Mich. 5; *Hewiston v. Hunt*, 8 Rich. 106; or his moving to discharge an order against him, *Futroye v. Kennard*, 2 Giff. 110; *Parker v. Dawson*, 5 L. J. Ch. 108; *Hill v. Bissel*, Mos. 258. And see, further, *Hurd v. Robertson*, 1 Ch. Cham. (Cas.) 3; *Marshall v. Marshall*, 2 Hun, 238.

In *Bradbury v. Shawe*, 14 Jur. 1042, a husband and wife were complainants in a suit against three defendants, and moved for an injunction to stay certain proceedings at law instituted by the defendants against the husband alone, which was refused, with costs, and an attachment therefor issued. *Held*, that two of the defendants might have the suit in chancery stayed until the husband has cleared his contempt. See *Bickford v. Skewes*, 10 Sim. 193.

In *Bonesteel v. Lynde*, 8 How. Pr. 226, the plaintiff had been subpoenaed to produce certain documents as evidence, and was convicted of contempt for his wilful failure to do so. He afterwards obtained possession of the documents, knowing that a subpoena *duces tecum* had been issued for them. *Held*, on the trial, that his excuse, that he had lost or mislaid them, was inadmissible, and his complaint was stricken out, with costs.

The same rule applies to a defendant: *Wilson v.*

Bates, 9 Slim. 54, 8 Myl. & Cr. 197; Haldane v. Eckford, L. R. (7 Eq.) 425; Fry v. Ernest, 9 Jur. (N. S.) 1151; King v. Bryant, 3 Myl. & Cr. 191; Everett v. Prythergch, 12 Slim. 363; O'Dell v. O'Dell, 1 Hog. 217; Perrin v. Oliver, 1 Minn. 202; Lane v. Ellzey, 4 Hen. & Munt. 504; Mead v. Norris, 21 Wis. 310; Koehler v. Dobberpuhl, 56 Wis. 407; but, see Hewitt v. McCartney, 13 Ves. 560; Sprye v. Reynell, 1 De G., M. & G. 712; Cranstown v. Goldshede, 2 Y. & C. 73; Heyn v. Heyn, Jac. 49; Mussina v. Bartlett, 8 Port. 277; Savlon v. Mockle, 9 Iowa, 209; McClung v. McClung, 40 Mich. 493; Peltier v. Peltier, Harring. (Mich.) 19; Johnson v. Pinney, 1 Paige, 446; Wallis v. Talmadge, 10 Paige, 443; Ellingwood v. Stevenson, 4 Sandf. Ch. 366.

But an answer, in a divorce case, will be stricken out, for failure to pay alimony, only in extreme cases: Casteel v. Casteel, 38 Ark. 477; Peel v. Peel, 50 Iowa, 521; Bally v. Bally, 69 Iowa, 77; Allen v. Allen, 72 Iowa, 502; Cason v. Cason, 15 Ga. 405; Dwelly v. Dwelly, 46 Me. 377; Walker v. Walker, 20 Hun, 400; 82 N. Y. 260; see Gant v. Gant, 10 Hump. 464.

In New York, the power of the court is limited by statute, *Birdsall v. Birdsall*, 4 Wend. 196; *Rice v. Ehele*, 55 N. Y. 518; and in California, *Johnson v. Superior Court*, 63 Cal. 578.

But, in Connecticut, such a statute has been held not to apply to proceedings in chancery, *Roger's Manf. Co. v. Rogers*, 38 Conn. 121. And see as to Florida, *Edwards ex parte*, 11 Fla. 174; and Georgia, *Cobb v. Black*, 34 Ga. 162. JOHN H. STEWART.

CORRESPONDENCE.

THE ILLINOIS CONTROVERSY.

To the Editor of the Central Law Journal:

The real object of my communication of two weeks ago has been accomplished, as from the two communications in the JOURNAL of this week and letters I have received show that the attention of the profession has been focused upon the case of *Shifferstein v. Allison*, 123 Ill. 662, and its relation to section 11 of the Illinois limitation law. That decision is an illustration and application of the pernicious doctrine of "repeal by construction," and it is to this point that the attention of Illinois lawyers was desired to be brought, so that if need be, such legislation on the subject might be had as to give the benefit of the quieting statute to the people beyond the power of the supreme court to take away.

The law prior to the enactment of section 11, under prior statute equivalent to section 16, has been that a mortgage was barred when, and only when, the debt it was given to secure was barred. There was no law of limitation on the foreclosure of mortgages, *as such*. Under this state of the law there was absolutely no period when land could be purchased free from the lien or cloud of an unreleased mortgage, however venerable. A mortgage past due, as to the amount, is always more or less a secret lien. Trust deeds given to secure notes, payable to the order of the maker and grantor, and by him indorsed in blank and delivered to the legal holder thereof—a convenient impersonality beyond the ken of the assessor—have of late years grown considerably in favor, and are an even more effectual method of hiding the extent of the lien. A mortgagee might be discovered and the extent of his lien determined, but the trustee in the trust deed can generally furnish no information, even as to the holder of the notes. No search of the records, however diligent, will advise the inquirer. This was the

condition of things in 1872, when the legislature added section 11 to the previous ten sections, limiting actions concerning real estate. This section was positive in its terms, and was classified by the legislature among the limitations to *real actions* by placing it where they did. The policy of acts of limitation in respect to actions involving real estate, being to quiet titles by freeing them, after a reasonable period, from stale claims; the state of the law as well understood at the time it was passed, and the evils to be reached, furnish ample motive for the enactment of section 11. With this motive, the language of the section itself, and the classification of the new section among limitations to real actions render the intention of the legislature clear. This section was first before the supreme courts in *McMillan v. McCormick*, 117 Ill. 79. In this case the note was not barred, but the mortgage would be under section 11 if it related back to mortgages executed prior to July 1, 1872. The point before the supreme court was whether such retroactive effect could be given that section, and the supreme court held it only applied to mortgages executed after the act went into effect. This was all that was decided by that case.

In *Shifferstein v. Allison*, 123 Ill. 662, the supreme court decide that the legislature in adding this section 11 meant nothing, except to enable the law to follow in the wake of the decisions of the courts, and by thus construing the section out of the statute, have revived all the musty clouds upon titles which the legislature of 1872 manifestly endeavored and intended to effectually quiet. Now, there is practically no limitation on the lien of a mortgage, as far as public records and the law can disclose, and the old maxim, "once a mortgage, always a mortgage," has a new application. Joliet, Ill. JNO. B. FITHIAN.

QUERIES AND ANSWERS.*

QUERY NO. 7.

A dies testate, leaving surviving him his wife and B and C, his children. To his wife he gives his real estate for life, and provides that after her death the executor shall sell all the real estate and, after paying \$168 to B and \$1,370 to C, the balance of the proceeds to be equally divided between B and C. Immediately after the death of wife, and before the executor sells the land, B makes a quitclaim deed releasing his interest in and to the real estate, describing it, but not as the land of deceased, nor does he describe himself as an heir or legatee. After the sale of the land, D, a judgment creditor of B, garnishes his share of the money in the hands of the executor. The devise above, under our laws, is a devise of money. Admitting this, did B, by his quitclaim deed, convey anything? And can grantee defend in garnishment proceedings so as to defeat a judgment for D? Would the quitclaim deed amount to an equitable assignment of B's share of the money? J.

QUERY NO. 8.

In the spring A conveys his farm to B; B gives back mortgage, and chattel mortgage on future crops, as full purchase price. Papers are held by conveyancer, who claims lien thereon until his fees are paid. B takes possession of farm and puts in crop. In the fall, A and B are informed by conveyancer that the deed is now void, having been in his hands so long. This they believe, and proceed to execute new papers, which are recorded, the last deed, however, being

made to B's wife, instead of to B. The former deed is returned to A and the mortgage to B. A now revivies one-third of B's crop for rent during the season, claiming title and right of possession up to the execution of the last deed. Who now holds title? Admitted that the first deed did not divest A of title, could he gain a portion of the crop as rent, in absence of an express contract, or should his demand be for money?
DEFENDANT.

QUERIES ANSWERED.

QUERY No. 5.

[To be found in Vol. 28, Cent. L. J., p. 118.]

When the appeal was dismissed, the case stood in the same condition as it was before the appeal was prayed: 3 Estate's Plead. § 5080. It depends upon the local statutes, whether a second appeal or a writ of error can be taken. If the case warrants it, an injunction may be obtained against the issuance of an execution: 2 Story's Eq. Jur. § 886. M. S.

QUERY No. 6.

[To be found in Vol. 28, Cent. L. J., p. 119.]

Equity will relieve against the deed to C, which was obtained by fraud, due to misrepresentation, A's ignorance and misplaced confidence: 1 Story's Eq. Jur. § 187; 3 Wait's Act. & Def. 432, 476; Kerr on Fraud (2d ed.), 313. So long as equity can restore the parties to the condition they were in before, and the rights of third parties are not effected, it will rescind the deed: Kerr on Fraud, 367, 524. No lapse of time will bar the right, so long as A, without fault of his own, remains in ignorance of the fraud which has been committed: *Idem*, 18, 345, 346. A can sue in equity. E. J.

RECENT PUBLICATIONS.

THE LAW OF HUSBAND AND WIFE, of Parent and Child, Guardian and Ward, Master and Servant. By Tapping Reeve. Revised and Annotated, with Notes and References to English and American Cases. Fourth Edition. By James W. Eaton, Jr., Counselor at Law. Albany, N. Y.: Wm. Gould, Jr. & Co., Law Booksellers and Publishers. 1888.

Few, of the present generation of practitioners, know that Tapping Reeve, the original projector of this work, was, in his day, one of the most eminent of American lawyers, and that this book is one of the oldest of American text-books. Tapping Reeve was born at Brookhaven, Long Island, in 1744, graduated at Princeton College, and was a patriot at the time of the revolution. In 1798, he was made a judge of the Superior Court of Connecticut, afterward became chief justice of that State and remained on the bench till he was seventy years old. In 1792, he commenced a law school at Litchfield, and continued to give lectures to students till 1820. He died in 1823. He was not only distinguished as a judge, but contributed to legal literature two valuable books—a treatise on the Law of Descents and a treatise on Domestic Relations. Of the first, David Hoffman is said to have declared that if an American lawyer did not read it, he would scarcely be said to understand thoroughly the law of descents of this country. But Judge Reeve's best known book is that on Domestic Relations. The first edition was published in 1816; the second, annotated by Lucius E. Chittenden, appeared in 1846, and the third edition, by Amosa J. Parker and C. E. Baldwin, was published in 1862. The fourth edition, revised and annotated by James W. Eaton, Jr., is the one before us. It was Chancellor Kent's opinion that in this

treatise, Judge Reeve "everywhere displays the vigor, freedom and acuteness of a sound and liberal mind." For many years, and until the appearance of the works of Schouler and Browne, Reeve's Domestic Relations continued to be the only standard and authoritative treatise in this country upon that subject. We are informed, through the preface, that the notes have been entirely re-written by Mr. Eaton, and the aim has been to set forth, as far as possible, the general principles of the common law, as interpreted and laid down by Judge Reeve, with such changes and modifications as modern law and cases render necessary. The book gives us the law of husband and wife, their individual rights and liabilities as between themselves and with reference to third persons; of parent and child, guardian and ward and master and servant. The law, particularly that pertaining to the subject of husband and wife, has been so changed and modified by statute since the time of Judge Reeve, that the work of the annotator must, of necessity, be great. Further, it is in the notes that the modern practitioner will look for aid. Hence, in the preparation of such a work, the annotator must bring the greatest zeal and industry. In this regard, to judge from appearances, the editor of the present edition was not lacking, and his work seems to have been thoroughly and conscientiously performed, as, for instance, the note beginning page 42 on "dower," which is exhaustive of the subject, and note, page 168, as to "suits by and against a married woman." We feel sure that the book will commend itself to the profession.

We must, however, enter a criticism as to the mechanical execution of the work. Though the printing is good, the binding is very bad, and gives one the impression of haste in the finishing touches.

COUNTERCLAIM, under the New York Code of Civil Procedure. A Monograph upon Counterclaim and Kindred Remedies, adapted to Jurisdictions which follow, in Substance, the Revised Code. By John S. Derby, Counselor at Law. Rochester, N. Y.: Williamson & Higbie, Law Booksellers and Publishers. 1888.

This little book of 120 pages is primarily intended for New York consumption, but as many of the States have codes similar to that in New York, and as the author cites many decisions from other States, it is not improbable that it will be found of use elsewhere. It is prepared in the shape of a digest of cases on the different subjects, within which the question of counterclaim may arise.

JETSAM AND FLOTSAM.

"SIR," said the judge, "I commit you to jail for ten days for contempt of court." "Better make it ten years, judge," was the response. "I couldn't begin to get over my contempt in less than that."

THE "injured party," with his arm in a sling, is under cross-examination by counsel. "You tell me you cannot lift your arm?" "Well, perhaps half an inch—like this; but it gives me horrible torture; it pains me even to touch it." "Poor fellow! just show me how high you find it possible to lift it." With many sighs and groans he lifted it three-quarters of an inch. "And before the accident there was nothing the matter with it?" "Nothing whatever." "How high could you lift it then?" "Oh, as high as you please—like this;" and he raised his arm over his head. This did please the counsel very much, for it extinguished the plaintiff's claim. For the moment the poor fellow had lost his presence of mind.

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ABATEMENT AND REVIVAL—Judgment.—Under Rev. St. Mo. § 3767, a judgment of reversal, rendered after the death of one of several defendants in error, is binding upon the personal representative of the deceased, though he is not made a party in the supreme court, and such personal representative may be made a party in the circuit court, after the cause has been remanded. — *Prior v. Kiso*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 898.

2. ADMIRALTY—Courts—Recovery of Possession.—Where a sheriff has attached a vessel, which is afterwards taken out of his custody and removed into another State, he can sue in admiralty to recover possession in the district court of the district into which the vessel has been removed.—*The Bonnie Doon*, U. S. D. C. (Del.), Nov. 24, 1888; 36 Fed. Rep. 770.

3. ADMIRALTY—Jurisdiction—Conflict of Laws.—A proceeding in rem by a seaman for personal injuries received on board an English vessel, while within English territorial waters, is governed by the law of England, though libellant is a naturalized American citizen.—*The Egyptian Monarch*, U. S. D. C. (N. J.), Nov. 17, 1888; 36 Fed. Rep. 773.

4. ANIMALS—Vicious Dog—Injuries—Scienter.—Under the Michigan statute, in an action for an injury by dogs, it is unnecessary to prove that defendant knew that the dog was accustomed to do mischief.—*Newton v. Gordon*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 921.

5. ANIMAL—Injury by Dog.—Under Pub. St. Mass. ch. 102, § 38, rendering the owner of a dog "liable to any person injured by it" it is immaterial whether the injury is by biting or jumping upon plaintiff, or whether in ay or with vicious intent.—*Hathaway v. Tinkham*, S. J. Mass., Nov. 28, 1888; 19 N. E. Rep. 18

6. APPEAL—Jurisdiction—Appellate Courts—Right of Way.—Under Seas. Laws Ill. 1887, p. 156, which except from the jurisdiction of the appellate courts cases involving a freehold, such courts have no jurisdiction of suits involving the title to a right of way granted by deed as appurtenant to an estate in fee.—*Oswold v. Wolf*, S. O. Ill., Nov. 15, 1888; 19 N. E. Rep. 28.

7. APPEAL—Record.—Construction of Rev. St. Ind. § 1410, for certification by clerk of original long hand manuscript of the evidence.—*Flint v. Burrell*, S. C. Ind., Dec. 14, 1888; 19 N. E. Rep. 140.

8. APPEAL—Presumption—Bond.—A bond required to be given by defendant on appeal by him which appears among the papers sent up, and which is indorsed "filed," is presumed to have been approved by the district court.—*Clapp v. Freeman*, S. C. R. I., Oct. 5, 1888; 16 Atl. Rep. 207.

9. APPEAL—Justice of the Peace—Judgment.—In North Carolina, a motion to have satisfaction entered of a judgment rendered by a justice of the peace, on which execution has improvidently issued after payment, may be entertained by the justice, and an appeal will lie from his decision.—*Bailey v. Hester*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 164.

10. APPEAL—Supersedeas Bond—Sunday.—Under Rev. St. U. S. § 1007, providing procedure for obtaining supersedeas on writ of error and time within which, Sundays exclusive, it may be done: *Held*, that the exclusion of Sunday applies to the time for filing supersedeas and for lodging writ of error.—*Town of Danville v. Brown*, U. S. S. C. Dec. 3, 1888; 9 S. C. Rep. 149.

11. APPEAL—Notice.—Where the abstract of the record shows that no notice of appeal was served on the clerk of district court, as required by Code Iowa, § 3178, the appeal will be dismissed.—*Shelton v. Aupperle*, S. C. Iowa, Dec. 21, 1888; 40 N. W. Rep. 823.

12. APPEAL—Review—Record.—A finding as to the amount of damages a defendant is entitled to recoup by reason of the defective execution of work, compensation for which is sued for, will not be reviewed where the special facts relied on to sustain the objection to it are not stated, and no question upon the finding is reserved.—*Hays v. Minnick*, S. C. Ind., Dec. 11, 1888; 19 N. E. Rep. 102.

13. APPEAL—Practice—Exceptions.—Under Code Civil Proc. N. Y. § 2576, it is not necessary, in order to bring up for review the sufficiency of the evidence to support a decree admitting a will to probate, that any exception should have been taken to the findings of fact.—*Burger v. Burger*, N. Y. C. App., Dec. 11, 1888; 19 N. E. Rep. 99.

14. APPEAL—Evidence.—Where the direct testimony of a witness, if believed, is sufficient to convict, the point that it was destroyed by his testimony on cross-examination is not available on exceptions to the conviction.—*Commonwealth v. Lafayette*, S. J. C. Mass., Dec. 3, 1888; 19 N. E. Rep. 26.

15. APPEAL BOND—Surety.—A bond given in justice court having effect in releasing garnishment proceedings will bind the obligors to pay any final judgment against defendants in district court on appeal.—*Washer v. Campbell*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 858.

16. ASSIGNMENT FOR BENEFIT OF CREDITORS—Releases.—When an insolvent debtor assigns all his property for the benefit of all his creditors (and not for the benefit merely of those filing releases), the surplus, if any, to be repaid to him only after payment in full of all his debts, creditors cannot be required to file releases to the debtor as a condition of sharing in the benefits of the assignment.—*In re Bird*, S. C. Minn., Dec. 18, 1888; 40 N. W. Rep. 827.

17. ATTACHMENT—Evidence—Declarations.—Where the assignee of a defendant in a civil action files and presents a motion to discharge the property claimed by him under an assignment from the defendant, and the defendant is not a party to the motion, the statements

and declarations of the defendant subsequent to the assignment are not competent evidence against the assignee. — *Wichita, etc. Co. v. Records*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 881.

18. ATTACHMENT—Waiver—Delivery Bond. — The execution of a delivery bond, and the release of the property, constitute a waiver of all prior irregularities in the attachment proceedings. — *New Haven Lumber, Co. v. Reynolds*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 820.

19. AUCTION AND AUCTIONEER—Sale—Conversion. — An auctioneer who refuses a rightful demand for property placed in his hands for sale, and persists in selling it, is guilty of conversion. — *Miliken v. Hathaway*, S. J. C. Mass., Nov. 28, 1888; 19 N. E. Rep. 16.

20. BANKRUPTCY—Discharge—Execution—Laches. — Under Rev. St. U. S. § 5106, providing that suits against a bankrupt shall be stayed pending his application for discharge, etc., such a stay will not be granted when the application for discharge has been pending without action by the bankrupt for more than eight years. — *In re Sweet*, U. S. D. C. (N. Y.), Dec. 6, 1888; 86 Fed. Rep. 761.

21. BOUNDARIES—Lot Bordering on Street. — In asserting the boundaries of a city lot, the lines of the street as located by the city engineer, and acquiesced in by the city authorities for many years, are to be preferred to those of a more recent survey. — *Koenigs v. Jung*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 801.

22. CARRIERS—Passengers—Station Approaches—Dangerous Premises. — A railroad company which provides proper and safe means of egress from its depot platforms to the public highway is not liable to one who seeks to attain the highway by way of the railroad track, and is injured by falling into a cattle-guard. — *Sturgis v. Detroit*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 914.

23. CHATTEL MORTGAGE—Good-will—Foreclosure. — A mortgage of the "machinery, type, presses, cases, furniture, paper, forms, and tools" of a newspaper company, together with the "good-will" of its business, cannot be foreclosed as to the good-will after all the tangible property covered by the mortgage has been alienated, and the corporation has become consolidated with another newspaper corporation. — *Met. Nat. Bank v. St. Louis Dispatch Co.*, U. S. C. C. (Mo.), Nov. 21, 1888; 36 Fed. Rep. 723.

24. CONSPIRACY—Indictment—Sufficiency. — An indictment which charges a conspiracy by defendants to procure a complaint to be made against one of their number, and to cause him to be acquitted, but does not charge that they contemplated the use of any improper means to procure the acquittal, does not charge a conspiracy to do an unlawful act. — *Commonwealth v. McFarland*, S. J. C. Mass., Dec. 3, 1888; 19 N. E. Rep. 25.

25. CONSTITUTIONAL LAW—Contracts. — Act N. Y. 1875, ch. 600, requiring a reduction of rates of street railroad fare is not unconstitutional as impairing the obligation of contract between two companies, agreeing that one shall connect with the other so long as the latter receives fare at the rate allowed under then existing laws. — *Buffalo, etc. Co. v. Buffalo W. N. Co.*, N. Y. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 63.

26. CONSTRUCTION—Statute—Jurisdiction—Mandamus. — Act Ill. July 1, 1877, §§ 80-90, giving the supreme court jurisdiction to render judgment on an appeal in mandamus proceedings, is not affected by act June 6, 1887, entitled "An act to amend § 8, of an act entitled 'An act to establish appellate courts,' approved June 2, 1877." — *Dement v. Rokker*, S. C. Ill., Nov. 14, 1888; 19 N. E. Rep. 53.

27. CONTINUANCE—Discretion of Court—Review on Appeal. — The application for a continuance of the hearing on a motion for a new trial is addressed to the discretion of the trial court, and unless there has been an abuse of such discretion, on this court will not reverse the ruling. — *Westheimer v. Cooper*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 852.

28. CONTRACTS—Pleading—Conditions Precedent. — A contract for the exchange of lands provided that

each party should furnish complete abstracts, showing good and perfect titles: *Held*, that a petition, in an action for damages for non-performance, which failed to aver that plaintiff could furnish such abstract, was demurrable. — *McDoughlin v. McAllister*, U. S. C. C. (Mo.), Dec. 3, 1888; 86 Fed. Rep. 745.

29. CONTRACT—Pleading—Consideration. — If a written contract for the payment of money which states that it is "for value received" be set forth in a complaint according to its terms, the recital in the instrument is a sufficient allegation of a consideration. — *Ehnquist v. Markoc*, S. C. Minn., Dec. 10, 1888; 40 N. W. Rep. 825.

30. CONTRACT—Work and Labor—Statute of Frauds. — A party who performs labor for another under a verbal contract within the statute of frauds cannot enforce such agreement; but the party who has received the benefits of the labor, is liable for the same upon a quantum meruit. — *Wonsettler v. Lee*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 862.

31. CONTRACTS—Work and Labor—Pleading—Petition. — A petition on account for labor performed in the construction of a building, which alleges the execution of a contract, the performance of the labor thereunder by the plaintiff, the acceptance of the work by defendant and the amount due thereon states a cause of action. — *Davenport v. Jennings*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 962.

32. CORPORATIONS—Stockholder. — One who obtains judgment against an insolvent corporation brought suit against stockholder: *Held*, that whether the original claim of the plaintiff for damages was or was not an "indebtedness" of the corporation within the scope of § 3, art. 11, of the constitution, the judgment obtained thereon is such an "indebtedness," and any stockholder of the corporation is liable therefor to the plaintiff therein to the amount unpaid on his stock. — *Powell v. Oregonian Ry. Co.*, U. S. C. C. (Oreg.), Dec. 3, 1888; 36 Fed. Rep. 726.

33. CORPORATIONS—Elections—Executors and Administrator. — An executor or administrator, in virtue of § 39 of the general corporation act, is entitled to vote at an election of directors on the stock standing on the books of the corporation in the name of the testator or intestate, and no formal transfer or entry on the company's books is necessary to enable him to do so. — *In re Cape May, etc. Co.*, S. C. N. J., Dec. 1, 1888; 16 Atl. Rep. 191.

34. CORPORATIONS—Contracts. — Question of authority of cashier to bind corporations by contract there being no by-law or evidence of usage. — *Delta Lumber Co. v. Williams*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 940.

35. COSTS—Statute. — Construction of Code Civil Proc. N. Y. §§ 2853, 3228, providing for jurisdiction of justice of the peace and taxing costs, etc. — *Sherry v. Cary*, N. Y. Ct. App., Dec. 4, 1888; 19 N. E. Rep. 87.

36. COUNTIES—Statute—Officers. — Construction of Const. Mich. 1850, art. 10, §§ 9, 10, as to the powers of the board of county auditor of Wayne county. — *Taggart v. Board of Auditors*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 852.

37. COUNTIES—Liabilities—Renewal Bonds—Tax Limitation. — Where county bonds were issued in aid of a railroad, before the constitution of North Carolina of 1868, and in 1887 new bonds were issued in place of those that had matured, the act authorizing the issue of the new bonds declaring them to be a continuation of the former liability, such reissue was not the creation of a new debt. — *Blanton v. Board, etc.*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 162.

38. COUNTY WARRANTS—Negotiability—Treasurer. — Where a county treasurer, who by law was forbidden to buy or sell, or in any manner deal in county warrants, upon payment of a county warrant neglects to cancel it, but marks it, "not paid, for want of funds," and puts it into circulation, a subsequent holder

though he purchased it for value and in good faith, cannot maintain an action against the sureties on the official bond of the treasurer for alleged malfeasance in office. — *McConnell v. Simpson*, U. S. C. C. (Neb.), Nov. 30, 1888; 36 Fed. Rep. 750.

39. CREDITOR'S BILL—Devisee. — The interest of a beneficiary before distribution and sale of the realty, whose sale was postponed, is not attachable and he having no other property, his judgment creditor can maintain a creditor's bill, under Pub. St. Mass. ch. 151, § 2, cl. 11, as amended by St. 1884, ch. 285, to compel the executors to apply his interest to the payment of her debt. — *Ricketson v. Merrill*, S. C. Mass., Nov. 28, 1888; 19 N. E. Rep. 11.

40. CRIMINAL LAW—Indictment—Accessory Before the Fact. — One T was indicted for arson. By consent the indictment was changed to charge an attempt to burn, and he pleaded guilty: *Held*, that the change was *ultra vires*, and the sentence void, and T was not acquitted of the charge of arson so as to prevent one who was indicted as accessory before the fact from being tried under Rev. Code N. C. ch. 34, § 53.—*State v. Jones*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 147.

41. CRIMINAL LAW—Burglary—Indictment. — Indictment for burglary is sufficient though it does not state whether the owner of the building is a corporation or partnership under Pen. Code. Cal. § 939. — *People v. Henry*, S. C. Cal., Dec. 8, 1888; 19 Pac. Rep. 880.

42. CRIMINAL LAW—New Trial—Evidence. — Where it appears that defendant presenting motion for new trial on ground of newly-discovered witnesses, exercised no diligence in finding such witnesses at time of trial, the court is justified in overruling motion.—*Smith v. State*, S. O. Ga., Dec. 5, 1888; 8 S. E. Rep. 187.

43. CRIMINAL LAW—Venue. — The venue of an offense is a jurisdictional fact and there can be no legal conviction with proof that the offense was committed in the county.—*Davis v. State*, S. O. Ga., Nov. 28, 1888; 8 S. E. Rep. 184.

44. CRIMINAL LAW—Appeal—Evidence—Bill of Executions. — On a trial for assault with intent to kill, the rejection of evidence of a statement by the prosecuting witness as to the manner in which he held the pistol after he had taken it from defendant, the bill of exceptions not setting out the statement proposed to be shown, and not showing that the witness had given material evidence on that subject, nor that there was other error in the ruling, is not cause for reversal. — *State v. Clarkson*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 928.

45. CRIMINAL LAW—Continuance—Constitutional Law. — Where a defendant in a criminal prosecution presents a sufficient application for a continuance, on the ground of the absence of witnesses, with sufficient affidavits, the trial cannot proceed on the prosecuting attorney's consent that the facts alleged as those which the defendant expects to prove by such witnesses may be taken as their testimony. — *State v. Dyke*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 928.

46. CRIMINAL LAW—Jurisdiction. — A person undergoing confinement in jail for an escape cannot be tried for a felonious assault, on an indictment found at the same term as the former indictment and sentence, until the end of his imprisonment.—*State v. Jolly*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 897.

47. CRIMINAL LAW—Carrying Weapons—Deputy Sheriff. — Under Rev. St. Tex. art. 4520, one charged with unlawfully carrying a pistol cannot defend on the ground that he is a deputy-sheriff, where his appointment bears no indorsement and he was a resident of another county at the time of such appointment.—*Blair v. State*, Tex. Ct. App., Nov. 14, 1888; 9 S. W. Rep. 890.

48. CRIMINAL LAW—Continuance—Absent Witness. — Defendant in a murder case moved for a continuance for the absence of a witness: *Held*, that as the proposed testimony of the absent witness was not probably true, under Code Crim. Proc. Tex. art. 560, the continuance was properly refused. — *Testard v. State*, Tex. Ct. App., Oct. 27, 1888; 9 S. W. Rep. 888.

49. CRIMINAL LAW—Continuance. — A continuance in a criminal case will not be granted for the mere convenience of defendant and his counsel for the absence of witnesses the nature of whose testimony is unknown. — *People v. Jackson*, N. J. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 54.

50. DAMAGES—Fraud—Purchase. — Where, through collusion with a pretended agent of an insane woman, one obtains her consent to the transfer of a large amount of personal property at much less than its value, her administrator can, in an action for damages, recover the difference between the amount paid, or the value of the property given in exchange, and the value of the property so fraudulently obtained, without offering to return what was received. — *Johnson v. Culver*, S. O. Ind., Dec. 13, 1888; 19 N. E. Rep. 129.

51. DEED—Seal—Presumption. — Where the copy of sheriff's deed as recorded, contains no seal but the attestation clause recites that the deed is signed and sealed, it will be presumed that the original deed was sealed. Over ruling *Hamilton v. Boggess*, 63 Mo. 233. — *McCoy v. Cassidy*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 928.

52. DIVORCE—Custody of Child. — In an action for divorce by a wife, where it appears that the complaint was properly dismissed, and divorce granted on the cross-bill of the husband, and that he is the proper person to whom the care and custody of the child should be committed, it should be given to him, with permission to the mother to visit the child at reasonable times.—*Bailey v. Bailey*, S. O. Oreg., Nov. 28, 1888; 19 Pac. Rep. 844.

53. DIVORCE—Adultery—Evidence. — Sufficiency of evidence to warrant decree for divorce on the ground of adultery.—*Leyland v. Leyland*, N. J. Ct. Chan., Dec. 14, 1888; 16 Atl. Rep. 177.

54. DOWER—Seizin. — *Held*, upon the facts in the case that the interest of plaintiff's husband in the land at his death was not such as to entitle plaintiff to dower therein.—*Beebe v. Lyle*, S. O. Mich., Nov. 28, 1888; 40 N. W. Rep. 944.

55. DOWER—Release—Acknowledgment. — A sealed agreement between husband and wife in 1868, by which the latter released any claim to her husband's property but which was not acknowledged as required by Illinois statute is not effectual release of dower. — *Bottomly v. Spencer*, U. S. C. C. (Ill.), Nov. 28, 1888; 36 Fed. Rep. 782.

56. DRAINAGE—Taxation—Constitutional Law. — Pub. Acts Mich. 1885, No. 227, to provide for the construction and maintenance of drains and the assessment and collection of taxes therefor, is valid. — *Mathias v. Cramer*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 926.

57. EJECTMENT—Execution—Judgment. — Plaintiff in ejectment, claiming title under execution sale, must put in evidence the judgment upon which execution issued. Its recital in the execution not sufficient. — *Levison v. Henninger*, S. O. Cal., Dec. 10, 1888; 19 Pac. Rep. 834.

58. EJECTMENT—Evidence—Statute of Frauds. — In an action of ejectment, evidence of an oral agreement between defendant and one to whom he conveyed the land, and under whom plaintiff claims, that defendant should have the right to redeem on payment of a certain sum, is properly excluded. — *McGlands v. Fernandes*, S. C. Ill., Nov. 14, 1888; 19 N. E. Rep. 44.

59. EMINENT DOMAIN—Telephone Companies. — In a petition for the assessment of damages for the taking of lands for the erection of telephone poles it must appear that the telephone company is organized under the laws of this State, and that the common council of the city within which the poles are erected has designated the streets in which the poles are to be placed. — *State v. N. Y. & N. J., etc. Co.*, S. O. N. J., Nov. 20, 1888; 16 Atl. Rep. 188.

60. EMINENT DOMAIN—Ejectment—Estoppel. — One who has taken no steps to prevent the location and construction of a railroad on the street in front of his

lot, cannot, after the road has been fully completed and put in operation, eject the company from the street, but is confined to his action for damages.—*L. N. A. & C. Ry. Co. v. Saltwaddle*, S. C. Ind., Dec. 12, 1888; 19 N. E. Rep. 111.

61. EMINENT DOMAIN—Compensation—Evidence—Opinion. — Where persons are shown to be familiar with the value of a particular piece of land across which a railroad has been built, they may be permitted as witnesses to testify as to the value of such tract immediately before the location of the road, and to the value thereof immediately afterwards.—*Blakely v. Chicago, etc. Co.*, S. C. Neb., Dec. 12, 1888; 40 N. W. Rep. 356.

62. EQUITY—Pleading—Multifariousness.—Question whether bill for damages and injunction was multifarious.—*Brinkner, etc. Co. v. Henry*, S. O. Wis., Dec. 22, 1888; 40 N. W. Rep. 809.

63. EQUITY—Cancellation—Undue Influence.—Evidence which court held not sufficient to set aside a deed for undue influence.—*Gunther v. Gunther*, Md. Ct. App., Dec. 16, 1888; 16 Atl. Rep. 219.

64. EQUITY—Bill of Review. — As to what an applicant must show in order to obtain leave to file a bill of review on the ground of newly-discovered evidence.—*Trophogan's Ex'r. v. Vorhees*, N. J. Ct. Chan., Dec. 7, 1888; 16 Atl. Rep. 198.

65. EQUITY—Fraud—Cancellation. — Conveyances will not be set aside for fraud where it appears that the complainant is an experienced real estate dealer, capable of taking care of his own interest and that he did not act on vendee's representations.—*Shields v. Hamburg*, U. S. S. C., Dec., 17, 1888; 9 S. C. Rep. 176.

66. EQUITY—Accounting—Redemption. — Where the creditor of one occupying land under a contract of purchase agreed to purchase it at tax-sale, and convey to the debtor on payment of the debt, and the debtor thereupon refrained from bidding, and the creditor conveyed his "right" to another, who had notice of the agreement, the debtor, is entitled to an accounting, and a decree giving him right to redeem.—*Berlin v. Bieler*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 916.

67. EQUITY—Conspiracy to Defraud Creditors. — One who enters into a conspiracy to defraud the creditors of a co-conspirator, and, pursuant to such purpose, obtains a judgment, and a sale under an execution thereon, may be compelled to account for the proceeds of the sale to the creditors of the co-conspirator.—*Phelps v. Smith*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 156.

68. EQUITY—Jurisdiction—Mistake. — The chancery court has jurisdiction of a bill to remove a cloud arising from mistake in description in a partition agreement.—*Robinson v. Jones*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 102.

69. EVIDENCE—Books of Accounts. — In ejectment by the grantee of the vendor to enforce a forfeiture for non-payment of the purchase price, the vendor's account-book, containing a charge against and credits in favor of the vendee, is not admissible to prove that the purchase price is in part unpaid.—*Kerns v. Dean*, S. O. Cal., Dec. 13, 1888; 19 Pac. Rep. 17.

70. EVIDENCE—Parol Agreement. — In suit against county for rent of building for court house evidence of parol agreement between plaintiff and defendant to submit to an architect the question of safety of building is admissible.—*Riley v. Pettis County*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 906.

71. EVIDENCE—Right of Way. — A grant of right of way to a railroad company across certain lands which fails to define the width of the strip is not conclusively presumed to intend to convey 100 feet in width, because a railroad is empowered to lay out its road not exceeding six rods wide, and evidence is admissible to show that the road was originally laid out at a less width, so as to explain the intention of the parties.—*Ind. & V. R. Co. v. Reynolds*, S. C. Ind., Dec. 15, 1888; 19 N. E. Rep. 141.

72. EXECUTION—Instructions. — Where there is no evidence of instructions, or of an understanding, it is

error, in replevin by mortgagees for goods levied on under the execution, to submit to the jury the question whether there was such instructions or understanding.—*Williams v. Mellor*, S. O. Colo., Nov. 30, 1888; 19 Pac. Rep. 889.

73. EXECUTION—Justice—Inventory. — If a constable, under an execution of a justice's court, takes actual possession of defendant's chattel, it will amount to a valid levy, although no inventory be taken.—*State v. Martin*, S. C. N. J., Nov. 26, 1888; 16 Atl. Rep. 199.

74. EXECUTION—Sheriff's Deed. — Duty of court to set aside sheriff's sale under execution, where an account of formation of lot sold the sheriff should have divided it into parcels and sold to better advantage.—*Gordon v. Hickman*, S. O. Mo., Nov. 26, 1888; 9 S. W. Rep. 920.

75. EXECUTION—Redemption. — A mortgagee, whose mortgage was executed and recorded after a sale on execution, is entitled to redeem from such sale, under Rev. St. Ind. 1881, § 774.—*Hervey v. Krost*, S. O. Ind., Dec. 13, 1888; 19 N. E. Rep. 125.

76. EXECUTION—Stockholders—Sale of Pledged Stock—Liability of Purchaser. — A levy and sale of bank shares, under execution, against the former owner, after he has transferred them on the books to others as collateral security for a debt unpaid and due at the date of the levy, and greater than the market value of the stock at that time, passes no title.—*Simmons v. Hill*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 61.

77. EXECUTORS AND ADMINISTRATORS—Claims. — A complaint, in an action by a widow against her husband's estate, alleging that on a sale of land, of which four-fifths belong to her, her husband, without her knowledge took notes for, and converted the entire purchase price, is sufficient on demurrer without alleging a demand.—*Armstrong v. Lindley*, S. O. Ind., Dec. 14, 1888; 19 N. E. Rep. 183.

78. EXECUTORS AND ADMINISTRATORS—Payment of Taxes. — An executor is not entitled to credit for the payment of taxes a portion of which were on lands of which testator did not die seized.—*In re Decker's Estate*, N. Y. Ct. App., Nov. 27, 1888; 19 Pac. Rep. 66.

79. EXECUTORS AND ADMINISTRATORS—Demands—Evidence. — Where a son presents a claim against his father's estate as for money loaned in 1876, which the executors allege was given in part payment of a large debt shown to have been due the father in 1866, evidence is admissible to show that in 1873, after the death of his father, he attempted to procure his father's name to be forged to an antedated receipt for the amount of the debt of 1866.—*Graham v. Graham*, N. Y. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 53.

80. FACTOR AND BROKER—Evidence—Contract. — Question of weight of evidence and finding of facts by lower court in suit on contract to secure a loan.—*Bacon v. Rupert*, S. C. Minn., Dec. 13, 1888; 40 N. W. Rep. 832.

81. FACTOR AND BROKER—Commissions—Evidence. — Question of weight of evidence in action for commission by one broker against another for division of commissions.—*O'Callaghan v. Boeing*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 843.

82. FALSE PERSONATION—Evidence. — Under Pen. Code Cal. § 529, making punishable "every person who falsely personates another," a conviction cannot be sustained for falsely personating a certain doctor, where the evidence shows that defendant did not assume to pretend to be the doctor, but signed the latter's name to the death certificate on being told that he had authorized it.—*People v. Maurier*, S. O. Cal., Dec. 8, 1888; 19 Pac. Rep. 832.

83. FALSE REPRESENTATIONS—Scienter—Evidence. — Where the petition alleges that defendant knew, when he made them, that his representations were untrue, plaintiff must prove actual knowledge, and not mere reasonable cause of belief.—*Allison v. Jack*, S. O. Iowa, Dec. 19, 1888; 40 N. W. Rep. 811.

84. FEDERAL COURTS—Practice—Bills of Exception

—Rev. St. U. S. § 914, requiring the practice, in the circuit court to conform, as near as may be to those of the State courts, any rule of court to the contrary notwithstanding, does not apply to bills of exceptions, which may be regulated by rules of the circuit courts. — *In re Chattanooga Iron Co.*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 180.

85. FEDERAL COURTS — Jurisdiction — Trade-marks — Infringement. — Under act Cong. March 3, 1881, § 11, the circuit court has no jurisdiction of an action between citizens of the same State for infringement of a trade-mark, where it is not alleged that it "was used on goods intended to be transported to a foreign country." — *Ryder v. Hall*, U. S. S. C. Dec. 10, 1888; 9 S. C. Rep. 145.

86. FEDERAL COURTS. — Errors assigned in the court's holdings that a record sufficiently identified a mining claim, and that the annual labor should not be measured by its actual value, but by a speculative value in advance, show no question of federal law involved. — *Quinby v. Boyd*, U. S. S. C., Nov. 26, 1888; 9 S. C. Rep. 147.

87. FEDERAL COURTS—Venue—Corporations.—Under act Cong. March 3, 1887, as modified and explained by act Aug. 13, 1888, a New York corporation, having its principal office in that State, and doing business in Illinois, cannot be sued in the federal courts in Illinois. — *Preston v. Fire, etc. Co.*, U. S. S. C. (Ill.), Nov. 5, 1888; 86 Fed. Rep. 721.

88. FRAUDS—Statute of—Verbal Promise. — Verbal promises to pay the debt of another, if the creditor will forbear to sue, or discontinue a suit already begun, or release a lien on personal property held in pledge, unless the promisor derives a benefit therefrom peculiar to himself, are all collateral undertakings, and within the statute, unless in writing. — *Miller v. Lynch*, S. C. Oreg., Nov. 1, 1888; 19 Pac. Rep. 845.

89. FRAUDS—Statute of—Sale—Contract. — An execution or contract for the sale of chattels for the price of \$50 or more is within the statute of frauds, although it also embraces some other agreement to which the statute is not applicable. — *Henson v. Marsh*, S. C. Minn., Dec. 27, 1888; 40 N. W. Rep. 841.

90. FRAUDULENT CONVEYANCES — Homestead. — In the absence of an intent to defraud creditors, an insolvent merchant may take a part or the whole of his stock of goods to purchase a homestead, which will be protected from seizure and sale on execution by creditors who sold him the goods. — *Melgs v. Dibble*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 985.

91. GAMING—Renting for Gambling House — Evidence. — Evidence sufficient to support verdict of guilty under Rev. St. Ind. § 2079, making it penal to rent premises for gaming. — *Morgan v. State*, S. C. Ind., Dec. 19, 1888; 19 N. E. Rep. 154.

92. GARNISHMENT—Creditor. — Question of right of garnishment where the identity of the creditor by name not fully established. — *Allison v. C., B. & Q. R. Co.*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 813.

93. GRAND JURY—Number—Constitutional Law. — A statute making the number of grand jurors in a county dependent on the population does not violate the constitutional provision requiring all laws of a general nature to operate uniformly. — *State v. Standley*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 815.

94. HIGHWAYS—Defects—Instruction. — In action for injuries received while walking along a highway: Held, proper to refuse to charge that, if plaintiff knew there was no guard, and was unable to see the road and its surroundings solely by reason of the darkness, and walked off the embankment, he could not recover. — *Allegheny County v. Broadwaters*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 223.

95. HOMESTEAD—Mortgage — Failure of Wife to Sign. — A mortgage (not for purchase money) of his homestead, by a married man, without his wife's signature, is void, and the fact that the husband and wife are subsequently divorced will not render it valid. — *All v. Bankholzer*, S. C. Minn., Dec. 18, 1888; 40 N. W. Rep. 823.

96. HOMESTEAD—Exemption— Undivided Interest. — It is error to measure the result of a claim case by the amount to be collected out of the property, when it ought to be measured by the interest of the defendant in the property levied upon. — *Vining v. Officers*, S. C. Ga., Nov. 12, 1888; 8 S. E. Rep. 185.

97. HOMESTEAD—Allotment. — Under Code N. C. § 519, providing a remedy for a judgment debtor who may be dissatisfied with the valuation and allotment of his homestead, where a homestead is allotted, and no exceptions taken thereto, the sheriff may sell the excess, and the purchaser has a right to assume a determination of all dissatisfaction with the allotment. — *Welch v. Welch*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 156.

98. HUSBAND AND WIFE — Wife's Separate Estate — Growing Crops. — Where a married woman owns a farm, the mere fact that her husband lives with her and assists in its cultivation will not warrant an inference that the ownership in the crops vested in him. — *Hearty v. Klinkhammer*, S. C. Minn., Dec. 10, 1888; 40 N. W. Rep. 636.

99. HUSBAND AND WIFE—Contract—Joint Estate.—How. St. Mich. §§ 6295-6297, removes the common-law disability of a married woman to contract in reference to her separate estate only, and does not make her liable on a contract made jointly with her husband for improvements on the land owned by them jointly. — *Speier v. Opfer*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 909.

100. INJUNCTION—Fraud—Stock of Goods. — Injunction will not lie by creditor to restrain debtor from transferring goods where there is no allegation of fraud in procuring them and it does not appear that debtor is insolvent. — *Dereny v. Hicks*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 179.

101. INSTRUCTIONS — Opinion. — Question whether instructions on questions of due care in negligence case, were in violation of Pub. St. ch. 153, § 5, providing that courts shall not charge juries with respect to matters of fact. — *McKean v. City of Salem*, S. J. C. Mass., Nov. 28, 1888; 19 N. E. Rep. 21.

102. INSURANCE — Pleading — Conditions. — Under Rev. St. Ind. 1881, § 370, an allegation, in an action on a fire insurance policy, that "all matters and things required by said open policy had been in all things complied with," is sufficient. — *Amer. Cent. Ins. Co. v. Sweetser*, S. C. Ind., Dec. 19, 1888; 19 N. E. Rep. 159.

103. INSURANCE—Condition. — A condition in insurance policy that no suit for claim shall be sustained unless commenced within twelve months, is a complete bar to a suit begun after expiration of that time. — *Gho v. West. Assur. Co.*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 102.

104. INTOXICATING LIQUORS—Verdict.—Question of sufficiency of finding in verdict by jury, in action for illegal sale of intoxicating liquors. — *Commonwealth v. Certain Intoxicating Liquors*, S. C. Mass., Dec. 3, 1888; 19 N. E. Rep. 23.

105. INTOXICATING LIQUORS — Illegal Sales — Medical Purposes. — Under the North Carolina license acts of 1887, an unlicensed person not a druggist cannot lawfully retail liquor for medical purposes on a physician's prescription. — *State v. Dalton*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 154.

106. INTOXICATING LIQUORS — Illegal Sale — Evidence. — Evidence sufficient to sustain a verdict for illegally selling intoxicating liquor in a tenement claimed not to belong to defendants. — *Commonwealth v. Locke*, S. J. O. Mass., Dec. 3, 1888; 19 Pac. Rep. 24.

107. INTOXICATING LIQUORS — Complaint—Venue.—Complaint for illegally selling liquors sufficiently alleged the venue. — *Commonwealth v. Rhodes*, S. J. C. Mass., Nov. 30, 1888; 19 N. E. Rep. 22.

108. JUDGMENT—Res Adjudicata. — Points decided on an affidavit of illegality, after judgment in an attachment suit, are *res adjudicata* on a subsequent petition

for an injunction against levying a *fi. fa.*—*Craig v. Cosby*, S. C. Ga., Dec. 5, 1888; 8 S. E. Rep. 185.

109. JUDGMENT—Execution—Levy. — It does not prevent the dormancy of a judgment that a levy could not be made on certain property because of the existence of a homestead right which did not expire until after the expiration of the time within which a judgment becomes dormant. — *Anderson v. Kilgore*, S. C. Ga., Dec. 7, 1888; 8 S. E. Rep. 189.

110. JUDGMENT—Evidence—Res Adjudicata. — In an action to enforce the collection of a judgment rendered on a note executed by defendant's testator, evidence introduced by defendant, inquiring into the validity of the note, is inadmissible. — *Rogers v. Kunsey*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 189.

111. JUDICIAL SALES—Description—Negligence of Purchaser. — A purchaser at partition sale, who neglects to examine the official advertisement of the referee making it, and relies upon a hand-bill, cannot complain that he was misled as to the number of acres. — *Dennerlein v. Dennerlein*, N. Y. Ct. App., Dec. 4, 1888; 19 N. E. Rep. 85.

112. LANDLORD AND TENANT—Notice. — A landlord on January 16, 1888, rented a house on monthly payments. He sold the house on April 1, following. The tenant subsequently paid his rent monthly to the assignee of the reversion. The assignee gave a month's notice to the tenant to quit on October 16, 1888; *Held*, that the payment of rent to the assignee was not the beginning under a new tenancy under Laws 1888, p. 496. — *State v. Schittinger*, S. C. N. J., Nov. 30, 1888; 16 Atl. Rep. 186.

113. LANDLORD AND TENANT—Leases—Forfeiture—Rent. — A clause in a lease declaring that, if the rent remains unpaid for a definite period, the tenant's rights and privileges shall become forfeited, does not have the effect of avoiding the lease on the happening of the default. — *Crevelling v. West End Iron Co.*, S. C. N. J., Dec. 10, 1888; 16 Atl. Rep. 184.

114. LIMITATION OF ACTIONS—Acknowledgment—Account. — Under Gen. St. 1878, ch. 66, § 24, a statement of account, unless evidenced by some writing signed by the party to be charged, will not prevent the running of the statute of limitations against previously existing liabilities included therein. — *Erpelding v. Ludwig*, S. C. Minn., Dec. 18, 1888; 40 N. W. Rep. 829.

115. LIMITATION OF ACTIONS—Fraud. — Evidence reviewed with reference to the question as to whether there was fraud by which the statute of limitation was prevented from running, under Code Ga. § 2981. — *Marler v. Simmons*, S. C. Ga., Dec. 5, 1888; 8 S. E. Rep. 190.

116. LIMITATION OF ACTIONS—Adverse Possession. — Facts upon which court hold in the case of conveyance of land charged with a bequest, of which defendants had no notice, that statute of limitations was a complete bar. — *Trustees v. Bank, etc.*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 174.

117. LIMITATION OF ACTIONS—Tax-sale—Possession. — As the act of Missouri of 1872, providing for the sale of land for taxes, unlike the act of 1857, does not give the holder of a certificate of purchase possession of the land until the right of redemption expires, the statute of limitations begins to run at the time the purchaser takes possession. — *Parsons v. Viets*, S. C. Mo., Nov. 30, 1888; 9 S. W. Rep. 908.

118. LIMITATION OF ACTIONS—Void Tax—Assumpsit. — An action to recover the amount paid on an assessment, alleged to be void for want of jurisdiction to levy it, is one of a legal nature, to which the six years' statute of limitation applies. — *Jex v. Mayor*, N. Y. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 52.

119. MALICIOUS PROSECUTION—Advice of Counsel. — Evidence in this case for malicious prosecution upon the question as to whether defendant was guided by advice of counsel: *Held*, sufficient to sustain a verdict for plaintiff. — *Vann v. McCreary*, S. C. Cal., Dec. 8, 1888; 19 Pac. Rep. 828.

120. MARITIME LIEN—Material. — Under a statute giving a lien for materials "furnished" in and about the building and repairing of a water craft, it is sufficient to show that the materials were ordered for and delivered to or near the vessel. — *The James H. Prentice*, U. S. D. C. (Mich.), Nov. 21, 1888; 86 Fed. Rep. 777.

121. MASTER AND SERVANT. — Plaintiff got on the front of defendant's switch engine, which was then switching cars, at the invitation of defendant's brakeman, and was injured. It did not appear that the agent was acting within the scope of his employment: *Held*, that the defendant was not liable. — *Stringer v. Mo. Pac. Ry. Co.*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 905.

122. MASTER AND SERVANT—Negligence—Knowledge of Danger. — Where a switchman knew the shape and purpose of a "frog," it was error to submit to the jury whether he was charged with notice of the difficulty of removing his foot from the converging rails, and of the danger resulting from having his foot caught therein. — *Appel v. Buffalo, etc. Co.*, N. Y. Ct. App., Dec. 11, 1888; 19 N. E. Rep. 93.

123. MECHANIC'S LIEN—Notice—Retainer of Moneys Subsequently Due. — The owner of a building is bound to retain moneys due, or to grow due to the contractor, after being served with notice by the material man or workman of the non-payment of his claim, in accordance with the mechanic's lien law. — *Budd v. School Dist.*, S. C. N. J., Dec. 10, 1888; 16 Atl. Rep. 194.

124. MECHANIC'S LIEN—Property—Undivided Lot. — When defendant, owning a large lot on which four houses are already built, erects two other houses thereon, without in any manner subdividing the lot, a mechanic's lien for the two houses covers the whole lot. — *Quimby v. Durgin*, S. J. C. Mass., Nov. 28, 1888; 19 N. E. Rep. 14.

125. MINES AND MINING—Custom—Equity. — The legal remedy for acts which render the development of a mining claim impossible is inadequate, and, under Gen. Stat. Colo. § 2293, a miner must take care of his tailings on his own property, and evidence of a custom of miners to dump their tailings upon their own grounds, and let them go where they will, is insufficient to prevent the issuing of an injunction. — *Fuller v. Swan, etc. Co.*, S. C. Colo., Nov. 30, 1888; 19 Pac. Rep. 836.

126. MORTGAGE—Foreclosure—Title. — On bill to foreclose mortgage, the title or ownership of the mortgage which is in dispute will not be determined. — *Hunt v. Bradfield*, N. J. Ct. Chan., Nov. 26, 1888; 16 Atl. Rep. 178.

127. MORTGAGE—Evidence. — An indorsement by a mortgagee upon the bond, stating the amount due, is not evidence against the mortgagor, where it is not shown that it was ever brought to his notice until after the death of the mortgagee. — *Coleman v. Howell*, N. J. Ct. Chan., Dec. 4, 1888; 16 Atl. Rep. 202.

128. MORTGAGE—Foreclosure—Merger. — In an action to foreclose, the complaint prayed judgment against all of the makers of the note secured, but the judgment entered by default was personal against only one of them: *Held*, that the note was merged in the judgment, and plaintiff could not bring a subsequent action thereon against the other makers. — *Lawrence v. Beecher*, S. C. Ind., Dec. 15, 1888; 19 N. E. Rep. 143.

129. MUNICIPAL CORPORATIONS—Public Improvements—Assessment. — Under the charter and ordinances of St. Louis, relative to opening of streets, in an action on a special tax bill for alleged benefits to defendant's property: *Held* that, defendant having received notice of the proposed assessment, it was not necessary that he should be made a party defendant in the condemnation proceedings. — *City of St. Louis v. Rankin*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 910.

130. MUNICIPAL CORPORATIONS—Ordinance—Passage—Yeas and Nays. — Though Code Iowa, § 498, requires the yeas and nays to be taken and recorded upon the passage of a municipal ordinance, it is immaterial that the nays do not appear to have been called where only five members of a council composed of eight are shown

by the record to have been present, all of whom voted in the affirmative.—*Bayard v. Baker*, S. C. Iowa, Dec. 19, 1888; 40 N. W. Rep. 818.

131. MUNICIPAL CORPORATIONS—Taxation—Exemptions.—The property in Brooklyn belonging to the city of New York, and used by it as a landing for its ferry, is used for public and municipal purposes, though controlled by lessees, is therefore exempt from taxation.—*People etc. v. Assessors*, N. Y. Ct. App., Dec. 4, 1888; 19 N. E. Rep. 90.

132. NEGLIGENCE—Injury.—Question as to whether plaintiff injured while walking on defendant's track was exercising watchfulness and care.—*State v. B. & O. R. Co.*, Md. Ct. App., Dec. 6, 1888; 16 Atl. Rep. 210.

133. NEGLIGENCE—Injury.—Held, in an action for injury, that though the train was running at a higher rate of speed than was allowed by the city ordinance, the death was caused by deceased's own negligence.—*B. & O. R. Co. v. State*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 212.

134. NEGLIGENCE—Evidence.—Held, under the fact that the question of negligence and contributory negligence, by which plaintiff was injured while on pay car of defendant was for the jury.—*New York, etc. Co. v. Colbourn*, Md. Ct. App., Nov. 22, 1888; 16 Atl. Rep. 208.

135. NEGLIGENCE—Passengers—Injury to Pregnant Woman.—Whether by the same use of ordinary care a pregnant woman could avoid the consequences to herself of the negligence of a railway company, in not providing a safe and suitable place to alight from the cars, the conductor having designated the place as suitable, is a question for the jury.—*Georgia, etc. Co. v. Usury*, S. C. Ga., Nov. 23, 1888; 8 S. E. Rep. 186.

136. NEGLIGENCE—Dangerous Premises—Trespassers.—In an action for injuries received in the manufactory of the defendants, the general allegation that plaintiff was lawfully on the premises is sufficient to show that he was not a trespasser.—*Mathews v. Boussee*, S. C. N. J., Dec. 10, 1888; 16 Atl. Rep. 195.

137. NEGLIGENCE—Carriers—Passengers.—Question of facts as to whether there was overloading or negligent mismanagement of train on which plaintiff was injured.—*Wallace v. Western, etc. Ry. Co.*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 166.

138. NEGLIGENCE—Railroad Company—Fire.—Sufficiency of evidence to establish negligence in action for damages against railroad caused by fire from locomotive.—*C. & E., I. R. R. Co. v. Ostrander*, S. C. Ind., Dec. 12, 1888; 19 N. E. Rep. 110.

139. NEGLIGENCE—Evidence—Instruction.—In an action against a railroad company for negligence in repairing its track on a street, by which, in cutting a rail with a cold-chisel, a piece of iron was thrown, striking and destroying plaintiff's eye, it is error to instruct that if defendant did the work in such manner as to throw pieces of iron through the air with great velocity, so as to endanger the safety of people on the street, plaintiff could recover if injured thereby, there being no evidence to support it.—*C. M. etc. R. Co. v. Harper*, S. C. Ill., Nov. 15, 1888; 19 N. E. Rep. 81.

140. NEGLIGENCE—Passenger—Street Car.—Review of evidence as to contributory negligence of plaintiff injured while attempting to get on street car.—*Briggs v. Union, etc. Ry. Co.*, S. J. C. Mass., Nov. 28, 1888; 19 N. E. Rep. 19.

141. NEGLIGENCE—Evidence.—Review of evidence as to contributory negligence of plaintiff injured in a freight elevator.—*Patterson v. Hamenway*, S. J. C. Mass., Nov. 28, 1888; 19 N. E. Rep. 15.

142. NEW TRIAL—Costs.—Under the facts, the court had no jurisdiction to grant a new trial under Rev. St. Ill., ch. 45, § 35, giving right to new trial on payment of costs.—*Cook County v. Claumert, etc. Co.*, S. C. Ill., Nov. 14, 1888; 19 N. E. Rep. 46.

143. ORDERS—Bill of Exchange.—A written order

directing the drawee to "pay to the bearer \$38, and oblige" is a bill of exchange, under Code Ga. § 1950.—*Ingle v. Davis*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 192.

144. PARENT AND CHILD—Support of Step-child—Right to Service.—The law does not impose upon a step-father the duty of supporting a step child, nor is he by virtue of such relation entitled to demand its services.—*Gerber v. Bawertine*, S. C. Oreg., Dec. 3, 1888; 19 Pac. Rep. 849.

145. PARTITION—Purchase Money—Improvements.—In an action for partition by a son, who in the life-time of his mother, from whom the lands descended, had made a parol contract to sell his interest to his brother, such interest is chargeable with the purchase money paid by the latter, and with improvements made by him to the extent of the interest of the vendor.—*Tucker v. Markland*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 169.

146. PARTITION—Parties—Construction.—Under Pub. St. Mass. ch. 178, § 11, providing for continuance to enable parties to answer in partition case, they must have estate or legal interest in the lands in controversy and under the evidence herein such interest not sufficiently shown.—*Fales v. Fales*, S. J. C. Mass., Nov. 28, 1888; 19 N. E. Rep. 6.

147. PARTNERSHIP—Sale—Assumption.—Question under the testimony whether the defendant, who was an incoming partner assumed certain obligations of the old firm.—*Smith v. Allard*, S. C. Cal., Dec. 8, 1888; 19 Pac. Rep. 824.

148. PARTNERSHIP—Parties—Joinder.—Under Code Iowa, §§ 2543-255, requiring actions to be brought in the name of the real party in interest, etc., be joined, unless otherwise provided, an administratrix of a deceased partner should not be joined with the survivor in an action against the firm's debtor on an account stated, before settlement of the partnership and distribution of the assets, as while she has an interest in the proceeds, she has none in the chose in action itself, the title to which upon her intestate's death passed to the survivor.—*Robinson v. Hintrager*, U. S. C. O. (Iowa), Dec. 6, 1888; 36 Fed. Rep. 752.

149. PATENTS—Defects—Pleading.—A patent was issued, from which the signature of the secretary of the interior was omitted. Pending a suit for infringement, the omission was discovered and the patent returned to the patent office, where the then acting secretary signed it as of its own original date: Held, that defendant could impeach its validity without pleading the defense.—*Marsh v. Nichols*, U. S. S. O., Dec. 10, 1888; 9 S. C. Rep. 168.

150. PATENTS—Infringement.—Question of infringement of patent look and key.—*Yale, etc. Co. v. Corbis*, U. S. C. O. (Conn.), Nov. 27, 1888; 36 Fed. Rep. 785.

151. PATENTS—Novelty.—Claim for patent No. 179,400, for improvements in spring seats, is void for want of novelty.—*Hale, etc. Co. v. Hartford, etc. Co.*, U. S. C. O. (Conn.), Dec. 4, 1888; 36 Fed. Rep. 782.

152. PLEADING—Liberal Construction.—The Civil Code of this State requires the allegations of a pleading to be liberally construed, in order to determine its effect, with a view to substantial justice between the parties.—*Jackson v. Jackson*, S. C. Oreg., Nov. 26, 1888; 19 Pac. Rep. 847.

153. PLEADING—Specific Performance—Departure.—Question as to whether there was a departure by plaintiff in pleading, where defendant on suit for specific performance first set up rescission of contract by agreement and plaintiff replied admitting same, but alleging that it was on condition of payment of some money.—*Houston v. Sledge*, S. C. N. C., Dec. 10, 1888; 8 S. E. Rep. 145.

154. PLEADING—Bill of Particulars—Discretion of Court.—In a suit for wrongful conversion of personal property, where defendant alleges that plaintiff placed certain property in his hands to use and invest, and that heavy losses were incurred, the court, in its discretion, may order defendant to furnish a bill of partic-

ulars.—*Cunrad v. Francklyn*, N. Y. Ct. App., Dec. 4, 1888; 19 N. E. Rep. 92.

155. PLEADING—Judgment—Demurrer.—A judgment upon demurrer, involving merits of the action or jurisdiction of the court is as complete as judgment following verdict of a jury. — *McLaughlin v. Doan*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 858.

156. POOR LAWS—Pleading.—Sufficiency of allegation as to where pauper was "last legally settled" under North Carolina poor laws.—*Commissions Brown County v. Commissions Buncombe County* S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 176.

157. POOR AND POOR LAWS—Settlement—Division of Township.—When part of the territory composing an old township is by act of the legislature formed into a new township, those persons who at the time of separation had a legal settlement in the old township, and resided upon the territory so cut off, acquire, *ipso facto*, a legal settlement in the new township. — *Overseer of Franklin Tp. v. Overseer of Clinton Tp.*, S. C. N. J., Nov. 12, 1888; 16 Atl. Rep. 184.

158. POST-OFFICE—Postmaster—Larceny—Official Bond.—A postmaster placed in the mail-bag, at his office, a sum of money belonging to the government, to be carried through the mail to the postal depository. While the carrier was on his way to deliver the mail-bag to a steamboat, the postmaster intercepted and robbed him of the bag and contents. His sureties were held liable on the postmaster's bond for the sum claimed by the government.—*United States v. Jones*, U. S. C. C. (La.), Oct. 1888; 36 Fed. Rep. 759.

159. POWERS—Testamentary—Right of Executrix to Borrow Money.—Express direction in a will to keep the estate together, and carry on farming operations, implies a limited power in the executrix to incur debts on the credit of the estate for needful supplies.—*Palmer v. Moore*, S. C. Ga., Dec. 3, 1888; 8 S. E. Rep. 180.

160. PRACTICE IN CIVIL CASES—New Trial—Exceptions.—Arguing motion for new trial at judge's suggestion after filing bill of exceptions, the court may hold, though the motion is refused, that the excepting party has not waived the exceptions.—*Anthony v. Travis*, S. J. O. Mass., Nov. 28, 1888; 19 N. E. Rep. 8.

161. PRACTICE IN CIVIL CASES—Change of Venue.—In an action which must be tried in the county in which defendants or some of them reside, an order denying a motion for change of venue from the county in which one of sixteen defendants resides to a county in which others are residents will not be reviewed.—*Hirschfeld v. Severe*, S. C. Cal., Dec. 6, 1888; 19 Pac. Rep. 819.

162. PRINCIPAL AND AGENT—Authority of Architect.—An architect whose authority it is to see that the building is properly constructed, is not authorized to receive notice of an assignment of the payments accruing on the contract for the erection of the building.—*Renton v. Monsier*, S. C. Cal., Dec. 8, 1888; 19 Pac. Rep. 820.

163. PUBLIC LANDS—French and Spanish Titles.—Act Cong. June 18, 1872, providing for the confirmation of French and Spanish titles in certain villages in Missouri, operated as a grant *in presenti* of the land, and a later act giving land so possessed to the State for school purposes is void.—*Glasgow v. Baker*, U. S. S. C., Dec. 20, 1888; 9 S. C. Rep. 154.

164. RAILROAD COMPANIES—Statute—Construction.—Under Laws N. Y. 1871, ch. 298, § 8, authorizing extension of a railroad and the issue of bonds therefor by towns, before such bonds can be issued the company must have adopted an entire route and designated all the counties through which the road would pass.—*Purdy v. Town of Lansing*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 172.

165. RAILROAD COMPANIES—Leases—Parties.—A bill to enforce an alleged lease averred that O Co. leased its road to D Co. for 40 years; that the latter then leased its road for 20 years to defendant, which agreed to assume the lease of the O Co. that the 20-year lease has expired, and defendant refuses to pay the rent re-

served on the lease of the O Co.: *Held*, the D Co. was a necessary party. — *Jessup v. Ill. Cent. R. R.*, U. S. C. O. (Ill.), Nov. 28, 1888; 36 Fed. Rep. 738.

166. REAL ESTATE—Non Resident—Publication.—Under Rev. St. Mo. 1879, § 3494, providing that in actions for the enforcement of liens against real estate the court shall order publication, when the plaintiff alleges in his petition, or files an affidavit, that the defendant is a non-resident, an order made on an allegation in the petition of non-residence is valid, though the petition is unverified.—*Elting v. Gould*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 922.

167. RECEIVERS—Appointment—General Demurrer.—Where the plaintiff sues as receiver, alleged to have been appointed in proceedings supplementary to execution, the objection that he was not duly appointed, or is not authorized to maintain the action, cannot be raised upon general demurrer for insufficiency.—*Walsh v. Byrnes*, S. C. Minn., Dec. 21, 1888; 40 N. W. Rep. 831.

168. RECEIVERS—Appointment—Motion to Show Cause—Return.—Under Code N. C. §§ 836, 879, an order to show cause why a receiver should not be appointed may be made returnable before a judge residing in the district in which the order was made, but assigned to a different district.—*Stith v. Jones*, S. C. N. Car., Dec. 3, 1888; 8 S. E. Rep. 151.

169. REFERENCE—Setting Aside Order.—The court has power to set aside an order of reference entered by consent of the parties, under Code N. C. § 430, without their common consent, for good and sufficient cause.—*Patrick v. Richmond & D. R. R. Co.*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 172.

170. REPLEVIN—Execution—Notice—Mortgage.—The written notice, required by Code Iowa, § 8055, to be given to the officer holding the goods prior to replevin of property seized under execution, is not dispensed with in replevin by a mortgagee, by Acts Iowa, 1886, ch. 117.—*Danforth v. Harlow*, S. C. Iowa, Dec. 20, 1888; 40 N. W. Rep. 823.

171. RES ADJUDICATA—Judgment—Mail Contractor.—The government having charged a mail contractor a certain sum in an account against him for his failures in carrying the mails, and having recovered judgment for that sum against him and his sureties, cannot recover in this suit, against the same defendants, on the mail contractor's bond.—*United States v. Oliver*, U. S. C. (La.), Oct. 1888; 36 Fed. Rep. 758.

172. SALE—Possession—Payment.—On a sale of corn at auction for cash, the purchaser is not entitled to the possession thereof till the price is paid or tendered.—*Jennings v. West*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 868.

173. SALVAGE—Collision—Towage.—Discussion of evidence as to the proper amount of salvage which should be awarded under the facts of this case.—*The Benton*, U. S. D. C. (N. Y.), Nov. 23, 1888; 36 Fed. Rep. 738.

174. SCHOOLS AND SCHOOL DISTRICTS—Taxation.—At a special meeting called by the board of trustees of a school district to build an addition to a school house, a majority of the votes of the taxable residents present at the meeting is sufficient authority to act.—*Crandall v. Trustees*, S. C. N. J., Dec. 10, 1888; 16 Atl. Rep. 194.

175. SCHOOLS AND SCHOOL DISTRICTS—Officers—Election of County Superintendent.—At a meeting of the township trustees of a county for the purpose of electing a county superintendent of schools, a vote by one of the trustees for himself for that office is illegal as against public policy.—*Horning v. State*, S. C. Ind., Dec. 15, 1888; 19 N. E. Rep. 151.

176. SHIPPING—Carriage of Goods—Delay.—Facts reviewed with reference to agreement of vessel to carry coal, there being unreasonable delay during the winter, and *held* that the master acted in bad faith and was not entitled to extra freight agreed on.—*Holland v. 700, etc.*, U. S. D. C. (Wis.), Dec. 4, 1888; 36 Fed. Rep. 784.

177. SPECIFIC PERFORMANCE—Time.—*Held*, under the evidence of this case, that time was of the essence of the contract of conveyance, and specific performance

would be decreed. — *Nageli v. Lemmer*, N. J. Ct. Chan., Dec. 11, 1888; 16 Atl. Rep. 205.

178. SPECIFIC PERFORMANCE—Parol Lease — Part Performance. — A parol letting, under which the tenant enters into possession and makes improvements, will be enforced, in case the terms are definite, fair, and reasonable, and no advantage taken by either party of the other. — *Benton v. Crawford*, N. J. Ct. Chan., Nov. 30, 1888; 16 Atl. Rep. 180.

179. STATE OFFICERS—Salaries. — Construction of Acts Ind., 1879, p. 4, and Acts 1883, p. 15, providing appointment of trustees for insane, blind, and deaf and dumb asylum and salaries therefor. — *State v. Harrison*, S. C. Ind., Dec. 15, 1888; 19 N. E. Rep. 146.

180. SUPREME COURT—Construction—Statute. — The Supreme court of the United States will follow the decision of a State court as to the construction of a State statute where such construction was announced before the contract in question was entered into. — *German Sav. Bank v. County of Franklin*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 159.

181. SUPREME COURT — Certificate of Difference of Opinion. — A certificate of difference of opinion, from the circuit court held bad, as attempting to refer the whole case to the supreme court by the device of splitting it into several questions and for other reasons. — *Dubin Tp. v. Milford, etc. Inst.*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 148.

182. TAXATION—Counterclaim—Set off. — Construction of const. Mich. art. 8, § 4, and Laws 1885, § 77, providing for adjustment of claims against the State. — *People v. Van Tassel*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 847.

183. TAXATION—Redemption—Infancy. — In a suit by a minor to redeem land from tax-deed under Code Iowa, § 892, allowing a minor to redeem at any time within one year after attaining majority, the burden of proof is upon complainant to show that he owned the land at the date of the tax-sale. — *Harding v. Vaughn*, U. S. C. O. (Iowa), Dec. 3, 1888; 36 Fed. Rep. 742.

184. TAXATION—Tax-deed—Judgment. — Under the revenue law Mo. 1872, conferring jurisdiction for enforcement of tax-liens on county court, a tax-deed showing that judgment was obtained at the August term, but not showing good cause for not obtaining it at the July term, is void on its face. — *Kinney v. Forsythe*, S. C. Mo., Nov. 26, 1888; 9 S. W. Rep. 918.

185. TAXATION—Exemption. — *Held*, after reviewing the testimony that the University of the South, had not parted with certain land and therefore under the charter it was exempt from taxation. — *Franklin County v. University*, S. C. Tenn., Dec. 20, 1888; 9 S. W. Rep. 892.

186. TAXATION—Assessments—Revision. — Construction of Laws N. Y. 1880, ch. 550, providing for the revision of assessments for local improvements. — *Defenther v. Mayor, etc.*, N. Y. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 83.

187. TRADE-MARK—Protection. — The terms "Goodyear Rubber Company," and "Goodyear's Rubber Manufacturing Company," and other similar terms, are not capable of exclusive appropriation as a trade-mark; the term "Goodyear Rubber" being descriptive of a well-known class of goods produced by the process known as "Goodyear's invention." — *Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co.*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 166.

188. TRADE MARKS. — The words "La Favorita" do not indicate quality, and are a valid trade-mark, as applied to a grade of flour selected, though not manufactured by those who have acquired the right to use the term. — *Mendez v. Holt*, U. S. S. C., Dec. 10, 1888; 9 S. C. Rep. 143.

189. TROVER AND CONVERSION—Evidence—Sufficiency. — In trover for horses levied on under a void attachment, an instruction assuming a valid purchase by plaintiff, and an unauthorized delivery of the property to the debtor, should be refused. — *Mears v. Cornwall*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 931.

190. TRUST—Trustee—Executors. — Any employment of trust funds for the individual benefit of a trustee,

executor or administrator, is illegal and constitutes a *devastavit* authorizing removal of the trustee and the reclamation of such funds from anyone receiving them with knowledge. — *Debold v. Apperman*, N. Y. Ct. App., Dec. 11, 1888; 19 N. E. Rep. 24.

191. TRUSTS—Trustee — Bankruptcy. — Money of wife given to husband, he to use the interest and give bond for the principal: *Held*, in action to recover the principal, that the liability was incurred while acting in fiduciary capacity and was not discharged by proceedings in bankruptcy. — *Moch v. Howell*, S. C. N. Car., Dec. 10, 1888; 8 S. E. Rep. 167.

192. USURY — Illegal Interest — Lex Loci. — Note dated and payable in Boston, but taken in New York: *Held*, that the transaction was governed by laws of New York, and that under the evidence it was void for usury. — *Holmes v. Manning*, S. J. C. Mass., Nov. 30, 1888; 19 N. E. Rep. 25.

193. USURY—Payment—Notice. — One who pays a usurious mortgage without notice of the usury, at request of mortgagor, may recover from him the sum so paid. — *Perdue v. Brooks*, S. C. Ala., Dec. 10, 1888; 5 South. Rep. 128.

194. WILL—Powers. — Construction of a will where father left money to his son to be paid him by the executors, if in the opinion of the latter he had used certain other amounts in a judicious manner, etc. — *Perris v. Lepper*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 869.

195. WILL—Construction. — *Held*, in construction of a will, that a clause was not sufficiently clear and decisive to reduce the son's estate to one for life, in the face of testator's expressed intention to leave nothing undisposed of, which was liable to be defeated in certain contingencies if said clause were allowed effect. — *O'Boyle v. Thomas*, S. C. Ind., Dec. 12, 1888; 19 N. E. Rep. 112.

196. WILL—Construction. — *Held*, under the language of will leaving wife, rooms, etc., and providing for her "decent support" that the widow was entitled to the use of the rooms, but that she was not compelled to live there. Nor did she forfeit her right to a "decent support" by setting up an independent establishment. — *Hart v. Hart*, S. C. Ga., Dec. 3, 1888; 8 S. E. Rep. 182.

197. WILLS—Construction. — Construction of clauses in will, where it was a question as to who was intended by testator and whether the disposition of the estate was not in restraint of alienation. — *Van Brunt v. Van Brunt*, N. Y. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 60.

198. WITNESS — Competency — Transaction with Deceased Person. — The statute declaring the incompetency of one interested in the event of an action to testify concerning conversations with a deceased person relative to a matter in issue: *Held*, applicable to an indorser of a certificate of bank deposit, who had received from the defendant the money evidenced by it, the title of the certificate being in issue. — *Beard v. First Nat. Bank*, S. C. Minn., Dec. 27, 1888; 40 N. W. Rep. 842.

199. WITNESS—Competency. — Under Act Ga. 1886, where plaintiffs in ejectment claim under a deed of gift from defendant to their father, defendant is not incompetent to rebut evidence of declarations by him that he had given the land to his son, plaintiffs' father. — *Hardman v. Howell*, S. C. Ga., Dec. 7, 1888; 8 S. E. Rep. 188.

200. WITNESS — Competency of Attorney — Privilege Waived. — A testator who requests the attorney employed to draw his will to become a witness to the same, waives the attorney's privilege from testifying to conversations had with testator at the time of drawing the will. — *In re Coleman's Will*, N. Y. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 71.

201. WITNESS—Competency — Promissory Note. — Where the original payee of a note brings an action against the administratrix of the maker, he is incompetent to testify that he saw the maker sign it, when the execution of the same was a part of a trade between the maker and himself. — *Bryant v. Stainbrook*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 917.

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CURRENT EVENTS.

IN view of the attention, at this time, drawn to the Indian Territory, and the passage, by the house of representatives, of what is known as the Oklahoma bill, the leading article in this issue on the "Rights of the Cherokees," will, we think, be found of interest, as being a clear statement from the pen of one who has made the subject a study, of the tenure by which the Cherokee nation hold and own the land which is sought to be appropriated, and the legal obstacles in the way of such an appropriation. As we understand it, there is included, in the terms of the Oklahoma bill, considerable land, within the confines of what is generally known as the Indian Territory, which the United States can, without question or legal objection, appropriate and sell. Oklahoma proper was originally sold by the Creek Indians to the United States, conditioned that the latter would settle thereon "friendly Indians." There were no friendly Indians to settle there. Therefore the condition failed and, of course, the land could not be opened for general settlement. The effect of the recent treaty concluded with the Creek Indians was in reality a sale to the United States of their equitable or reversionary interest. But to this land the Cherokees make no claim whatever. What the latter claim, (and upon this is predicated the legal contention) is the "outlet" or "strip" of six million acres embraced in the same patent whereby they obtained the land upon which they now live. Mr. Blair shows, very plainly, that the title of the Cherokees to this piece of land is as clear, and unassailable as that of any property owner in the United States, and that the proposition to appropriate them is in absolute violation of law and justice.

And in a strictly legal point of view, leaving out of consideration questions of politics or expediency, it would seem, to the unbiased student of law, that the objection of the Cherokees is well founded, and that the land

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sought to be thus confiscated, under the form and sanction of law, is held by treaty in such a manner that it cannot be encroached upon, even in the methods proposed, without breaking solemn obligations of the government of the United States towards the Indians.

PERHAPS there is not a public question which is exciting more general interest, and upon which the attention of legislators and law makers is more securely fixed, than that of ballot reform. The movement in this direction, born on foreign soil and but recently adopted in one of our States, has spread with surprising rapidity, and a sincere and zealous effort is now everywhere manifest to correct the abuses which have crept into the execution of our present election laws. It is generally understood that the system of ballots and voting, which is the basis at least for the Massachusetts statute and for most of the proposed enactments, is of Australian origin, but few know its features or comprehend its scope. Therefore the public will find much of value and interest in a book recently prepared by Mr. John H. Wigmore, of the Boston bar, on "The Australian Ballot System as Embodied in the Legislation of Various Countries," which has just come into our hands. The design of the author was, as he says, to sketch the history of the measure known as the Australian ballot system, as it passed from State to State in Australasia on to the mother country in Europe, thence westward to Canada and eastward to continental countries and finally westward again to these United States.

The thought, so admirably expressed by Mr. Wigmore, will occur to many that, "where a community has reason to believe itself numbered among the enlightened ones of its age, and its institutions to be pre-eminent among those of civilized mankind as types of liberty and progress, it relaxes (it may be) the constant strain of high endeavor; an easy complacency settles upon it; and it awakes one day to realize that a community, having no pretensions to as conspicuous a rank among nations, has grasped the torch of progress and now leads the way with intelligent and advanced methods, pointing the path for its more eminent fellows to pursue. With some such reflection as this must En-

gland, and our own commonwealth, look upon the history of ballot reform in the past fifty years. Before representative government in Australasia had an existence, corruption, fraud and intimidation (to name none of the less palpable evils that beset an election) thrived abundantly in Great Britain and Ireland, and even in our own country had begun to take root. But it was reserved for striping States, when to them in their turn the exigency came, not merely to apply, but to invent an effective remedy and to indicate a cure for at any rate the grosser evils that prevent an election from being what at the least it should be, the free and accurate expression of the opinions of the electors."

From this book we learn that the system is undoubtedly Australian by birth, the father of the measure being Francis S. Dutton, member of the legislature of South Australia from 1851 to 1865. The first enactment was 1857-8, though not until 1887 was it applied to all elections held in that country. It was adopted in Victoria in 1865, and thereafter in Tasmania, New South Wales, New Zealand, Queensland and West Australia. Meanwhile its good results had reached England, where thoughtful men were anxiously looking for some solution of the problem. It was, after considerable agitation, first adopted in that country in 1872, but not until the year 1888 was it applied to all elections, so that now the entire field of elections in England and Wales is covered by the Australian system of balloting. Thereafter it was adopted in Canada and in some of the continental countries. The first effective movement in this country was that of Louisville, Ky. (act of February 24, 1888), in its essential features like the Australian system. Massachusetts followed May 30, 1888. The success of the system has everywhere been recorded. Its cardinal features as everywhere adopted, are two: First. An arrangement for polling by which compulsory secrecy of voting is secured. Second. An official ballot containing the names of all candidates printed and distributed under State or municipal authority. Each, as Mr. Wigmore points out, has an efficacy of its own, and, to that end, he argues that the best results are to be reached, when preventive legislation is planned, by adopting one of these courses, viz: First. By making

the detection of the offense absolutely certain. Second. By taking away all interest in its commission or by making it profitable to refrain. Third. By making the offense physically impossible. In other words, the secret of effectively reaching an evil by law is either to insure its detection, to render it impossible, or to make it unprofitable. In this way the compulsory secret ballot, and the official ballot feature have the effect to check bribery, prevent intimidation, improper influence, etc. In short, it is claimed that the secret ballot approaches these more or less elusive evils, not merely with the weak instrument of a penal clause for this and that offense, but with the effective methods of modern legislation. By compelling the dishonest man to mark his vote in secrecy, it renders it impossible for him to prove his dishonesty, and thus deprives him of the market for it. By compelling the honest man to vote in secrecy, it relieves him not merely from the grosser forms of intimidation, but from more subtle and perhaps more pernicious coercion of every sort.

A large portion of this book is taken up with the text of the different statutes as they exist in Massachusetts, South Australia, Queensland, Great Britain, Belgium and other countries. But, as the substantial features of each are the same, it will be sufficient to notice the Massachusetts statute, and that only in a general and cursory manner.

It provides that the printing and distribution of ballots shall be paid for by the State in all elections except municipal, when the expense shall be that of the cities.

Any convention of delegates representing a political party which polled at least three per cent. of the whole vote cast may make a nomination, and a certificate of such nomination shall be made and sent to the secretary of State.

Informal nominations may be made by nomination papers, signed by not less than one thousand voters.

All certificates of nomination and nomination papers shall specify: First, the office for which the candidate is nominated; second, the party or principle he represents; third, his place of residence, with street and number thereon. In case of presidential electors the names of the candidate for president and vice-president may be added.

Certificates of nomination and nomination papers must be filed with the secretary of State or city clerk a certain number of days before the election.

Any question arising upon them shall be settled by the secretary of State, auditor and attorney general, without any appeal.

Any person who has been nominated may withdraw by request in writing, signed and acknowledged by him before an officer qualified to take acknowledgments, and the withdrawal must be sent to the secretary of State or city clerk a certain number of days before the election.

The ballots shall have only the names of those nominated, alphabetically arranged, with party designation or principle represented by each candidate, leaving blank space for insertion of other names.

Ballots shall be folded and fastened together in blocks in such manner that each may be detached separately.

At each polling place there shall be two sets of such general ballots.

Full instructions to voters in large type shall be printed, to be hung up at the polling places.

Names of all the candidates shall be publicly posted for a certain number of days before the election.

Two sets of ballots, prepared by the secretary of State, shall be furnished to city and town clerks a certain number of hours before the election and receipts given for same.

These shall be packed by city and town clerks in separate sealed packages, with marks to show its polling place.

The city and town clerk shall, before the opening of polls, send to the election officers one set of ballots so prepared and marked, for which a receipt shall be given. At the opening of polls the seals shall be broken.

Two inspectors, with two deputies additional to those now provided, shall be appointed in each voting precinct.

The officers who designate polling places shall provide a number of compartments or closets without doors, in which voters may conveniently and secretly mark their ballots, and a guard rail shall be so placed that only such persons as are inside said rail can approach within six feet of the ballot boxes or of the voting compartments. But neither the

former nor the latter shall be hidden from the view of those just outside the rail.

Any person desiring to vote shall give his name and residence to one of the ballot clerks, who shall announce it in a loud voice, and if the name is on the poll list he shall be allowed to enter the space inclosed by the guard rail. The ballot clerk shall give him one ballot. He shall then enter one of the compartments and mark an X opposite the name of the candidates of his choice for each office to be filled. He shall fold his ballot without displaying the names on it and vote it folded.

Any person who from blindness or from physical disability is unable to mark his ballot, may have it marked for him by an election officer.

If a voter marks more names than there are persons to be elected to an office, or if impossible to determine a voter's choice, the ballot shall not be counted.

Finally, penalties are provided for a voter who intentionally shows his ballot or interferes with a voter, or who shall endeavor to induce any voter before voting to show how he marks or has marked his ballot, and against officers of election.

In this book may also be found a cut or diagram of a polling place, with compartments, as established by law, and of ballots under the different systems.

It is to be hoped, that this book will find its way into the hands of legislators generally, and inspire them with the determination to solve this perplexing problem, and to make the ballot, in the language of John Pierpont, who, though many years dead, may have had this reform in his mind:

"A weapon that comes down as still
As snow-flakes fall upon the sod,
But executes a freeman's will
As lightning does the laws of God;
And from its force, nor doors, nor locks
Can shield you—'tis the ballot box."

NOTES OF RECENT DECISIONS.

In the case of *City of Shreveport v. Cole*, 9 S. C. Rep. 210, decided by the Supreme Court of the United States, the contention was that a constitutional provision adopted by the State of Louisiana, impaired the obligation of contracts, and, therefore, involved a question arising under the constitution and laws of the United States. The facts were that petitioners had a claim on a contract, for balance due them from the city of Shreveport, for the enforcement and collection of which they had adequate remedies, but that before its collection the people of the State adopted a new constitution, article 208 of which had deprived them of all remedies for the enforcement of the claim in this, viz: by limiting municipal taxation for all purposes whatever to ten mills on the dollar of valuation, and this, with the available funds of the city, was not sufficient to pay any portion of petitioner's claim after deducting alimony. It was, therefore, alleged that article 208, so far as the same limits municipal taxation, is to them null and void, because it violates the tenth section of the first article of the United States constitution, which prohibits States from passing any law impairing the obligation of contracts. Petitioners, therefore, asked that the provision of the State constitution be declared null and void. The court denied the writ upon the ground that the constitutional provision in question did not indicate on its face that it was intended to be applied to antecedent contracts, and that the argument of petitioners required the United States court to assume that the courts of Louisiana would hold that the city could lawfully avail itself of the constitutional limitation in question as a defense to the collection by taxation of the means to liquidate the indebtedness, notwithstanding that would be to apply it retrospectively to the destruction of an essential remedy existing when the contract was entered into, whereas the presumption in all cases is that the courts of the States will do what the constitution and laws of the United States require. *Railroad Co. v. Ferry Co.*, 108 U. S. 18; *Neal v. Delaware*, 103 U. S. 370. And indeed, in accordance with that presumption the Supreme Court of Louisiana holds, and had held prior to the commencement of this suit, that article 209

must have a rigid enforcement with regard to all creditors whose rights are not protected by the constitution of the United States, and with regard to all future operations of the city government of every kind whatever.

In the case of *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3, Judge Brewer, of the United States circuit court, in construing the recent act providing for removal of causes from State to federal courts, overrules the case of *Harold v. Mining Co.*, 33 Fed. Rep. 529. It appears that in the case sought to be removed, both plaintiff and defendant are non-residents of the district. Under the act of March 3, 1887, the plaintiff could not have brought the defendant into this court by original process, or at least could not have compelled it to stay here against its will, and the contention is that, as this court could not take original jurisdiction, it cannot take jurisdiction by removal. It will be observed from the language of the statute that the right to object to this court taking jurisdiction of the case, if the suit had been originally commenced here, is a personal privilege of the defendant, and may be waived by it. There is no lack of power in the court but only a personal right of defendant. Under the judiciary act of 1789, it was held that a suit pending in a State court between citizens of different States could be removed by defendant into the federal court, although by reason of his not being an inhabitant of or found within the district he could not have been sued originally in that court. *Sayles v. Insurance Co.*, 2 Curt. 212; *Barney v. Bank*, 5 Blatchf. 107; *Bushnell v. Kennedy*, 9 Wall. 387; *Green v. Custard*, 23 How. 484; *City of Lexington v. Butler*, 14 Wall. 282. And the same distinction was applied to the act of March 3, 1875, between the right of removal and the right to bring a party in by original process. *Claffin v. Insurance Co.*, 110 U. S. 81. Turning to the act of 1887, the court concludes:

It is obvious that the first part of section 1 describes in general terms the jurisdiction of the circuit courts, while the provisions of the latter part of the section refer, not to the general matter of jurisdiction, but to the particular court in which a case may be brought and tried. It is said by Chief Justice Waite, in *Ex parte Schollenberger*, 96 U. S. 378: "That the act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is

one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases; and certainly jurisdiction will not be ousted because he has consented." The same distinction between the general matter of jurisdiction and the particular court for suit and trial is recognized in *Fales v. Railway Co.*, 32 Fed. Rep. 673; *Gavin v. Vance*, 33 Fed. Rep. 84; *Loomis v. Coal Co.*, *Id.* 353. Turning to the second section, we find that the removable suits are those of which, by the first section, the federal courts are given jurisdiction. The language speaks of jurisdiction generally, and of courts in the plural. Any suit is removable of which any federal circuit court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts, does not destroy the general jurisdiction of federal courts, or prevent its removal. Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment it rendered would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court. I am aware that in the case of *Harold v. Mining Co.*, 33 Fed. Rep. 529, I concurred with Judge Hallett in an opinion different from that herein expressed, but further reflection, after hearing the question discussed at length and frequently, has satisfied me that that opinion was erroneous. It is, perhaps, unnecessary to carry this discussion any further, and it is enough to say that we hold that the fact that both parties are non-residents of this district does not oust this court of jurisdiction in a case removed from the State court by a non-resident defendant.

In *Wilson v. Atkinson*, 20 Pac. Rep. 66, the Supreme Court of California say, for the first time, that, under Code Civ. Pro., § 322, possession of land under a void tax-deed gives color of title, and the statute of limitations is set in motion by such deed, and it is admissible in evidence for the purpose of defining the character and limiting the extent of the occupant's possession. The court says:

There is much diversity of opinion, in the decided cases, upon the question whether a deed, void on its face, is such a written instrument as will uphold and render effective the possession of real estate that would otherwise fail to give title. The deed in question was a written instrument, purporting to convey the real estate in controversy by proper description. It is properly executed and there is evidence tending to show that the defendant and her grantor claimed title under it as being a conveyance of the property. In some of the cases it is said that the conveyance must be good in form, contain a description of and profess to convey the property, and that, containing these requirements, it will give color of title, although in fact invalid and insufficient to pass the title, or actually void or voidable. *Packard v. Moss*, 68 Cal. 123, 8 Pac. Rep. 818, and cases cited. To sustain their contention that the deed, being void on its face, could not put the statute of limitations in motion, counsel for appellants cite the

following authorities: *Packard v. Moss*, *supra*; *Moore v. Brown*, 11 How. 414, 425; *Skyles v. King*, 2 A. K. Marsh. 385; *Walker v. Turner*, 9 Wheat. 542; *Shoat v. Walker*, 6 Kan. 65; *Cain v. Hunt*, 41 Ind. 466; 26 Am. Law Reg. 409, 416. We have given these authorities our careful attention. They are in the main based upon statutory provisions differing materially from our own, but in principle support the appellant's position. Many other cases to the same effect might have been cited. The decided cases are so conflicting as to aid us very little in attempting to arrive at a proper conclusion, but the reasoning by which the courts of the several States have supported the doctrines laid down are worthy of careful consideration. The statute of Wisconsin is in almost, if not quite, the exact language of our own, and the supreme court of that State has held in a number of cases that a tax-deed, void upon its face, is a written instrument within its meaning. *McMillan v. Wehle*, 55 Wis. 685, 693, 13 N. W. Rep. 694, and cases cited. As further supporting this doctrine we cite *Leffingwell v. Warren*, 2 Black. 599; *Pugh v. Youngblood*, 69 Ala. 296; *Gatling v. Lane*, 22 N. W. Rep. 227; *Dalton v. Lucas*, 63 Ill. 337; *Stovall v. Fowler*, 72 Ala. 77; *Pillow v. Roberts*, 13 How. 472, 476; *Wood, Lim. Act.* 522-536. The deed we are considering was not prohibited by law, and the officer who executed the deed was authorized to do so by the laws of this State. The only objection to it is that it shows that the legal steps necessary to authorize a sale of the property were not taken. The defect was not one which would be readily detected. Whether such a deed was in fact void has been a matter of grave question, but is now settled by the decided cases. The parol evidence in the case sufficiently shows that the holder of the deed entered and held possession of the land under it, claiming to be the owner of the property by reason of the conveyance, and that the plaintiff had actual notice of the adverse claim and its foundation. We are clear that under the circumstances of this case the deed was properly admitted in evidence for the purpose of defining the character and limiting the extent of the defendant's possession. See dissenting opinion of Mr. Justice McKee, in *Wilson v. Atkinson*, 68 Cal. 592.

The Supreme Court of Kentucky, in the case of *Stewart v. Mulholland*, 10 S. W. Rep. 125, decide an interesting question as to the revocation of a will. There a widow being about to marry entered into a matrimonial contract by which she attempted to secure to herself the right to own her separate estate, and make such disposition of it, by last will, as she saw proper. In accordance therewith she prepared a will in her own handwriting. It was dated January 9, 1876. The marriage contract was written and signed two days afterwards, and the same day the ceremony was performed. She there, in the presence of her husband, handed the will to a friend to take care of, and it was kept by him some years. The propounders of the will are met with the objection that the marriage revoked the will by reason of an express provision of statute, ch. 113, § 9, and that

under § 11 thereof, such a will can be revived only by a re-execution thereof. The court holds that the statute is plain in providing for the revocation of a will by marriage, and that as to a will so revoked the prohibition of the statute makes it absolutely void, which can only be revived by a re-execution. By the rule of the common law the marriage of a woman revoked a will previously made by her, because, if allowed to stand, it would affect the marital rights of the husband, and during marriage no power existed by reason of the disability of the wife either to revoke, alter, or make another will. At common law, however, where the wife had the right of disposing of her separate estate by an antenuptial agreement, her will previously made was not revoked by her subsequent marriage, and in this State a married woman may dispose of her separate estate by last will and testament. The court says:

It is not a question here whether the will was properly executed, for its validity prior to the marriage ceremony is not controverted, nor does the question arise as to whether or not a holographic will, once revoked, can be revived by a republication, when the statute requires a re-execution; but the question is, was the will of Mrs. Jacob revoked by her marriage with Stewart? It is conceded that by a contract the property rights of either could be regulated and fixed; but when a will is made in pursuance of that contract, and in this instance, where it is directly connected with the act of marriage, we are asked to say that the marriage revoked the will because dated two days prior to the antenuptial contract and the marriage ceremony. The marital rights having been settled (and we are proceeding now on the idea that we cannot but regard the entire action of the parties from the 9th to the 12th as one, so far as these contracts are concerned) by their agreement, and no one else being interested directly or indirectly, but the husband, why should the will of the wife be revoked? Was the statute intended to apply to any such case as this? It was to protect the marital rights of the parties that the statute was enacted, and it was never designed to prevent parties by written contract from fixing their marital rights, and to give to one or both, by an antenuptial contract between the two, the power to dispose of their estate by will. It is idle to say that by a deed evidencing a marriage contract the parties about to consummate it can before marriage fix and determine their right to property by reason of the marital relation that is binding on both, and cannot under the same contract agree that the one or the other shall dispose of their property by a will already executed, if made as the statute requires. The will made by the wife in this case was as much a part of the marriage contract as if it had been inserted in it.

THE Supreme Court of Oregon, in the case of *Rhoton v. Mendenhall*, 20 Pac. Rep. 49, undertake to define the meaning of the word

"concealed," as used in the statute of limitations. They say:

Webster defines the word "concealed," "to hide or withdraw from observation; to cover or keep from sight; as a party of men concealed behind a wall." It does not appear that the defendant did anything after his removal to this State whereby his identity or place of residence should be concealed or kept secret or hidden. In the absence of any statement to the contrary, and such is, no doubt, the fact, he lived openly in the community where he had fixed his residence in this State, without any effort or attempt in any way to baffle search or inquiry. These facts do not constitute concealment, within the meaning of that term as used in our statute. In *Frey v. Aultman*, 30 Kan. 181, 2 Pac. Rep. 168, the Supreme Court of Kansas gave a construction to the word "conceal" used in the statute of limitations of that State. It appeared that the defendant had formerly resided in Iowa; that he absconded from that State, and settled in Kansas, and that the plaintiff made reasonable efforts to find him, but failed. In passing on the question, the court said: "We think the word 'conceal' contemplates some action here; that he passes under an assumed name; has changed his occupation or acts in a manner which tends to prevent the community in which he lives from knowing who he is or whence he came. It cannot be doubted that the legislature has the power to make the statute of limitations absolute, and without any exceptions on account of concealment; and when we remember that this statute has no extraterritorial force, and therefore contemplates acts and conduct of the party within our limits, it would seem difficult to say that a man who, going under his own name, lives in a community in as open and public a manner as any other citizen in the same line of business, is concealing himself from the service of process within this State." This construction is decisive of this case. Counsel for appellant rely very much upon *Harman v. Looker*, 73 Mo. 622; *Nelson v. Beveridge*, 21 Mo. 22; *Wells v. Halpin*, 69 Mo. 92—and some other like cases were cited by appellant—but they do not support his contention. The Missouri statute, under which their decisions were made, provides: "If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited after the commencement of such action shall have ceased to be so prevented." These Missouri cases seem to turn more upon the effect of absconding, or other improper conduct mentioned in the statute of that State, than they do upon the concealment. Indiana has a statute of limitations in criminal cases which precludes the accused party from availing himself of its benefits where he "conceals the fact of the crime." In construing that statute, the court held that the concealment must be the result of positive acts done by the accused, and calculated to prevent the discovery of the fact of the commission of the offense of which he stands charged. *Jones v. State*, 14 Ind. 120. And this rule was applied and followed in a civil case. *Stanley v. Stanton*, 36 Ind. 445.

A QUESTION of negligence, somewhat out of the usual run, arose in the case of *Evansville & T. H. R. Co. v. Crist*, 19 N. E. Rep. 310, decided by the Supreme Court of Indiana. There the complaint was that defendants had constructed its railroad upon a highway, and

had dug an excavation in the same and piled the dirt along the sides thereof, making embankments some nine feet high for a long distance, leaving no way for persons to pass along the highway except upon the embankment, with the railroad track between, and that the plaintiff was lawfully riding along the highway, when defendant's agents approached in a hand car and frightened plaintiff's horse; that after seeing the dangerous situation in which plaintiff was placed, they failed to stop the hand car and thereby her horse was frightened and she was thrown off and greatly injured. The court says:

The two important facts to which we have referred—the place where the injury was received, and the duty of the appellant respecting the highway it had made unsafe—when assigned their due weight, fully and clearly relieve the plaintiff from any imputation of negligence, especially in this, when considered, as they must be, in connection with the explicit averment of her complaint that she was without fault or negligence. She was upon a public highway leading from her home, and there she had a right to be. She was, it is true, bound to exercise ordinary care in using the highway, but she was not bound to more. She was not crossing a railroad track, where the rights and duties of the company and a traveler are reciprocal; but she was upon a public way, which the company had no right to use in operating its road, or to make unsafe. The action is not, it is to be remembered, to recover for injuries received on a crossing, for the complaint proceeds upon a radically different theory. The cases of *Railway Co. v. Green*, 106 Ind. 279; *Railway Co. v. Hammock*, 113 Ind. 1; and *Railroad Co. v. Butler*, 103 Ind. 31—are not in point, for the reason that they were cases where the injury was received on a crossing, and not cases where the interference with a public highway, and a negligent breach of duty, caused the injury. Throughout this case this difference runs, exerting all through it a controlling influence. Here the defendant negligently failed to perform a duty imperatively enjoined upon it by positive law. The initial step in the defendant's wrong was the negligent violation of a mandatory statute, § 3903 of the Revised Statutes of 1881. This statute prescribes a plain duty. Indeed, the duty existed independent of the statute, but the statute makes it all the more clear and positive. The right to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed, or at least to use reasonable care and skill to do so. This duty is violated if there is a failure to restore it to its former condition in all cases where the exercise of reasonable care and skill can effect a restoration. * * * Our own cases recognize and enforce a rule very much the same as that stated by the author from whom we have quoted, although it is perhaps not quite so strongly stated. *Railroad Co. v. Stout*, 53 Ind. 143; *Railway Co. v. Phillips*, 112 Ind. 59; *Railroad Co. v. Carvener*, 113 Ind. 51. In the case last cited it was said: "Leaving the highway in such a condition as to require the wheels of vehicles passing over the railroad track to be raised nine inches perpendicularly from the surface of the highway in order to pass over the top of the rails was *prima facie* a negligent interference with the free use thereof. *Railroad Co. v. State*, 37 Ind. 489;

Johnson v. Railroad Co., 81 Minn. 233; *Railway Co. v. Locke*, 112 Ind. 404. The wrong of the defendant in negligently failing to restore the highway is, as we have seen, of itself sufficient to constitute a cause of action; and the additional act of negligence in the management of the hand car, if not considered as adding strength to the complaint, cannot, at all events, detract from it; but we think that the fact that the defendant, by its own wrong, rendered the highway unsafe, made it necessary for it, in operating its road, to exercise care to prevent injury to one placed in danger by that wrong. We are not dealing with a case where the railroad company was not guilty of any breach of duty respecting the highway on which the plaintiff was traveling, but with a case where, in violation of a positive duty, it wrongfully interfered with a highway. Here the two wrongs blend in one concurring tort. If the appellant was free from fault respecting the public highway, we add, to prevent possible misunderstanding, we should have an entirely different case, and one in which it may be that no action would lie.

THE Supreme Court of South Carolina, in the case of *State v. Carroll*, 8 S. E. Rep. 433, had occasion to construe the law as to the proof required in prosecution for adultery under the statute which reads as follows:

"Adultery is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other, without living together, of a man and woman, when either is lawfully married to some other person."

Under this statute they say that adultery may be committed in either one of two ways: (1) Where a man and woman, one of whom is married to another person, live together in carnal intercourse; (2) where, not living together, they indulge in habitual carnal intercourse—and the indictment in this case falls under the second head. It will be observed that the statute does not undertake to define either the word "habitual" or the word "carnal," and their meaning must be determined by the common sense of mankind; and in the absence of any statutory definition, it would be very difficult, if not absolutely impossible, to define, with any greater precision, the terms "habitual carnal intercourse" than was done by the circuit judge in this case—that it must be frequent, and not occasional; but how frequent to make it habitual must be left to the common sense of the jury. What are the habits of a person must necessarily be a question of fact. For example, where the question is whether a person is habitually intemperate, or whether he is a person of temperate habits, is mainly a question of fact, and is not susceptible of

being defined with precision as matter of law. As was said by Mr. Justice Field, in *Insurance Co. v. Foley*, 105 U. S. 354: "When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts;" but neither he nor any other judge, so far as we know, has ever undertaken to say how frequently the act in question must be repeated in order to generate a habit of doing such act.

THE Supreme Court of New Jersey, in *Chism v. Schipper*, 16 Atl. Rep. 316, has lately decided a question of arbitration and award which is certainly novel, and in regard to which the court says at the outset: "The question to be decided is, can the defendant cheat the plaintiff by due course of law?" Though the conclusion is that he cannot, the opinion evinces considerable effort to find law and precedent justifying this invasion of the rights of New Jersey citizens and the dissenting opinion of Judge Magie is an ingenious argument, apparently supported by authority, in favor of the affirmative. The case was this: Suit on a building contract wherein the plaintiff agreed to erect and finish a dwelling house to the satisfaction of a certain architect, to be testified to by a writing or certificate, under the hand of said architect, that any alterations or additions were to be deducted from or added to the contract price; that in case of a dispute as to the construction or the specifications, the said architect was to decide the same, whose decisions should be final and conclusive. Full performance by plaintiff and also allegations of work and labor beyond the specifications. The breach is that the architect wilfully and fraudulently decides that certain alterations and additions are within the true construction of said specifications, and that plaintiff is not entitled to be paid the fair and reasonable value thereof, and fraudulently and wilfully refuses to sign the certificate required by the contract. To this defendant demurs, thus placing the matter before the court: "I admit that this money is due for additional work; I admit that the architect fraudulently certifies to the contrary; and I claim that, by a correct application of legal principles, I have the right to take advantage of

this fraud, and to appropriate to myself the moneys that are its fruits." The court says:

The inquiry is, does the law, in reality, justify this immoral attitude? It should be premised to the inquiry that, if this action will not lie, neither will any action lie against the defendant founded on the facts stated, either at law or in equity. As such a result would be one much to be deprecated, and would stand as a blot on the jurisprudence of the State, it would seem that the most cogent reasons should be forthcoming to afford a satisfactory answer to the interrogatory, why should a man be permitted to take advantage of the fraud of another? The only known reply is that the plaintiff has covenanted to that effect; that he has agreed that the action of the architect, whether honest or dishonest, shall be conclusive. It is proper to say, *in limine*, that it is not by any means deemed certain that this contract, if to be read in the sense just specified, is sustainable in law. It is assumed that a man cannot contract that he himself may commit a fraud. For example, this defendant could not have agreed that this money should not be payable except on his own written certificate, and that he might fraudulently withhold such certificate. If such a stipulation would, as it is thought, be expunged from the instrument on grounds of public policy, how can the party legally stipulate that another may commit this same crime for him? The capacity of parties to a contract to provide that one or the other, as the case turns out, may be cheated, does not appear to be a faculty requisite in the transaction of any legitimate business; while, at the same time, its existence is palpably offensive to good morals, and consequently may well be said to be adverse to the public welfare. The consequence is that it is, in my opinion, doubtful whether such an agreement can be legally made; but it is not deemed necessary to pursue the inquiry, inasmuch as, by proper rules of construction, applied to the facts set forth in this record, the proper conclusion is that the contract existing between these parties does not contain this stipulation so highly questionable. The inquiry is, what did these parties mean? Did they intend, or, by reason of the language employed, must it be concluded *de jure* that they intended to be bound by the award of the architect, even though such award was the creature of fraud? The clause thus referred to is in the common form that has long been in frequent use, and yet it may be safely said that it is most improbable that it would have been adopted in a single instance, if it had expressed in plain terms the meaning that it is contended lies latent in its expressions. It is hard to believe that any self-respecting man would put his name to an agreement that a third party might do in his favor a fraudulent act. But the adverse argument is that the agreement of the parties is to be ascertained from the plain language used by them, and such agreement is to be enforced, no matter what the intention may have been. This is the general rule, beyond a doubt, but such required literalism is not to be pushed to the preposterous length of requiring that by its operation the general intention of the parties, as evidenced by their contract itself, shall be frustrated or perverted, either in whole or in part. The terms employed are servants, and not masters, of a perspicuous intent; they are to be interpreted so as to subserve, and not to subvert, such intent. As an illustration, it plainly appears on the face of this instrument that it was the evident and sole purpose of the provision in question to provide for fair and definite decision of certain matters; and it is not said that by force of the terms

used, the decider is empowered to cheat either party at will; and yet it is obvious that the existence of such a power in the agent has no tendency to effectuate the object in view, but, so far as it can operate, is destructive of it. The stipulation giving the quality of finality to the action of their agent is part of a contrivance of these parties to insure fair dealing between them in certain particulars, there seems to be no reason why they should impart to such a contrivance a fraudulent potency. It was quite reasonable for these parties to say to their agent, decide honestly between us, and your decision shall be final; but it was utterly unreasonable for them to agree to abide by such award, if it were fraudulent. For my own part, I do not believe that in the history of the human race the transaction has occurred in which a man has consciously agreed that another should be clothed with the power to cheat him, and that the decision of the fraud-doer should be conclusive on the subject; and in the present instance such a stipulation can be construed only by an abstract interpretation of the conventional terms; for if such language be construed as a part of an integer, and in the view of purpose in hand, it can be made to produce no such result. There is no more important rule of construction than that which requires that words shall be interpreted in the reflected light of the context in which they are found; and, applying this rule to the case in hand, it is not perceived how it can be reasonably said that these parties have given to the provision in question that noxious efficacy that is sought to be imparted to it. That the clause under discussion cannot be, out and out, construed literally, appears to be undeniable. This and similar engagements are never so read. Undoubtedly, if we construe these terms with entire literalness, the builder is required to produce, before he can claim the money due him, the certificate of the architect. There are no exceptions provided for nor indicated, if the language is thus alone regarded. But suppose the money be earned, and the architect die before the signing of the certificate, is the claim lost or forfeited? Such a result, it is presumed, would not be claimed; and yet it is avoidable only in one way, and that is, to construe the terms of the contract reasonably, as applied to their subject, and not literally. The exception can stand on no other ground than this, for the maxim, *actus Dei neminem facit injuriam*, is never applied in violation of a contract. Looking to the letter alone, these parties have said that under all possible circumstances the certificate shall be a condition precedent to the right to payment. Admitting this as the true construction, the impossibility of the performance of such condition would not avoid it; and that such an effect has never been judicially given to such provisions shows conclusively that they have been interpreted according to their spirit, and not in subservience to their very letter. And, indeed, in my view, the entire legal course that has been pursued in the construction of submissions to arbitration in the common-law, form, can be explained only on the ground that they have been construed liberally, and not with literal narrowness. In all these submissions the stipulation is in the most unqualified form that the award shall be final and conclusive, but, if such award be tainted with fraud, it is set aside on the application of the party; and yet it is plain that such party could not be permitted to make such application, if his submission is to be read by its letter, and thus made to mean an engagement on his part to abide by the award, whether honest or dishonest. In such cases it has never been pretended that the parties, by the terms of their sub-

mission, reasonably understood, meant anything of the kind. The grounds of decision in that entire class of cases would seem to be precisely applicable to the present case. As another illustration of the principle that a literal interpretation is out of place, when its adoption will run counter to the expressed general object of the contract, reference may be made to the familiar case of clauses so frequent in leases, that if the rent is in arrear for a certain time the instrument shall become void. In all these instances the courts have declared, notwithstanding the literal meaning of the terms, that the lease, on the happening of the event, is not absolutely vacated, but only becomes voidable at the option of the lessor. In looking to the authorities, I do not find that the point in question has ever been put under the consideration of any of the courts of this State. The subject was not discussed nor considered in any of the three cases cited in the brief of the counsel of the defendant in the decision of which I participated. With respect to the English law touching this topic, I am inclined to think that it is still in a fluent condition, and that the last word in reference to it has not yet been spoken. See *Clarke v. Watson*, 18 C. B. (N. S.) 278; *Milner v. Field*, 5 Exch. 829; *Battenbury v. Vyse*, 2 Hurl. & C. 41; *Pawley v. Turnbull*, 7 Jur. (N. S.) 792. The matter has been more definitely treated by the American tribunals, and the results reached seem to be very generally in accord with the views propounded in this opinion. *Railroad Co. v. Polly*, 14 Grat. 447; *Lynn v. Railroad Co.*, 60 Md. 404; *Herrick v. Belknap*, 27 Vt. 673; *Snell v. Brown*, 71 Ill. 133; *Wyckoff v. Meyers*, 44 N. Y. 143; *Thomas v. Fleury*, 26 N. Y. 26; *Bank v. Mayor*, 68 N. Y. 336; *Martin v. Leggett*, 4 E. D. Smith, 255. In *Batchelor v. Kirkbridge*, 26 Fed. Rep. 899, the question present in this case was put directly in question, and was pointedly decided, for the inquiry was whether the plaintiff was dispensed from producing a certificate, if it had been refused by the fraud of the arbitrator without collusion with the defendant. The jury was instructed at the trial by Mr. Justice Bradley that, if such fraud was shown, the plaintiff was entitled to recover, and that ruling was upon reconsideration declared to be right, both by the distinguished judge before whom the case had been tried, and by his associate, Mr. Judge Nixon. This case in itself is of great weight, and appears to be supported by the general current of American authority. Nor does it seem to me that by the adoption of the foregoing theory of exposition these arbitration clauses will be shorn of any beneficial efficacy. The awards authorized by them will, for all useful purposes, be in truth finalities. They cannot be impeached for the want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons, such awards can be vitiated by fraud alone, which must be proved to the satisfaction of a jury, under a watchful, judicial supervision. In fine, it appears to me that the foregoing construction of the clause of the contract in question rests upon the triple ground of legal principle, authority and public policy. I think on this issue the plaintiff should have judgment.

RIGHTS OF THE CHEROKEE NATION.

1. Title of Cherokee Nation to its Lands.
2. Criminal Jurisdiction of the United States over the Cherokees and White Men.
3. Civil Jurisdiction Among the Cherokees.

1. *Title of Cherokee Nation to its Lands.*—

The public at large and the newspapers are almost as ignorant of the title by which the Cherokee Nation of Indians hold their land as are the members of congress so vehemently pushing the so-called Oklahoma bill. It is pertinent, therefore, to inquire into this title.

Early in this century, the Cherokees occupied a large country lying in the States of Tennessee, Georgia and Alabama. They had lived there time out of mind; but their presence had become obnoxious to the white inhabitants, and in accordance with the persistent appeals of the latter, a treaty was, in 1828, negotiated, whereby the Indians agreed to exchange their lands for seven million of acres just west of Northern Arkansas, and also for what is known as the "outlet."¹ The preamble of this treaty reads: "Whereas," * * * the United States being anxious to secure to the Cherokees "a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a State or territory, etc." The treaty then agrees to give them the seven million acres, part of which they now occupy; and, moreover, the "United States guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of soil extend."²

This treaty was solemnly renewed in 1833, again in 1835, and yet again in 1846.

¹ Revision of Indian Treaties, pp. 57, 58. This "outlet" lies just south of Kansas, east of no man's land, and the panhandle of Texas, north of the Cheyenne and Arappahoe reservation, and Oklahoma proper, and west of the Creek country. It contains a little more than 6,000,000 acres.

² Of this large tract no man's land was afterwards sold by the Cherokees to the United States, a large part to the Creeks, and smaller tracts to the Nez Percés, Pottawattamies, and other tribes, leaving what is known as the "outlet" or "strip," and upwards of 4,000,000 acres actually occupied by the tribe.

In the treaty of 1835 the United States agreed that the lands theretofore ceded, "including the outlet, * * * shall all be included in one patent executed to the Cherokee Nation, * * *." In pursuance of this last treaty, and in 1838, the United States executed to the Cherokee Nation a patent, which recites first the various treaties already made, then describes seven million acres of land in the eastern end of the Indian Territory, also the "outlet" (*both by metes and bounds*), then reserves certain minor rights to the United States, such as military reservations, post roads, etc., and continues: "Therefore, in execution of the agreements, * * * the United States have given and granted, and by these presents do give and grant unto the said Cherokee Nation (the land described), TO HAVE AND TO HOLD THE SAME, together with all the rights, etc., to the said CHEROKEE NATION FOREVER." The patent then concludes by subjecting the land to certain minor conditions, one only of which bears upon title.³ That provision is that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same."

Thus, we see that the title of the Cherokees to the outlet is the same as to their present actual home; by treaty they are guaranteed the use of the outlet, and by patent, the "outlet" is embraced indifferently with the eastern portion of their domain. Their title to the "outlet" is impliedly recognized by the provision (now repealed), that they must give title to certain portions thereof to "friendly Indians." Their title, therefore, is a base or determinable fee, vested in the Cherokee Nation, *Qua Nation*.

The "outlet" is now leased to a cattle syndicate for five years at an annual rental of \$200,000. The Oklahoma bill,⁴ while on its face apparently complying with treaty provisions requiring consent to open up the "outlet," and providing for compensation to the Cherokees at \$1.25 per acre (as and when it shall be paid by settlers, and less cost of

³ These conditions are: To permit Red men to gather salt on the "outlet;" to sell to friendly Indians portions of the "outlet;" that the trade and intercourse laws shall extend over the whole country granted, and finally, the reversion mentioned in the text.

⁴ House bill 1,277, commonly known as the "Springer bill."

surveying),⁵ nevertheless, contains this insidious provision (section 13), that any leases, except those for strictly "farming purposes, are hereby declared void and contrary to public policy." Observe the legal effect. The Cherokees are guaranteed the use of the "outlet" forever, but if they abandon it, it reverts to the United States. They can use it only by actual settlement thereon, or by letting it out to tenants. It is fitted practically only for grazing purposes. The Cherokees have grazing land enough to the east, and besides, their towns, their government, their interests are all in the east. The only profitable way they can use it is by leasing it as they now do. They gave full consideration for this land; they got their patent, and the rent pays the greater part of their governmental and school expenses. But, says this bill, "your lease is void." Then follows a reverter for non-user,⁶ and the great restless American settler attains his end, he steals the Indian's land.

2. *Criminal Jurisdiction of United States Courts over Cherokees and White Men.*—In 1845, it was decided⁷ that a murder by a white adopted citizen of an Indian by blood is cognizable only by the United States Courts.⁸ Following this decision, and in accordance with its reasoning, the United States district court for the western district of Arkansas holds that the Cherokee courts have no jurisdiction over offenses committed by whites (whether adopted citizens, permitted persons or intruders),⁹ nor over any

⁵ The Cherokees have had a *bona fide* offer of \$3 per acre, but of course cannot accept, as they have no power to alienate.

⁶ The conditions are such that no considerable portion could be actually occupied by the Cherokees without loss to them; and besides, their own laws would largely prevent such occupation.

⁷ *United States v. Rogers*, 4 How. 567.

⁸ A white person can become a citizen of the Cherokee nation only by marriage with one who has Cherokee blood.

⁹ A word of explanation is necessary. There are three classes of whites in the Cherokee nation. First, mere intruders; second, permitted persons, and these are generally tenant farmers, who cultivate on shares with Cherokee owners, and are allowed to do so on payment of fifty cents per month; and third, white adopted citizens. These last become citizens by virtue of marriage. The Cherokees preserve intact the archaic idea of adoption, as described by Sir Henry Maine in his "ancient law." The bond of union is a substantial one, and the person adopted is still conceived, for all purposes, as of the real blood of the tribe. Until of late years there were seven clans of the tribe, and

offense committed by a Cherokee by blood upon the person or property of a white. Thus, in the recent case of *United States v. Boudinot*, the defendant killed one Stone, a white adopted citizen. He was tried and acquitted at Fort Smith, Arkansas, before the United States district court.

This is really a great hardship, for these Indians have a very complete system of laws, which are as well administered in their own circuit, district and supreme courts as in the average country circuit in the west.¹⁰ The trial of a Cherokee before an Arkansas jury is certainly not a trial by a jury of his peers or of the vicinage; but as was said in *United States v. Kagama*,¹¹ a trial often before "their 'deadliest enemies.'" The objection that no intelligent jurors can be found in the nation is not well taken; for the census of 1880 shows in Arkansas: population, 802,525, schools, 2,768, number of pupils during the year, 108,236, a percentage of attendance of 13. The same year the Cherokees numbered 20,086, schools, 107, attendance, 9,291, a percentage of 46.¹²

This rule, as to jurisdiction, produces a curious anomaly. The trade and intercourse laws cover comparatively few offenses, and as the United States courts have only the jurisdiction conferred by statute, there are necessarily many crimes not punishable by them. Thus, there are twenty-eight distinct grave offenses, defined and punishable by the Cherokee laws, which a white man may commit, and go unwhipt of justice. Among them are burglary, abortion, bribery, forgery, gambling, perjury and others. If a white man commit one of these offenses, and he be arrested by the Cherokee authorities, a writ of *habeas corpus* will at once issue from the United States court, and the Indian authori-

so close was this blood tie that the adopted citizen, equally with his Red brother, was forbidden to intermarry in his own clan.

¹⁰ I was amazed at the first trial I saw, at the dignity preserved, the care with which the case had been prepared, the ready objections of counsel, and the soundness of the judge's rulings on points of evidence. We might, indeed, learn something from them; for a majority of a jury renders a civil verdict, the unanimous rule obtaining only in criminal cases.

¹¹ 118 U. S. 375, 384.

¹² All instruction is in the English language. Many full blood Cherokees do not understand their old language, and it is the exception to meet a person in that country who does not speak English.

ties are compelled to discharge the prisoner.¹³

In view of this state of affairs, the reasoning upon which Taney, C. J., bases his decision in the Rogers case (*supra*), reads queerly. He says: "It can hardly be supposed that congress intended to grant such exemptions (i. e., from federal jurisdiction), to men of that class who are liable to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian county." "Most mischievous and dangerous," and yet the United States say to the Cherokees, "you have adopted them, you shall not expel them; but they may commit any one of this long list of crimes with impunity." There is no doubt that the decision was meant to protect the Indian, but no more ingenious device could have been conceived to work the opposite result.

Elsewhere, it is said in the opinion, that it is not supposable that the United States would allow its citizens to throw off allegiance and become identified with an Indian tribe, though in the treaty of 1785, art. 5,¹⁴ and again in the treaty of 1792, art. 8,¹⁵ it is expressly provided that, "if any citizens of the United States, or person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not as they please." This provision has never been repealed by subsequent treaty or legislation. The case, however, was apparently not argued for the defense, and the above treaties were not cited to the court.

The true rule deducible from all the treaties, the provisions of which are too lengthy to be set out here, would seem to be that an adopted white citizen should for all purposes of criminal jurisdiction be considered as if he were a Cherokee born. That is to say, Cherokee citizens, native or adopted, for crimes *inter sese*, are properly punishable only by Cherokee courts, while for crimes against the United States (as *e. g.*, robbing United States

mail), they should be amenable just to the extent of a citizen of any State. The Boudinot case (*supra*), had defendant been convicted, would have gone to the Supreme Court of the United States, and it is believed that the Rogers' case would have there been overruled.

The United States guarantee to keep all unauthorized persons out of the Cherokee Nation, and the Indians themselves are authorized to arrest all such, disarm them and turn them over to the United States authorities.

3. *Civil Jurisdiction Among the Cherokees.*—The white adopted citizen has the same standing before the nation's courts as the Cherokee by blood, but no intruder or permitted person can sue there;¹⁶ nor have the United States courts any jurisdiction over any civil controversies which may arise within the nation. A non-citizen may be a witness in the Cherokee courts, and failure to obey process will subject him to expulsion as an intruder.¹⁷

A curious question arises as to how these Indians are to obtain redress in the courts in case the United States infringe upon their treaty rights. "There must be refuge," yet the supreme court have held that the Cherokee Nation cannot sue in their capacity of nation.¹⁸

The instance of the Oklahoma bill is in point. The taking of the outlet from the Cherokees can hardly be justified under the right of eminent domain, and if, therefore, the Indians have a title in fee thereto, the taking must be beyond the powers of the United States. How can the Cherokees assert their rights in the premises? Probably there would lie a bill in equity with a number of individual Indians as parties plaintiff, stating it was intended to join all the members of the tribe, but further enumeration was omitted because of the number involved; something similar to the bill by numerous parties plaintiff where the interest is common to all.

FRANK P. BLAIR.

¹³ Compiled Laws Cherokee nation, p. 297, § 126.

¹⁴ Compiled Laws Cherokee nation, p. 118, § 106. As the Cherokee courts cannot punish such citizen for perjury, his testimony is but lightly regarded.

¹⁵ The Cherokee Nation v. Georgia, 5 Pet. 1. In this case Mr. C. J. Marshall delivered the opinion of the court, Mr. Justice Johnson concurred "as a legal question," not as a question of morality. Mr. Justice Baldwin concurred in dismissing the bill. Mr. Justice Thompson dissented, and with him Mr. Justice Story.

¹³ I personally knew of the cases of Lewis and Markham, the former a white adopted citizen, the latter a half blood, who were convicted by the Cherokee courts for wrongfully cutting and shipping walnut timber from the public domain. They were sentenced to pay \$1,000 each, and to be imprisoned until payment. Lewis was about to sue out his writ, when the chief pardoned both. Only Markham could have been punished, and the chief thought it unfair for him to suffer and Lewis to go free.

¹⁴ Revision of Indian treaties, p. 26.

¹⁵ *Id.* p. 29.

**BONDS—ADMISSIONS AND DECLARATIONS—
ALTERATION OF WRITTEN INSTRUMENTS
—BURDEN OF PROOF.**

HODNETT V. PACE.

Supreme Court of Appeals of Virginia, May 3, 1888.

1. *Bonds—Admissions and Declarations of Parties Thereto—Hearsay.*—An admission or declaration made by a party to a bond, to a third person, in the absence of another named therein, as to the transfer or satisfaction of the same, is hearsay and inadmissible.

2. *Alteration of Written Instruments—Burden of Proof.*—In case of the alteration of a written instrument, the burden of proof is on the party offering it to explain the same.

FAUNTLEROY, J., delivered the opinion of the court:

The petition of Narcissa Hodnett, administratrix, etc., of M. B. Hodnett, deceased, represents that she is aggrieved by a judgment of the corporation court of Danville, Va., rendered at its April term, 1887, in an action of debt, wherein John R. Pace, administrator of G. T. Pace, deceased, suing for the benefit of James R. McCully, administrator *d. b. n.* with the will annexed of Charles Lucas, deceased, is plaintiff, and Narcissa Hodnett, administratrix, etc., of M. B. Hodnett, deceased, is defendant. The plaintiff sued out of the clerk's office of the circuit court of Pittsylvania county, on the 9th day of July, 1881, a summons against M. B. Hodnett, surviving obligor of himself and John M. Sutherlin, deceased, in a plea of debt for \$241.25, with interest thereon from the 18th day of October, 1853, till paid. To the declaration, the defendant, M. B. Hodnett, demurred, and thereupon, by consent of the parties, the case was removed from the circuit court of Pittsylvania county to the corporation court of the town of Danville, in which latter court it was duly docketed, and continued from term to term until the death of the defendant, M. B. Hodnett, whereupon it was revived against the appellant as administratrix of the said M. B. Hodnett, deceased, and was again continued from term to term until April term, 1887, when the appellant withdrew the demurrer filed by M. B. Hodnett in 1881, and filed three pleas, viz., *non est factum*, payment, and the statute of limitations; on which pleas issues were joined, a jury impaneled, and a trial had, resulting in a verdict for the plaintiff against the appellant for \$241.25, with interest from October 18, 1853; upon which verdict, the court, overruling defendant's motion to set aside the same, entered the judgment complained of against the appellant, as administratrix aforesaid.

In the progress of the trial, appellant excepted to sundry rulings and instructions of the court, and also excepted to the action of the court in overruling her motion for a new trial. The first error assigned is that the court admitted the witness George C. Cabell to state to the jury, against the objection of the defendant, conversations alleged to have been had with G. T. Pace, deceased,

the payee in the bond sued on, in relation to the said bond, not in the presence of the obligors in the said bond, or either of them, or their personal representatives. We are of opinion that this assignment of error is well taken. The statements of this witness of what G. T. Pace, deceased, said to him, seven years previously, disclaiming any interest in the bond sued on, and that he had transferred it to Charles Lucas, then deceased, was purely hearsay evidence, and wholly incompetent. The question of the admissibility of such testimony has been frequently decided adversely to the parties offering it. *Palge v. Cagwin*, 7 Hill, 361; *Alexander v. Mahon*, 11 Johns. 185; *Kent v. Walton*, 7 Wend. 256; *Hurd v. West*, 7 Cow. 752; *Whitaker v. Brown*, 8 Wend. 490; *Beach v. Wise*, 1 Hill, 612. In his notes on the case of *Palge v. Cagwin*, as reported in 42 Am. Dec. at page 80, Freeman says: "Declarations by a former owner of a chattel or chose in action, made after parting with his interest, are of course inadmissible. *Christie v. Bishop*, 1 Barb. Ch. 115; *Peek v. Crouse*, 46 Barb. 156; *Smith v. Ins. Co.*, 8 Jones & S. 500. And as declarations of a former owner are inadmissible against the title of a subsequent purchaser for value, so are they inadmissible to prove that title. *Worrall v. Parmelee*, 1 N. Y. 521." In the case last cited the court below admitted the declarations of a former owner to prove property in the defendant, and on this error alone was reversed; the court saying by Jewett, C. J.: "The decision of the justice upon the objection taken to the admissibility of the evidence of Brown's declarations was clearly erroneous. Such evidence is nothing more than hearsay." The record in this case shows that the bond sued on was not assigned in writing to Lucas, and there is no evidence of property therein or title thereto in Lucas, or his administrator, except the incompetent testimony of the witness George C. Cabell, offered seven years after the death of G. T. Pace, the payee in the bond, that said Pace had told him that he had no interest in the bond, but had transferred it to Charles Lucas, then deceased. Charles Lucas died some time before July 12, 1866, as is shown by the order of the court appointing appraisers of his estate, one of whom was G. T. Pace, to whom the bond sued on was given, and which said appraisers returned an inventory and appraisement of said Charles Lucas' estate, signed by themselves and by his administrator, in which inventory and appraisement no mention is made of the bond sued on. Its first appearance, according to the testimony of George C. Cabell, was when it was brought to him by Lucas' administrator, or by some member of his family, he does not know which, nor exactly when, but he believes in 1868; and, after remaining some time in his hands, it was placed by him, in 1871, in the hands of Commissioner Moseley among the papers of the suit of *Sutherlin v. Lucas' Admr.*, where it remained for some years, and until 1881, when this suit was brought on it at the insistence of Elisha Barksdale, Jr., attorney for

one Soyars, who sought to have a settlement of the accounts of J. R. McCully, administrator of Lucas in the suit of Sutherlin v. Lucas' Admr. G. T. Pace, the payee in the bond, refused steadily, as long as he lived, to permit suit to be brought upon the bond in his name, and after his death his administrator allowed the suit to be brought in his name, upon being indemnified against costs, etc. The suit was not brought until long after the death of John M. Sutherlin and G. T. Pace, the principals as debtor and creditor in the bond; and even then it was permitted to sleep on the docket, without a trial, or effort for a trial, for nearly six years, and until the death of the surety in the bond, M. B. Hodnett, had taken away the last party and living witness to the transaction—thirty-four years after the bond fell due. And the court upon the trial, admitted the testimony of the said witness, George C. Cabell, as to the admissions of John M. Sutherlin, the principal obligor in the bond, as evidence against the defendant, administratrix of M. B. Hodnett, deceased, surety in the said bond; it being admitted that the alleged admissions of John M. Sutherlin were made, if at all, in the absence of M. B. Hodnett, the surety. This was error. *Lewis v. Woodworth*, 2 N. Y. 512; *Shoemaker v. Benedict*, 11 N. Y. 179.

Upon the trial it was shown that the date of the bond has been changed or altered from 1852 to 1853. The face of the bond shows the alteration, and the uncontradicted testimony of the expert witness W. E. Boisseau is that it had been plainly changed from 1852 to 1853. If of the original date, 1852, the statute of limitations barred the action thereon. For this alteration of the date of the bond, palpable upon its face, and expressly proved withal, the plaintiff offered no explanation whatever, nor introduced one word of evidence in relation thereto. But the instructions given by the court to the jury were erroneous, and a new trial should have been awarded, because of the misdirection of the jury. In the three instructions given by the court at the request of the plaintiff, the jury were told that in the case before them, in which the defendant, upon her plea of *non est factum*, relied upon a palpable and undenied alteration of the instrument sued on—a change in its date so as to bring it within the period of limitations—it was the defendant's duty to satisfy them by evidence that the said alteration was made without her consent, or that of her intestate, and was not made at the time of the execution of the bond; and that, unless this was done, it was a presumption of law, by which the jury was bound, that the alteration was contemporaneous with the execution of the bond, and was made with the defendant's consent, and rendered her liable to judgment. The third and last instruction given by the court is in these words: "The court instructs the jury that if they believe from the evidence the bond in question has been altered, that, in the absence of other evidence, the presumption of law is that the alteration was made at the time

the bond was executed; and, further, that every alteration on the face of a written instrument detracts from its credit, and renders its suspicious, and this suspicion the party claiming under it must explain to the jury by satisfactory evidence." This instruction, if not (as it is) grossly self-contradictory and erroneous, is wholly ambiguous, and calculated both to misdirect and confuse the jury. The true and well established rule of fundamental law and justice is directly to the contrary. In his note to the case of *Woodworth v. Bank*, 19 Johns. 391, reported 10 Am. Dec. 239, Freeman says: "There is a presumption of fact that an alteration was made after execution; but it will be generally a question for the jury to determine whether the alteration was made before or after the execution." 1 Greenl. Ev. § 564, says: "If, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is bound to remove." "But, if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact to be ultimately found by the jury upon the proofs to be adduced by the party offering the instrument in evidence." *Priest v. Whitacre*, 78 Va. 151. And in the case of *Elgin v. Hall*, reported in April number Va. Law J. 1886, p. 231, Lacy, J., speaking for this court, says: "We have no occasion to go into speculation, however, as to the cause or agent of these changes, made in the interest of the defendant, who offers in evidence these papers to prove the payment of money by him. The rule of law is that he must explain these things (which he has not attempted to do), or he must lose all benefit, taking nothing on account of them." No evidence is offered in explanation of the alteration upon the face of the bond sued on, thirty-four years after it became due, without which alteration it would be barred by the statute. No proper evidence is offered of Lucas' title to or interest in the bond. No explanation of the failure of Lucas to sue in his life-time upon this bond (if in truth he had any right or title in or to the bond), although the proof is that he was, for years previous to his death, pressed for money, and lived all his life in the immediate vicinity of Hodnett, the surety, and of John M. Sutherlin, the principal obligor on the bond, one of whom was rich, and the other well to do, and prompt to pay his debts; and with Hodnett's estate, after his death, under administration.

Both upon the facts and the law of this case, the judgment of the corporation court of Danville complained of is wholly erroneous, and must be reversed and annulled, and the cause will be remanded to the said corporation court for further

proceedings in accordance with this opinion. Reversed.

NOTE.—Hearsay Evidence—Admissions and Declarations—As has been well said by a leading text-writer "verbal admissions ought to be received with great caution; the evidence consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party actually did say."¹

"Whenever a witness states that of which he is not personally cognizant, but has derived from some third person his testimony, is clearly hearsay and not ordinarily admissible."²

Thus, it is not competent for one member of a family to testify as to what another member of the same family, who is dead, told him a certain family portrait cost.³ Nor for one member of a firm to testify as to what another member of the firm told him the latter paid for certain goods purchased by him for the firm.⁴ And in an action for the conversion of property against an officer who took it under process, as the property of a person in whose possession it was found, it is not competent for the plaintiff, in order to establish his title to the property, to show that such person had stated to others that he borrowed the property of the plaintiff.⁵ Neither are confessions of the principal debtor, made in the absence of a surety, evidence against the surety.⁶ And it was held in a late case that admissions made nine years before, by defendant's testator, could not be received in evidence to disturb a written contract to which he was a party.⁷

Admissions of Principal as Against Surety—Res Gestæ.—A surety is bound by the declarations of the principal, when made during the transaction of the business for which the surety was bound, and with reference thereto. All other declarations made subsequent to the act to which they relate, must be excluded.⁸

Alteration of Written Instruments.—A material alteration of a written instrument is "any act done upon the instrument by which its meaning or language is changed."⁹ It has been held, in Pennsylvania, that sureties on a builder's indemnity bond are discharged by a material change in the building contract without their consent.¹⁰ And in California, that the sureties on a bond for the faithful performance of the duties of an agent, are released from liability, if the principal, without the sureties knowledge, materially alters the terms of the contract, or if the principal continues

to employ the agent after knowledge that he has misappropriated money coming into his hands as agent.¹¹ And, in Washington Territory, that a bond, altered after being sealed, without the consent of the sureties, may be repudiated by them.¹² In another case, where, after a distiller's bond had been signed by two sureties, with the understanding between them and the obligor and obligee, that it was to be signed also by one Hugh P. Reynolds, whose name was in the bond, and for his name, with the knowledge of the obligee, was substituted that of John B. Reynolds, who then signed the bond, it was held that the two other sureties were discharged.¹³ But we find it laid down in a Missouri case, that the increase of the capital stock of a bank will not discharge the sureties on the cashier's bond.¹⁴

It is well settled that where the alteration is not a material one, and does not change the contract in such a manner as to place the surety in a different position than was first contemplated, such alteration will furnish him with no defense in case of suit.¹⁵ And furthermore, a bond altered in a material part, and declared upon as altered, is admissible in evidence without explaining the alteration, unless there is a sworn plea of *non est factum*, or some plea denying on oath that the alteration was made with the consent or by authority of the makers of the instrument.¹⁶

Burden of Proof.—If any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which, the alteration was made, as matters of fact to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence.¹⁷

¹¹ Roberts v. Donovan, 70 Cal. 108.

¹² Walla Walla County v. Puig, 1 Wash. Ter. 339.

¹³ United States v. O'Neill, 19 Fed. Rep. 567.

¹⁴ Lionberger v. Krieger, 88 Mo. 160.

¹⁵ Claiborne v. Birge, 42 Tex. 98; Roach v. Simmons, 20 Wall. 165; Amicable Life Ins. Co. v. Sedgwick, 110 Mass. 163; Gardiner v. Harbick, 21 Ill. 129.

¹⁶ Thompson v. Gowan, 8 S. E. Rep. 910.

¹⁷ 1 Greenl. on Ev. § 564; 1 Am. & Eng. Ency. of Law, 512, citing Stahl v. Berger, 10 S. & R. (Penn.) 170; s. c., 13 Am. Dec. 666; Stephens v. Graham, 7 S. & R. (Penn.) 506; s. c., 10 Am. Dec. 485; Bowers v. Jewell, 3 N. H. 543; Steele v. Spencers 1 Pet. (U. S.) 552; State v. Dean, 40 Mo. 464; Keen's Exr. v. Monroe, 75 Va. 424; Jones v. Alley, 4 Iowa, 181; Oliver v. Hawley, 5 Neb. 439; Huston v. Plato, 3 Colo. 402; Overton v. Matthews, 35 Ark. 147; Rogers v. Vosburgh, 87 N. Y. 228; Cass Co. Bank v. Morrison, 17 Neb. 341; s. c., 52 Am. Rep. 417; Briscoe v. Reynolds, 51 Iowa, 673; Palmer v. Sargent, 5 Neb. 233; s. c., 25 Am. Rep. 476; Haynes v. Haynes, 33 Ohio St. 598; Newell v. Mayberry, 3 Leigh (Va.) 250; Ramsey v. McOne, 21 Gratt. (Va.) 849. And see Western Bldg. Assn. v. Fitzmaurice, 9 Cent. L. J. 169; Sufell v. Bank of England, 13 Cent. L. J. 455; "Alteration of Written Instruments," 15 Cent. L. J. 62.

¹ 1 Greenl. on Ev. § 200.

² Wood's Prao. Ev. 248.

³ Houston, etc. R. Co. v. Burke, 55 Tex. 323.

⁴ Williamson v. Dillon, 1 H. & G. (Md.) 444.

⁵ King v. Frost, 28 Minn. 417.

⁶ Boston Nat. Mfg. Co. v. Messenger, 2 Pick. 223; Dexter v. Clemens, 17 Pick. 175.

⁷ Hewitt v. Lewis, 13 Wash. L. Rep. 322.

⁸ See 1 Greenl. on Ev. § 187, and the following cases cited therein: Lee v. Brown, 21 Kan. 458; Ballard v. Railroad Co., 7 Bush (Ky.) 597; White v. Ger. Nat. Bank, 9 Helsk. (Tenn.) 475; Hatch v. Elkins, 65 N. Y. 489; Tenth Nat. Bank v. Darragh, 3 Thomp. & C. 138; Chelmsford Co. v. Demarest, 7 Gray 1; Union Savings Assn. v. Edwards, 47 Mo. 445; Chapel v. Washburn, 11 Ind. 393.

⁹ 1 Greenl. on Ev. § 566.

¹⁰ Whelan v. Boyd, 114 Pa. St. 228.

QUERIES AND ANSWERS.*

QUERY NO. 9.

Sentence cannot be passed at once, unless time is waived by defendant. The justice's docket does not show waiver of time in a case of misdemeanor where defendant pleads guilty. On writ of *habeas corpus*, the court held parol evidence inadmissible to prove the proceedings or that time was waived, and discharged defendant. Is the ground tenable? H.

QUERY NO. 10.

A brings an action of replevin against B to recover certain goods and merchandise on the alleged ground that B purchased them of A upon fraudulent representations, and with the intention not to pay for them. A is defeated in the replevin suit, the alleged fraudulent representations and intention not being proven. Can A afterwards sue B in *assumpsit* for the purchase price or value of the goods, or is the judgment in the replevin case an estoppel? Losing the replevin suit must he lose his goods or the value of them? If A had first sued in *assumpsit*, he, of course, must thereby waive the tort, and his election of such remedy would conclude him. But by suing in tort first and failing, does it bar him from suing in *assumpsit*? Please cite authorities. H.

QUERIES ANSWERED.

QUERY NO. 7.

[To be found in Vol. 28, Cent. L. J., p. 142.]

B could assign his interest. *Nimms v. Davis*, 7 Tex. 26; *Fitzgerald v. Vestal*, 4 Sneed, 258; *Ridgeway v. Underwood*, 67 Ill. 416. No particular form of assignment is required. 1 *Wait's Act. & Def.* 363. If the assignment was made to defraud B's creditors and his assignee participated therein, or if the judgment was a lien, then D can obtain the money; otherwise B's assignee is entitled to it. B. J.

RECENT PUBLICATIONS.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. III. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1888.

This volume contains much that is of interest and will be found as carefully prepared as its predecessors, of which we have frequently spoken in words of high praise. Of the important cases herein reported, we note many of special interest, notably, *Velsian v. Lewis*, 15 Oreg. 539, involving important questions of sale of chattels by one who had no right to sell, and connected therewith questions arising out of the possession and the doctrine of *caveat emptor*. Mr. Freeman's note to the case is very exhaustive. Another important case is *Spies v. People*, 122 Ill. 1—the anarchist case. This also is extensively annotated. A leading case on questions of the liability of stock and stockholders in corporations, is *Thompson v. Reno Sav. Bank*, 19 Nev. 103. The note to this case is equal to any text-book on the subject.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXIX. *Wages of Law—Wrongful Levy*—St. Louis, Mo.: The Gilbert Book Company. 1889.

We have had occasion so often to speak of this series

of reports, of which this is the twenty-ninth volume, that it seems almost unnecessary to do more than call the attention of the profession to the issue of this volume, and to say further that we regard the set as of inestimable value, especially to the federal practitioner. This volume contains 1007 pages and all federal cases from the organization of those courts to the present, which are included within the subjects from *Wages of Law to Wrongful Levy*. Herein may be found the adjudication on the subjects of war, including the special topics of blockade and contraband, confiscation of property, neutrality, captured prize, army and navy, the civil war, some of which are of interest, not only to the lawyer but to the student of history. It also includes writs and therein process generally, and attachment, garnishment, *habeas corpus*, *mandamus*.

BOOKS RECEIVED.

THE AUSTRALIAN BALLOT SYSTEM, as Embodied in the Legislation of Various Countries, with an Historical Introduction. By John H. Wignmore, of the Boston Bar. Boston: Charles C. Soule. 1889.

A TREATISE ON THE LAW OF TRIALS IN ACTIONS, Civil and Criminal. By Seymour D. Thompson, LL.D., in Two Volumes. Chicago: T. H. Flood & Co. 1889.

THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, Compiled under the Editorial Supervision of John Houston Merrill, Late Editor of the American and English Railroad Cases, and the American and English Corporation Cases, Vols. 1, 2, 3, 4, 5 and 6. Northport, Long Island, N. Y.: Edward Thompson, Law Publisher. 1887, 1888.

AMERICAN AND ENGLISH CORPORATION CASES. A Collection of Corporation Cases, both Private and Municipal (Excepting Railway Cases), Decided in the Courts of Last Resort in the United States, England and Canada. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor, Vol. XXI. Northport, Long Island, N. Y.: Edward Thompson Co., Publishers.

THE AMERICAN AND ENGLISH RAILROAD CASES. A Collection of all the Railroad Cases in the Courts of Last Resort in America and England. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor, Vol. XXXIV. Northport, Long Island, N. Y.: Edward Thompson Co., Publishers.

1 Noticed in editorial column.

JETSAM AND FLOTSAM.

A GOOD story is told of Mr. Justice Hannen. A demure, sombre-dressed jurymen in melancholy tones claimed exemption from serving, and his lordship asked, in kind and sympathetic tones, "On what ground?" "My Lord," said the applicant, "I am deeply interested in a funeral which takes place to-day, and am most anxious to follow." The reply was, "Certainly, your plea is a just one." Scarcely had the man departed before Mr. Justice Hannen learned that he was the undertaker.

Miss Gotham (to Mr. Wabash, recently returned from abroad)—I suppose you were at court while in London, Mr. Wabash?

Mr. Wabash (uneasily)—Well—er—yes, Miss Gotham, but only once, and then I got off with a merely nominal fine.

"We find," was the verdict of the Arizona coroner's jury in the case of the man who had been hanged for horse-stealing, "that the deceased came to his death from perfectly natural causes. He knew it was Jake Barnaby's horse."

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ALIMONY—Fraudulent Conveyance. — Although a claim for alimony is not a debt within the ordinary meaning of that term, yet it is a right which becomes vested with the right to divorce, and it can no more be defeated by a fraudulent conveyance than it could if it were fixed and certain in amount.—*Picket v. Garrison*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 38.

2. ALTERATION OF INSTRUMENT—Bond. — Question upon the facts, as to whether there was alteration of bond of administrator, sufficient to avoid it.—*Kinard v. Glenn*, S. C. S. Car., Nov. 27, 1888; 8 S. E. Rep. 203.

3. APPEAL — Justice of Peace. — The fact that an appeal bond, on appeal from a justice, is executed and approved before rendition of the judgment appealed from, does not invalidate the bond.—*James v. Woods*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 106.

4. APPEAL — Reversal. — An order setting aside a verdict and granting a new trial will not be reversed, unless an abuse of discretion clearly appear.—*Halpin v. Nelson*, S. C. Iowa, Dec. 23, 1888; 41 N. W. Rep. 62.

5. APPEAL—Objections to Evidence. — Errors in the refusal of testimony on a trial will be considered as waived, unless complaint thereof be made in a motion for a new trial.—*Yates v. Kinney*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 123.

6. APPEAL — From Inferior Courts — Foreign Attachment—Discharge of Trustee. — Under Pub. Laws R. L. ch. 597, the plaintiff in an action begun by foreign attachment cannot appeal when the district court renders judgment in his favor, but discharges the trustee.—*Clapp v. Smith*, S. C. R. I., Dec. 6, 1888; 16 Atl. Rep. 246.

7. APPEAL—Justice of Peace. — Right to new trial of case before a justice where judgment was rendered in the absence of defendant.—*Howard v. Jay*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 148.

8. APPEAL—Bond. — An appeal bond is to be filed within 30 days from the date of the order or judgment appealed from, and no notice of an appeal is required.—*Mallick v. McDermot*, S. C. Neb., Dec. 14, 41 N. W. Rep. 187.

9. APPEAL—Presumption. — Where the abstract on appeal does not purport to set out all the record necessary to a review of the rulings, and the appellee denies that it shows all that occurred, it will be presumed that the rulings were correct.—*Brown v. Long*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 58.

10. APPEAL—Record. — Under Code Iowa, § 3179, the court cannot recognize the original papers except the testimony, nor that when only certified by the original certificate filed with the other papers.—*Cox v. Macy*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 28.

11. APPEAL—Practice—Record — Failure to Show Appeal. — It is no ground for dismissing an appeal that the record fails to show that any appeal was entered in the trial court, it being the clerk's duty to perfect the record with reference to the appeal.—*Allison v. Whittier*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 338.

12. APPEAL—Jurisdiction — Mortgage. — A suit to foreclose a mortgage is not a case involving an interest in the property, within Code Iowa, § 3173, which provides that the limitation on appeals prescribed therein shall not apply to such cases.—*Brown v. Smith*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 27.

13. APPEAL — Interlocutory Order — Procedure. — Defendants, in a processioning proceeding, cannot appeal from an interlocutory order to the effect that they are entitled to have the issue as to the location of the boundary line tried by a jury.—*Martin v. Fluppen*, S. C. N. Car.; Dec. 19, 1888; 8 S. E. Rep. 345.

14. APPEAL—Record — Presumption. — Where the transcript shows no such irregularities as motion for new trial alleges, the supreme court will presume they did not occur.—*State v. Braniff*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 21.

15. APPEAL—Judgment—Estoppel. — By enforcing a judgment, an appeal from it is waived.—*Reichelt v. Seal*, S. C. Iowa, Dec. 29, 1888; 41 N. W. Rep. 16.

16. ASSIGNMENT OF ERRORS — Statute — Construction. — Construction of Code Iowa, § 3207, providing for assignment of errors.—*Albrosky v. City*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 23.

17. ATTACHMENT—Damages. — In an action for the recovery of property wrongfully seized under attachment against a third person, the measure of damages for the detention of the property is the value of its use during that time.—*Turner v. Younken*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 11.

18. ATTACHMENT—Motion. — Held, error to dismiss motion to dissolve attachment, where there has been alteration of order requiring security for costs.—*Harrison Mach. Works v. Hoeing*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 70.

19. ATTACHMENT—Abatement—Execution—Trespass—Verdict. — In an action for damages for the malicious issuance of an attachment, it must be alleged and shown that it was issued maliciously, and without probable cause.—*Beyersdorf v. Sump*, S. C. Minn., Dec. 14, 1888; 41 N. W. Rep. 101.

20. ATTACHMENT—Replevin—Pleading—Judgment. — In an action of replevin a general denial puts in issue every material allegation of the petition, and under it the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action.—*Merrill v. Wedgwood*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 149.

21. ATTORNEY AND CLIENT—Lien. — Respecting the lien of attorney filing bill to redeem mortgage, and paying amounts decreed, as against one having an as-

signment prior to his own.—*Osborne v. Dunham*, N. J. Ct. Chan., Dec. 26, 1888; 16 Atl. Rep. 231.

22. **BANKS AND BANKING** — Principal and Agent. — Where a bank delivers to another bank money, drafts, etc., to pay a creditor, the relation between the debtor bank and the other bank is that of principal and agent, until the creditor assents or acts upon the transaction.—*Brockmeyer v. Washington Nat. Bank*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 855.

23. **BONDS** — Limitation of Actions. — Under Code Iowa, § 2529, the statute begins to run against a tax-sale purchaser's action to recover redemption money paid into the auditor's office, which an ordinance directs the auditor to hold subject to the order of the purchaser, when the auditor in office receives the money from his predecessor, and not when it is first paid into the office.—*Hininger v. Richter*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 55.

24. **BONDS** — Clerk of Court. — The condition of a clerk's official bond, that he will perform the duties of his office during the whole period that he may continue therein, is not broken by his failure to pay over money received by him in a cause pending in his court, unless after an order requiring such payment demand is made during his term of office. — *State v. Lake*, S. C. S. Car., Dec. 7, 1888; 8 S. E. Rep. 522.

25. **BOUNDARIES** — Settlement by Agreement — Statute of Frauds. — Where there is a dispute as to the true division line between adjoining proprietors, and they agree on a permanent boundary, and take possession accordingly, the agreement is binding on them.—*Atchison v. Pease*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 159.

26. **CERTIORARI** — Petition. — Petition in this case held fatally defective under Ga. Code, § 4052, requiring petition for *certiorari* to set forth plainly and distinctly the errors complained of.—*Western, etc. Ry. v. Jackson*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 209.

27. **CHATTEL MORTGAGES** — On Crops to be Grown — Validity. — The owner of the soil may make a valid mortgage of the crop to be grown by him, before the crop is planted. — *McCann v. Mayer*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 98.

28. **CHATTEL MORTGAGE** — Animals — Increase. — A mortgage of a mare is a lien on colts afterwards foaled, whether before or after the mortgagee takes possession under the mortgage, as against one having the equitable title to the mare, in favor of a mortgagee who is a *bona fide* purchaser for value. — *Myer v. Cook*, S. C. Ala., Dec. 10, 1888; 5 South. Rep. 147.

29. **CHATTEL MORTGAGES** — Actual Notice. — Though the description in a chattel mortgage be insufficient to afford constructive notice, it is valid as against attachment creditors having actual notice. — *American Well-works v. Whinery*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 53.

30. **CLERK OF COURT** — Neglect — Liability on Bond. — A county may sue upon the bond of a clerk of court elected by the county, for failure to record pleadings and judgments as required by law. — *Chester County v. Hemphill*, S. C. S. Car., Nov. 27, 1888; 8 S. E. Rep. 196.

31. **CONSTITUTIONAL LAW** — Amendments. — St. Nev. 1887, p. 122, providing for publication of amendments preceding the election is a reasonable requirement and sanctioned by the constitution. — *State v. Davis*, S. C. Nev., Dec. 22, 1888; 19 Pac. Rep. 894.

32. **CONSTITUTIONAL LAW** — Taxation — County Commissioners. — Gen. St. Colo. ch. 97, §§ 67, 70, vests the county commissioner levying tax with merely ministerial duties, and is not in violation of const. Colo. art. 10 § 7. — *People v. County Commissioners*, S. C. Colo., Dec. 14, 1888; 19 Pac. Rep. 892.

33. **CONSTITUTIONAL LAW** — Officers — Compensation. — Resolution by the legislature voting additional pay to parties employed by them is contrary to const. Cal. art. 4, §§ 81, 82. — *Robinson v. Dunn*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 878.

34. **CONSTITUTIONAL LAW** — Legislative Powers — Counties. — Act Md. 1888, ch. 98, extending limits to Balti-

more does not violate const. Md. art. 18, § 1, relating to organization of new counties. — *Daly v. Morgan*, Md. Ct. App., Nov. 23, 1888; 16 Atl. Rep. 287.

35. **CONSTITUTIONAL LAW** — Rules of Evidence. — Act Va. Jan. 26, 1886, prescribing rules of evidence in certain cases is not repugnant to Const. U. S. art. 1, § 10, as latter has no application to procedure in State courts. — *Bryan v. Commonwealth*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 246.

36. **CONSTITUTIONAL LAW** — Taxation. — Act Va. May 12, 1887, authorizing summary proceedings to collect taxes is not repugnant to const. U. S. art. 1, § 10. — *McGahey v. Commonwealth*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 244.

37. **CONSTITUTIONAL LAW** — Taxation. — The tax ordinance of the village of Summerville for the year 1887, is void by reason of conflict with the constitution in not laying the tax *ad valorem* upon all property (real and personal) subject to be taxed.—*Verdery v. Village of Summerville*, S. C. Ga., Nov. 28, 1888; 8 S. E. Rep. 218.

38. **CONSTITUTIONAL LAW** — Religious Societies — Incorporation. — Gen. St. Mo. 1865, ch. 70, § 5, as amended by Act Leg. 1871, p. 16, providing for incorporation of religious societies, does not contravene Const. Mo. 1865, art. 1, § 12.—*Kelth, etc. Co. v. Bringham*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 32.

39. **CONTEMPT** — Stay of Proceedings — Attorney. — Pending an appeal from an order adjudging an attorney guilty of contempt, and enjoining him from practicing in the district court, where a stay of proceedings has been duly granted, the attorney is entitled to all his former privileges in court. — *Bird v. Gilbert*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 924.

40. **CONTRACTS** — Pleading — Proofs. — Under Code Iowa, § 2730, making it necessary to deny under oath the genuineness of signature to written instrument referred to in the pleading. Notes may be introduced in evidence without proof of signatures.—*Dickey v. Baker*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 24.

41. **CONTRACT** — Payment — Parol Evidence. — A written agreement to pay a sum "at the time of procuring a conveyance of the interest of the patent-title owner" of certain land, in favor of the promisee or his grantee, "or at the time of the perfection of the title" in one of them, is due and payable when the title is perfect in the grantee, and parol evidence to show a different meaning is inadmissible. — *Hunt v. Gray*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 14.

42. **CONTRACT** — Sale — Agreement. — Offer made to buy certain stock at any time after Jan. 1, and an acceptance July 9, constitutes no contract. — *Park v. Whitney*, S. J. C. Mass., Jan. 3, 1889; 19 N. E. Rep. 161.

43. **COVENANTS** — Running With the Land. — Covenants entered into by a separate instrument under seal, on a conveyance of a right of way to a railroad company, whereby it undertakes to establish a flag station on the grantor's land to run with the land. — *M. & M. Ry. Co. v. Gilmer*, S. C. Ala., Dec. 10, 1888; 5 South. Rep. 188.

44. **CONVICTS** — Removal to Another Prison. — St. Mass. 1884, ch. 255, § 14, authorizing the removal of "any prisoner" from the State prison at Boston to the reformatory at Concord is not inconsistent with the provision in § 3.—*In re Conlon*, S. J. C. Mass., Jan. 1, 1889; 19 N. E. Rep. 164.

45. **COPYRIGHT** — Pleading. — Sufficiency of averments in bill for infringement of copyright. — *Trow City Direct Co. v. Curtin*, U. S. C. C. (N. Y.), Dec. 1, 1888; 36 Fed. Rep. 829.

46. **CORPORATIONS** — Dissolution — Abatement of Action. — A decree dissolving a life insurance company, under authority of Gen. St. Conn. § 2869, abates a suit pending against it, and destroys the lien of an attachment, notwithstanding the provisions of § 1322.—*Wulcox v. Continental Life Ins. Co.*, S. C. E. Conn., Sep. 21, 1888; 16 Atl. Rep. 244.

47. **CORPORATIONS** — Stockholders — Liability for Cor-

porate Debts.—The phrase "liable to the amount of his stock," as used in Const. Ala. 1868, art. 13, §§ 2, 3, and in Code 1867, § 1760, relating to the liability of stockholders for the debts of the corporation, means not simply the amount remaining undue on the stock, but an additional sum equal to the amount of the stock. — *McDonnell v. Alabama Gold Life Ins. Co.*, S. C. Ala., Dec. 5, 1888; 5 South. Rep. 120.

48. CORPORATIONS—Stock—Assignee. — Release of the assignor of stock by the trustee of an insolvent corporation, in payment of a certain amount on account of unpaid installments, does not discharge the assignee, the liability not being joint. — *Glenn v. Foote*, U. S. C. O. (N. Y.), Aug. 3, 1888; 38 Fed. Rep. 824.

49. COUNTIES—Action—Negligence. — Sufficiency of averment in claim against a county under Code § 2610, for injuries received in falling from bridge through negligence of county. — *Dale v. Webster County*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 1.

50. COUNTERCLAIM—Appeal—Costs. — In an action by an administrator against several on a note given to intestate, a debt contracted by intestate to one of the defendants is a proper counterclaim, under Code Iowa, § 2659. — *Sherman v. Hale*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 48.

51. CRIMINAL LAW—Homicide—Indictment. — Sufficiency of indictment charging assault to kill with reference to person charged as being assaulted. — *State v. Knadler*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 923.

52. CRIMINAL LAW—Larceny—Bailor. — One who is intrusted with a horse to sell with the intention that he shall give the money received to the owner is a bailor within the statute Ark. Mansf. Dig. § 1640 making conversion by bailor larceny. — *Datson v. State*, S. C. Ark., Dec. 8, 1888; 10 S. W. Rep. 18.

53. CRIMINAL LAW—Forgery — Indictment. — Sufficiency of indictment under Pen. Code Cal. § 470, making it forgery to fraudulently alter a will. — *People v. Todd*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 883.

54. CRIMINAL LAW—Plea in Abatement—Incompetency of Grand Juror. — The evidence taken in support of a plea in abatement, that one of the grand jurors was incompetent because he had been convicted of felony, did not show affirmatively that the offense for which the juror was convicted was a felony: *Held*, that the plea was properly overruled, even if the statute authorizes a plea in abatement for such cause. — *Woods v. State*, Tex. Ct. App., Nov. 23, 1888; 10 S. W. Rep. 108.

55. CRIMINAL LAW—Homicide—Evidence—Declarations. — On a trial for murder, evidence that while defendant was going directly from the place of the homicide he asked a man going toward the place where the latter was going, and after reply, said, "You had better go, and that damn quick," and then took his gun from his shoulder, is admissible. — *State v. Matthews*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 144.

56. CRIMINAL LAW—Homicide—Self-defense—Threats. — Where there is a conflict of evidence as to whether deceased was approaching defendant with an open knife when the fatal shot was fired, evidence of a threat made by deceased to kill defendant, though not communicated to him, is admissible, as tending to show who was the aggressor. — *Miller v. Commonwealth*, Ky. Ct. App., Dec. 20, 1888; 10 S. W. Rep. 137.

57. CRIMINAL LAW—Homicide—Self-defense. — Where it appears on a trial for murder that deceased had threatened to kill defendant, to whom the threats had been communicated, and that in the quarrel that resulted in the homicide deceased said, "I will kill you," it is admissible to show that deceased habitually went armed, and that defendant knew it. — *King v. State*, S. C. Miss., Dec. 3, 1888; 5 South. Rep. 97.

58. CRIMINAL LAW—Sentence. — Where execution of sentence on conviction of a misdemeanor is stayed, and the convict admitted to bail pending a review in the supreme court, the term of sentence begins when the judgment is affirmed. — *State v. Gruttkau*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 80.

59. CRIMINAL LAW—Evidence. — Except in cases where it is necessary to show guilty knowledge, it is not admissible to prove that at another time and place the accused committed or attempted to commit a crime similar to that with which he stands charged. — *Berghoff v. State*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 136.

60. CRIMINAL LAW—Practice—Jury. — Conviction will not be reversed where in trial for felony, on agreement of both sides, the testimony of the principal witness is read to the jury after they had retired to consider their verdict. — *Jamison v. State*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 138.

61. CRIMINAL LAW—Appeal—Evidence—Record. — Though it is improper to allow a witness to state what his testimony was before the grand jury: *Held*, not error when the record shows only that a question calculated to bring out such evidence was allowed and does not show whether it was answered. — *Billingslea v. State*, S. C. Ala., Dec. 7, 1888; 5 South. Rep. 187.

62. CRIMINAL LAW—Indictment—Cruelty to Animals. — Sufficiency of averment in indictment under Code N. C. § 2482, declaring against cruelty to animals. — *State v. Watkins*, S. C. N. Car. Dec. 19, 1888; 8 S. E. Rep. 346.

63. CRIMINAL LAW—Evidence—Corroboration. — Prosecutrix, in an indictment for slander, testified on cross-examination as to conversation with one H about her difficulty with defendant. H, on examination by defendant, denied any such conversation: *Held*, that it was not error to permit prosecutrix subsequently to state what the alleged conversation was. — *State v. Shoemaker*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 332.

64. CRIMINAL LAW—Rape—Indictment. — An indictment for rape is not fatally defective, after judgment, for omitting to repeat the word "feloniously" in charging the consummation of the offense. — *State v. Casford*, S. C. Iowa, Dec. 31, 1888; 41 N. W. Rep. 32.

65. CRIMINAL LAW—Information—Offense. — The offense charged is to be determined by the statements of fact in the information, and not by the designation given in the caption. — *State v. Wyatt*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 31.

66. CRIMINAL LAW—Homicide—Provocation. — In his statement to the jury, the accused having imputed to his wife the use of the words which may have been the provocation upon which he acted in giving her the mortal blow, the court was warranted in charging upon the sufficiency of words as provocation. — *Fry v. State*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 308.

67. CRIMINAL LAW—Witness. — Under Code Iowa, §§ 4238, 4421: *Held*, that a mistake in the indorsement of the witness' name on the indictment was no ground of objection to him, when called as a witness at the trial, where he testified before the grand jury and signed his true name to the minutes. — *State v. Story*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 12.

68. CRIMINAL LAW—Evidence—Confessions—Fear and Compulsion. — On examination to determine whether confessions were made with that degree of freedom to warrant their admission, it is error to exclude evidence offered by the prisoner to show that they were procured through fear and compulsion. — *State v. Kinder*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 78.

69. CRIMINAL LAW—Evidence of Venue. — Facts held sufficient to warrant the inference that the larceny was committed where the venue was laid. — *State v. Hull*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 28.

70. CRIMINAL LAW—Record—Failure to Swear Jury. — In a misdemeanor case, it is no ground for reversal that the record fails to show that the jury, was specially sworn, since it presumed that the general oath of the term was administered to them. — *Ruble v. State*, S. C. Ark., Dec. 15, 1888; 10 S. W. Rep. 23.

71. CRIMINAL LAW—Appeal—Record—Failure to Plead. — Under Mansf. Dig. Ark. § 2468, it is no ground for reversal that the record fails to show that a plea was entered by defendant, defendant having submitted to a trial as under a plea of not guilty. — *Moore v. State*, S. C. Ark., Dec. 15, 1888; 10 S. W. Rep. 22.

72. CRIMINAL LAW—Evidence—Accomplice.— Question whether under certain facts the wife was a statutory accomplice of her husband within meaning of Mansf. Dig. Ark. §§ 1507, 1510. — *Edmonson v. State*, S. C. Ark., Dec. 8, 1888; 10 S. W. Rep. 21.

73. CRIMINAL LAW—Larceny—Indictment.— An indictment for larceny, describing the property alleged to be stolen as "two ten-dollar bills of United States currency," is fatally vague and uncertain. — *State v. Oakley*, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 17.

74. DAMAGES—Liquidated.— Under Civil Code Cal. §§ 1670, 1671, an agreement to pay \$200 per month and an attorney's fee, for failure to deliver possession of land on a certain day, is void. — *Eva v. McMahon*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 872.

75. DEED—Description.— Sufficiency of description of land in deed. — *Tiernay v. Brown*, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 104.

76. DEMURRAGE—Coal Orders.— Libelants offered a schooner to defendants' agent to load, whereupon the agent filled up a "coal order" to one of defendants' coal pockets, which libelants accepted: *Held*, that the order was incorporated in the contract, and defendants were relieved from liability for failure to furnish a load by a clause to that effect in the order. — *Morse v. Lehigh*, etc. Co., U. S. C. O. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 831.

77. DISMISSAL—Appeal—Defendants.— Appeal from temporary injunction after argument on appeal plaintiff dismissed the suit below: *Held*, that as the dismissal operated to dissolve injunction the supreme court had no real controversy before it. — *Chicago, etc. Co. v. Dey*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 17.

78. DISORDERLY HOUSE—Evidence—Opinion.— On a prosecution for keeping a disorderly house, an answer of a witness will not be stricken out, though it contains an irrelevant expression of opinion upon the propriety of granting a license so near a school. — *Delaney v. State*, S. C. N. J., Dec. 28, 1888; 16 Atl. Rep. 267.

79. DIVORCE—Adultery—Evidence.— Facts held not sufficient proof of adultery in suit for divorce. — *Peavey v. Peavey*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 67.

80. DOWER—Assignment—Allotment of Homestead—Joinder.— Under Rev. St. Mo. § 2634, an action for the recovery of dower and homestead may be joined in one count, but the widow cannot seek in one count the recovery of homestead, and in a second count the recovery of dower. — *Bryan v. Rhoades*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 53.

81. DOWER—Renunciation—Insanity.— A widow who is insane cannot renounce the provisions of her husband's will and elect to take dower. — *Young v. Boardman*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 48.

82. DRAINAGE—Notice of Petition—Collateral Attack.— Under the Indiana drainage act 1879, (1 Rev. St. 1876, p. 428,) § 2: *Held*, upon the facts that there was some notice, and that the assessment and collection of the tax for the drain cannot be enjoined in a collateral proceeding. — *Montgomery v. Wasem*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 184.

83. EJECTMENT—Improvements—Knowledge of Defendant.— Defendant, in ejectment, cannot assert a claim for improvements made in good faith, on the ground that he supposed the *locus in quo* was a vacancy between his survey and plaintiff's, when his own deed, under which plaintiff claims, calls for joining the two surveys, and the evidence shows that the surveyor intended to leave no vacancy. — *Brown v. Bedinger*, S. C. Tex., Dec. 11, 1888; 10 S. W. Rep. 80.

84. EJECTMENT—Evidence—Intervenor's Petition.— In ejectment, it is not error to exclude from evidence an intervening petition, and the proceedings on issues thereon, to which plaintiff is not a party, and the issues in which are still pending. — *Atkinson v. Dixon*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 163.

85. EJECTMENT—Surviving Partner—Lands of Firm.— Land conveyed to a firm, but never used in the partnership business, cannot, as a whole, be recovered in ejectment by the surviving partner. — *Baber v. Middlebrooks*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 829.

86. EJECTMENT—Defenses—Foreclosure—Fraud—Rescission.— After land has been sold under a deed of trust to secure the purchase money and purchased by the vendor, the vendee having retained possession of the land, cannot defend ejectment by the vendor on the ground of fraudulent misrepresentations by the vendor inducing the first sale. — *Crumb v. Wright*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 74.

87. EMINENT DOMAIN—Damages.— Evidence that the land across which a right of way is located contains beds of coal, is admissible to show the market value of the land as an entirety, and for purposes for which it might be available in the future, though the ownership of the coal is not appropriated, the jury being instructed to that effect. — *Doud v. Mason City*, etc. Co., S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 65.

88. EMINENT DOMAIN—Foreign Corporation.— While the constitution of this State provides that no railroad corporation organized under the laws of another State shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of this State, it does not prohibit existing railroad companies, one of which is a domestic corporation, from becoming a body corporate by consolidation. — *State v. Chicago B. & Q. R. Co.*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 125.

89. EQUITY—Jurisdiction—Fraud.— Where defendant sold complainant's property under a deed of trust, and sued for the balance due on the note, equity has jurisdiction of a bill charging fraud and praying that the prosecution of defendant's suit be restrained. — *Adams v. Ball*, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 109.

90. EQUITY—Action to Set Aside Deed—Fraud of Parties.— Where land taken in the name of a third person for the purpose of defrauding creditor's with knowledge of grantees, the deed is binding between the parties. — *Brett v. Brett*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 106.

91. EQUITY—Trustee—Parties.— Circumstances under which conveyance wrongfully made by trustee cannot be cancelled by court of equity unless trustee is a party. — *Humphries v. Humphries*, W. Va. Ct. App., Nov. 24, 1888; 8 S. E. Rep. 283.

92. EQUITY—Marshalling Assets.— On bill to marshal assets of decedent's estate where the whole fund was in court for distribution: *Held*, error after ordering senior judgments paid to refuse to direct payment of petitioner's mortgage out of the residue. — *Ackerman v. Moor*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 321.

93. EQUITABLE ASSIGNMENT.— Fact under which the court held an equitable assignment of purchaser's right on sale under foreclosure of mortgage. — *Gilbert v. Husman*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 3.

94. EQUITY—Rescission of Contract—Cancellation of Note—Mistake.— Equity will cancel a promissory note executed under the belief that the maker owed the payee, where in fact it was another person of the same name that owed the account. — *Fitzmaurice v. Mosler*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 180.

95. ESTATES—Condition Subsequent—Demand.— Under a condition subsequent, availing a deed if the grantee should fail to make three consecutive annual payments, it is not essential to a defeasance of the estate that any demand or notice of the non-payment of the amount should be made. — *Royal v. Aultman Taylor Co.*, S. C. Ind., Dec. 22, 1888; 19 N. E. Rep. 202.

97. EVIDENCE—Best and Secondary—Lost Papers—Continuance.— Where, as in respect to a written notice to sue, there is but a feeble presumption that a paper has been preserved, the defendant may introduce parol evidence of its contents after proving that the plaintiff, on inquiry for it pending the suit, answered that it was lost, that she had made diligent search for it, that she believed it destroyed, but that she was bound by it. — *Crawford v. Hodge*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 206.

97. EVIDENCE—Documentary—Parol to Vary Records. —A deed executed by a sheriff at an execution sale, under a judgment in which he and his wife are usees, is void, and parol evidence is not admissible, on the trial of a claim made by the grantee upon the levy of a subsequent execution, to show that, at the time of the sale, the sheriff was divorced from his wife, and that she was the only usee. —*Morrison v. Knight*, S. C. Ga., Dec. 28, 1888; 8 S. E. Rep. 211.

98. EVIDENCE—Witness—Criminating Questions. —Construction of Code Iowa, § 3847, providing that witness shall not be compelled to answer questions that criminate him. —*Makanks v. Cleland*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 53.

99. EVIDENCE—Documents—Presumption. —Every reasonable presumption will be against party withholding documents in his possession, after due notice to produce. —*McGinness v. School Dist.*, S. O. Minn., Dec. 14, 1888; 41 N. W. Rep. 103.

100. EVIDENCE—Witness—Examination of Expert. —In the examination of an expert witness, it is no objection to questions of counsel that he reads them from a medical book, or repeats them to the witness from memory. —*Tompkins v. West*, S. C. Conn., July 7, 1888; 16 Atl. Rep. 237.

101. EXECUTION—Levy—Priorities. —Goods in the possession of an officer under levy may be levied upon constructively by another officer having other process, and the process under which such constructive levy is made is entitled to satisfaction in preference to process subsequently coming into the possession of the officer making the first levy. —*Penland v. Leatherwood*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 234.

102. EXECUTORS AND ADMINISTRATORS—Advancement—Overpayment. —Question whether, under any circumstances, an executor has a right to recover back from a legatee an excess of advancements made to the latter. —*Eurst v. Morgan*, W. Va. Ct. App., Nov. 24, 1888; 8 S. E. Rep. 285.

103. EXECUTORS AND ADMINISTRATORS—Appointment—Petition. —Under Rev. Stat. Me. ch. 64, § 1, it is sufficient if the petition alleges that deceased "died intestate, possessed of goods remaining to be administered, leaving no widow." —*Danby v. Dawes*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 255.

104. EXECUTORS AND ADMINISTRATORS—Sales—Devise. —A purchaser of land, specifically devised, at a sale by an executor under order of court, which has been held void, and the land recovered by the devisee's grantee, has no lien for the purchase price. —*Frost v. Atwood*, S. C. Mich., Nov. 28, 1888; 41 N. W. Rep. 96.

105. EXECUTION—Against the Person—Affidavit. —Before an execution against the person of a judgment debtor can be allowed, under the provisions of § 507, Civil Code, an affidavit therefor must be made by the judgment creditor or his attorney. —*In re Heath*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 926.

106. EXECUTION—Sale—Waiver of Mortgagor's Rights. —The mortgagee in possession cannot, by consenting to the sale of the equity of redemption in the property, waive the mortgagor's right to object to its validity. —*Metzler v. James*, S. C. Colo., Dec. 10, 1888; 19 Pac. Rep. 885.

107. EXEMPTIONS—Statute—Construction. —Under acts Conn. 1887, ch. 132, § 1, and amendments the day after its passage and revision of Jan. 1, 1888: *Held*, the intent of the legislature protect wages earned after June 1, 1887, without reference to when debt was contracted. —*Burns v. Plume, etc. Co.*, S. C. Conn., Dec. 18, 1888; 16 Atl. Rep. 260.

108. FOREIGN INSURANCE COMPANIES—Quo Warranto. —*Quo warranto* held to be a proper proceeding to try the right of a foreign corporation to carry on its corporate business in this State. —*State v. Fidelity Ins. Co.*, S. C. Minn., Dec. 27, 1888; 41 N. W. Rep. 108.

109. FOREIGN JUDGMENT—Limitation of Actions. —A judgment of a superior court of a State of the union other than this State, sued on in this State: *Held*, a for-

feign judgment, within the intent and meaning of § 10 of the Code of Civil Procedure. —*Marx v. Kilpatrick*, S. O. Neb., Dec. 14, 1888; 41 N. W. Rep. 111.

110. FOREIGN JUDGMENTS—Evidence. —*Held*, that transcript of foreign judgment is *prima facie* evidence that the judgment had been recovered. —*Rea v. Scully*, S. O. Iowa, Dec. 21, 1888; 41 N. W. Rep. 87.

111. FRAUDS—Statute of—Agreement not in Writing—Assumption of Fire Risk. —A verbal promise to a landlord by a creditor who, as security for a debt, takes possession of a tenant's crop, that he will assume the risk of fire upon being allowed to store it in a place considered dangerous by the landlord, is not within the statute of frauds. —*Dillon v. Patterson*, S. C. Miss., Nov. 26, 1888; 5 South. Rep. 103.

112. FRAUDS—Statute of—Payment—Possession. —An oral contract for the purchase of real estate, followed by the payment of a portion of the purchase price and the taking of actual possession, would constitute a valid contract. —*Lipp v. Hunt*, S. O. Neb., Dec. 18, 1888; 41 N. W. Rep. 143.

113. FRAUDULENT CONVEYANCES—Sales to Accommodation Indorsers. —Accommodation indorsers may, on assuming the payment of the note, take in satisfaction of their liability, at its fair value, property of the principal debtor, who is insolvent. —*State v. Mason*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 179.

114. FRAUDULENT CONVEYANCE—Parent and Child. —Facts sufficient to establish fraudulent conveyance of land from mother to son. —*Peterson v. Rome*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 68.

115. FRAUDULENT CONVEYANCES—Husband and Wife—Estoppel. —A conveyance by a husband to his wife in repayment of a loan by her from property held in her own right, is not fraudulent as to creditors who commenced attachment proceedings about the time of the execution of the conveyance. —*Citizens' Nat. Bank v. Webster*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 47.

116. FRAUDULENT CONVEYANCES—Husband and Wife—Estoppel. —Though the husband acquires the legal title to the wife's money loaned by her to him, she has an equitable claim therefor which, together with a release of her contingent interest and homestead right in land of the husband, by joining in a mortgage with him, is a sufficient consideration for the husband's note to her as against debts subsequently contracted by him. —*Payne v. Wilson*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 45.

117. GAMING—Contracts—False Representations. —One who has purchased grain of a broker on margins, and has made regular settlements with him, cannot recover back money so lost on the ground that the broker falsely represented that he was dealing through a particular commission house. —*O'Brien v. Luques*, S. J. O. Mo., Dec. 10, 1888; 16 Atl. Rep. 804.

118. GRAND JURY—Qualification—Opinions. —Opinions disqualifying grand jurors must arise from something heard outside the grand jury room. —*People v. Northey*, S. C. Cal., Dec. 27, 1888; 19 Pac. Rep. 865.

119. GUARDIAN AND WARD—Suit on Bond—Judgment. —The judgment, in an action on a guardian's bond for misconduct, should be for the penal sum of the bond, and to be discharged on the payment of the damages sustained. —*Anthony v. Estes*, S. O. N. Car., Dec. 19, 1888; 8 S. E. Rep. 347.

120. HIGHWAYS—Defects—Notice. —Notice to municipal officers that a culvert was not of sufficient size to readily vent the water, is not notice of a defect. —*Pendleton v. Northport*, S. J. O. Me., Nov. 30, 1888; 16 Atl. Rep. 253.

121. HIGHWAYS—Establishment—Report of Viewers—Collateral Attack. —In a collateral proceeding to restrain the collection of assessments for a gravel road, the report of viewers appointed to locate the road is sufficient to show that they met on the day appointed. —*Hobbs v. Board of Commissioners*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 186.

122. HIGHWAYS—Taxes—Assessments. —Taxes for highway purposes, under the tax law of Michigan of

1882, can only be assessed by the supervisors upon the certificate of the township clerk that the proposed tax has been voted.—*Sage v. Stevens*, S. O. Mich., Nov. 28, 1888; 40 N. W. Rep. 919.

123. HIGHWAYS—Work on Road—Notice.—Construction of Mans. Dig. Ark. § 5907, providing for prosecution of those failing to work on road and question of notice to those delinquent.—*Ford v. State*, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 14.

124. HOMESTEAD—Conveyance—Estoppel.—The title to a homestead cannot be divested or incumbered by deed, unless such deed be executed and acknowledged by both husband and wife.—*Betts v. Sims*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 117.

125. HUSBAND AND WIFE—Wife's Separate Estate.—Plaintiff, her husband joining, executed a trust deed of her property to secure payment of supplies to be advanced. On default, the land was sold under the deed, and bought in by the creditors: *Held*, that deed was valid.—*Walker v. Ross*, S. C. Miss., Nov. 5, 1888; 5 South. Rep. 107.

126. HUSBAND AND WIFE—Wife's Separate Estate—Liability of Wife.—Code Miss. 1880, § 1177, does not prevent the wife from making the agency of the husband, by her conduct, broader than that provided for by the statute.—*Ross v. Baldwin*, S. C. Miss., Nov. 19, 1888; 5 South. Rep. 111.

127. HUSBAND AND WIFE—Wife's Separate Estate—Creditor's Bill.—Under Rev. Stat. Me., ch. 61, § 1, judgment creditor of husband can, upon facts of this case, maintain bill against equitable interest of wife.—*Merrill v. Jose*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 254.

128. HUSBAND AND WIFE—Suit by Wife—Joinder of Husband.—Under acts Va. 1876-77, p. 338, a husband is required to be joined with the wife in a suit instituted by her for the protection of her separate property against creditors of the husband.—*Burson v. Andes*, S. C. App. Va., June 16, 1888; 8 S. E. Rep. 249.

129. HUSBAND AND WIFE—Mortgage—Wife's Separate Estate—Suretyship.—Under Rev. Stat. Ind. 1881, § 5119, providing that a contract of suretyship by a married woman shall be void as to her, her children, on her death while married, stand in her shoes, and may set up the invalidity of a mortgage of her separate estate, executed by her as surety, in a proceeding against them as her heirs to foreclose.—*Ellis v. Baker*, S. C. Ind., Dec. 21, 1888; 19 N. E. Rep. 193.

130. HUSBAND AND WIFE—Contracts—Partnership.—The Michigan married woman's act (How. Stat. §§ 6295-6299) does not authorize a husband and wife to enter into a contract of partnership between themselves so as to render themselves jointly liable for the contracts of the firm thus established.—*Artman v. Ferguson*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 907.

131. HUSBAND AND WIFE—Contracts by Wife—Separate Estate.—A plea to an action on an insurance policy, averring that when plaintiff purchased the goods insured, she was and still remained a married woman, that she purchased them on credit, had not paid and refused to pay for them, and that hence she had no insurable interest therein, is insufficient.—*Queen Ins. Co. v. Young*, S. C. Ala., Dec. 5, 1888; 5 South. Rep. 116.

132. HUSBAND AND WIFE—Wife's Separate Estate—Debts of Husband.—In an action of replevin, instituted by a married woman for the possession of her personal property levied upon by the sheriff under execution against her husband: *Held*, that the property so purchased would not be subject to seizure upon final process against the husband, even though in the management and use of the property the husband was permitted to have charge of it, and even though the property was listed for taxation in his name.—*Taggart v. Fowler*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 964.

133. INDIANS—Sale of Land.—Deed of white adopted member of Indian tribe to a white man, of land which, under treaty with the United States, could not be aliened, is absolutely void.—*Sheldon v. Donohoe*, S. C. Kan., Dec. 8, 1888; 19 Pac. Rep. 901.

134. INFANCY—Fraudulent Representations—Pleading.—In an action on a note, in which infancy is pleaded, error in allowing the declaration to be amended by averring that defendant fraudulently represented that he was twenty-one years of age is cured by a charge that such representations will not authorize a recovery on the contract if defendant was an infant.—*McKamy v. Cooper*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 312.

135. INJUNCTION—Pleading.—Demurrer to bill for want of equity was properly sustained.—*Sorugge v. Burke*, S. C. Ga., Nov. 21, 1888; 8 S. E. Rep. 209.

136. INJUNCTION—Trust Deed—Sale.—Facts not held sufficient to support finding for plaintiff in suit to enjoin sale of land under trust deed.—*Van Meter v. Hamilton*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 71.

137. INJUNCTION—Assessment of Damages.—After an injunction *pendente lite* has been dissolved at the final hearing, a motion for an assessment of damages caused by the injunction, made at a subsequent term, without notice to the adverse party, should be denied.—*Hoffelmann v. Franke*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 45.

138. INSOLVENCY—Discharge—Practice.—A creditor who desires to oppose an insolvent's discharge must appear for that purpose on the day assigned for a hearing, and his appearance to oppose a discharge is not implied from his appearance on such occasion for other purposes.—*In re Butterfield*, S. J. C. Me., Nov. 18, 1888; 16 Atl. Rep. 247.

139. INSOLVENCY—Allowance of Claims—Partnership.—A creditor of an insolvent firm has such an interest in the individual estate of one of the partners, who is solvent, as will give him the right of appeal from the allowance of a claim against such estate by an individual creditor.—*Chadbourne v. Harding*, S. J. C. Me., Nov. 19, 1888; 16 Atl. Rep. 248.

140. INSURANCE—Acting as Agent—Information.—Under act Texas, July 9, 1879, prohibiting any person from acting as agent of an insurance company which has not complied with the laws of that State, an information is insufficient in not alleging that the company named was an insurance company.—*Brown v. State*, Tex. Ct. App., Dec. 12, 1888; 10 S. W. Rep. 112.

141. INSURANCE—Sunday—Action.—Where an insurance policy requires suit to be brought within twelve months after a fire occurs, and the last day of such twelve months falls on Sunday, suit brought on the following Monday is in time.—*Owen v. Howard Ins. Co.*, Ky. Ct. App., Dec. 4, 1888; 10 S. W. Rep. 119.

142. INSURANCE—Pleading and Proof.—In an action upon a fire insurance policy, the declaration being in ordinary form, it is reversible error to admit evidence that by fraud or mistake of the defendant's agent a clause was inserted in the policy different from that agreed upon by plaintiffs.—*O'Donnell v. Connecticut Fire Ins. Co.*, S. C. Mich., Nov. 28, 1888; 41 N. W. Rep. 95.

143. INSURANCE—Premiums—Waiver—Custom.—Where an insurance company, by its habits of business, creates in the mind of a policy holder the belief that payment of premiums may be delayed until demanded, is binding on the company.—*Home Protection v. Avery*, S. C. Ala., Dec. 7, 1888; 5 South. Rep. 143.

144. INSURANCE—Husband and Wife—Parties.—The wife cannot maintain an action at law on an insurance policy on her property, taken out in the name of the husband; neither the policy nor the application showing agency or trusteeship on his part.—*Zimmerman v. Farmers' Ins. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 89.

145. INSURANCE—Agent—Statute.—Facts sufficient to show that party occupies as to the company whose policy is issued the position of agent, under acts Gen. Assemb. Iowa, ch. 211, § 1.—*St. Paul, etc. Co. v. Shaver*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 19.

146. INSURANCE—Benevolent Society.—*Held*, that benevolent society, under the features of this case, was in effect an insurance company, and as such amenable to the statutes regulating insurance.—*State v. Nichols*, S. C. Iowa, Dec. 20, 1888; 41 S. W. Rep. 4.

147. **INSURANCE—Accident—Policy—Change after Injury.**—Accident insurance company has power after the injury to correct mistake in policy as to occupation of the insured.—*Ford v. U. S. etc. Co.*, S. J. C. Mass., Jan. 1, 1889; 19 N. E. Rep. 169.

148. **INSURANCE—Accident Insurance—Injury.**—A policy of accident insurance contained the express condition that it should not cover accidents from trying to enter a moving steam vehicle; the assured was killed while attempting to get on a moving railway train: *Held*, that the company was not liable.—*Miller v. Travelers' Ins. Co.*, S. C. Minn., Dec. 27, 1888; 40 N. W. Rep. 889.

149. **INSURANCE COMPANIES—Taxation—Exemption.**—Chapter 66, Laws 1887, amending chapter 77, Laws 1885, were not intended to exempt insurance companies from license tax within limits of cities of the second-class and villages.—*City of Columbus v. Hartford Ins. Co.*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 140.

150. **INTEREST—Coupons.**—§ 1, ch. 44, Comp. Stat. 1887, forbids the allowance of interest in excess of ten per cent. upon any loan, and where the interest provided for is represented by coupons providing that interest shall be allowed thereon after maturity, at the maximum rate, no interest will be allowed on such coupons.—*Matthews v. Toogood*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 130.

151. **INTOXICATING LIQUORS—Information.**—Sufficiency of averments in information under Laws Miss. 1885, ch. 296, § 1.—*Sires v. State*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 81.

152. **INTOXICATING LIQUORS—Local Option—Indictment—Proof of Law.**—Under Code Ga. § 3815, it is not necessary on an indictment for violation of local option law to allege or prove that the law had gone into effect in a county which had adopted it by a vote of the people.—*Combs v. State*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 318.

153. **INTOXICATING LIQUORS—License—Mandamus.**—Petition for *mandamus* to compel village trustees to approve liquor bond, not granted where trustees reject sureties as insufficient as Acts Mich. 1887, No. 313, § 8, leaves it to the "judgment" of the trustees.—*Palmer v. President*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 850.

154. **INTOXICATING LIQUORS—Illegal Sale—Prohibited District.**—Construction of Act Mans. Dig. Ark. § 4524, prohibiting sale of liquor within three miles from a church, under the facts of this case.—*Herron v. State*, S. C. Ark., Dec. 16, 1888; 10 S. W. Rep. 25.

155. **INTOXICATING LIQUORS.**—Under the Iowa statute prohibiting the manufacture and sale of intoxicating liquors, a beverage containing alcohol is an intoxicant, regardless of whether the quantity of alcohol contained in it is of itself intoxicating.—*State v. Intoxicating Liquors*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 6.

156. **INTOXICATING LIQUORS—Illegal Sales—Sales by Druggist.**—*Held*, under Act Ark. March 21, 1881, §§ 1, 3, that the legislature intended to intrust no one in the prohibited districts with the right to furnish liquors but the physician who has complied with the law.—*Battle v. State*, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 12.

157. **JUDGMENT—Pleading.**—A complaint will be liberally construed, upon a motion by defendant at the time of the trial of the action, and after answering for judgment on the pleadings.—*McAllister v. Welker*, S. C. Minn., Dec. 27, 1888; 41 N. W. Rep. 107.

158. **JUDGMENT—Equitable Relief—Justice of the Peace.**—Where an action was commenced before a justice of the peace, who, at the time of the commencement of the suit, designated a time for trial, but when, upon issuing the summons, he designated an earlier time, but of which the plaintiff had no notice, until after a judgment had been rendered against her, such judgment, if valid, must be corrected by a direct proceeding.—*Proctor v. Pettit*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 131.

159. **JUDGMENT—Res Adjudicata.**—In ejectment, plaintiffs claimed title by devise. Defendant admitted title in the testator, but denied that the devise covered

the land in dispute. Judgment was rendered for plaintiff on a general verdict: *Held*, that defendant was estopped by the record to deny plaintiff's title at the date of that judgment.—*Bickett v. Nash*, S. C. N. Car., Dec. 21, 1888; 8 S. E. Rep. 350.

160. **JUDICIAL SALES—Bond by Purchaser.**—The court may order a purchaser at commissioner's sale under a decree in equity to execute a bond for the price, the purchaser having been summoned to show cause why such rule should not issue, and having failed to present any excuse or defense.—*Brasfield v. Burgess*, Ky. Ct. App., Dec. 15, 1888; 10 S. W. Rep. 122.

161. **JUDICIAL SALES—Reversal of Decree—Recovery of Money.**—Where money from the sale of property has, by order of the court, been paid, and the decree ordering its payment, was void, the party whose property was sold to raise the money may recover the same from the party to whom it was illegally paid.—*Sturm v. Fleming*, W. Va. Ct. App., Dec. 14, 1888; 8 S. E. Rep. 268.

162. **JURY—Summoning—Prejudice of Sheriff and Coroner.**—On motion for the appointment of *elisors* in a criminal case, the defendant's affidavit, alleging prejudice in the sheriff and coroner, is not conclusive, and the denial of the motion is not ground for reversal, in the absence of abuse of discretion.—*State v. Matthews*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 30.

163. **JUSTICE OF PEACE—Replevin.**—Section 951 of the Code which requires the filing of a bill of particulars on the part of the plaintiff in all cases before a justice of the peace: *Held*, not applicable to an action of replevin.—*Hill v. Wilkinson*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 135.

164. **LANDLORD AND TENANT—Lease—Forfeiture.**—Where, by the terms of a lease, the lessee is permitted to erect houses on the leased lot, with privilege of removal, the mere fact that the houses are suffered to remain after the expiration of the lease, and pending litigation between the parties as to right of possession of the lot, does not work a forfeiture of the houses.—*Atkinson v. Dixon*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 162.

165. **LIENS ON CROPS—Sale.**—Where, upon a *bona fide* sale of seed wheat, the amount of wheat specified in the seed-grain note or contract given therefor was contained in a particular bin containing a larger quantity, all of the same quality and value, out of which it was agreed the purchaser was then and there entitled to take away the number of bushels purchased: *Held*, sufficient evidence of a sale and delivery of the wheat at the date of the note, as between the maker and payee.—*Nash v. Brewster*, S. C. Minn., Dec. 21, 1888; 41 N. W. Rep. 105.

166. **LIFE INSURANCE—Condition in Policy.**—*Held*, that condition in policy of life insurance against insured being in liquor business, applied only to connection with liquor business after date and delivery of policy.—*McGurk v. Met. Life Ins. Co.*, S. C. Conn., Dec. 19, 1888; 16 Atl. Rep. 263.

167. **LIMITATION OF ACTION—Breach of Warranty.**—Grantee's right of action for amount paid to redeem land under warranty and statute begins to run from time of payment.—*Hebron v. Yerger*, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 110.

168. **LIMITATION OF ACTIONS—Adverse Possession—Color of Title—Forged Deed.**—Where defendant purchased land in good faith, taking a bond for title from one signing it as the owner's agent, who had no authority in fact, it is color of title, and seven years' possession thereunder, in good faith, confers a good prescriptive title.—*Mullen v. Stines*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 315.

169. **LIMITATION OF ACTIONS—Adverse Possession.**—Though a deed, for want of words of inheritance, conveys but a life-estate, yet, as against a stranger, title in the grantee will be presumed from his occupancy for more than 20 years.—*McAlpine v. Daniel*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 215.

170. **LIMITATION OF ACTIONS—Disability.**—Question

when right of action accrued in this case and therefore whether recovery, barred by Gen. St. Ky. ch. 71, art. 1, § 4, limiting even to persons under disability the right to sue within statutory period.—*Bradley v. Burgess*, Ky. Ct. App., Dec. 8, 1888; 10 S. W. Rep. 5.

172. LOGS AND LOGGING—Lien. — Interpretation of Laws Wis. 1867, ch. 100, 1881, ch. 38, 1885, ch. 469, § 1, providing lien for loggers.—*Patten v. N. W. Lumber Co.*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 82.

173. MANDAMUS—Judgment. — Application for mandamus against board of directors to prepare for payment of judgment against the distruts was dismissed without prejudice, the judgment being found dormant, in order that proceedings might be taken to revive judgment.—*State v. School District* S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 155.

174. MASTER AND SERVANT—Contract of Hiring—Acceptance—Compromise. — An agreement by one to accept employment is not necessary to the validity of a promise by another to employ him, made as a part of the compromise of an action.—*East Line & R. R. Co. v. Scott*, S. C. Tex., Nov. 20, 1888; 10 S. W. Rep. 99.

175. MASTER AND SERVANT—Negligence. — Question of contributory negligence on part of servant where the defect which caused the injury was apparent.—*Yates v. McCullogh, Iron Co.* Md. Ct. App., Nov. 22, 1888; 16 Atl. Rep. 280.

176. MASTER AND SERVANT—Negligence—Defective Appliance. — Testimony reviewed with reference to negligence of defendant in providing defective hand car, upon which plaintiff was injured.—*Anderson v. M. & N. W. Co.*, S. C. Minn., Dec. 21, 1888; 41 N. W. Rep. 104.

177. MASTER AND SERVANT—Negligence. — Railroad company not liable for injury to servant caused by his negligence.—*Way v. C. & N. W. R. Co.*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 51.

178. MASTER AND SERVANT—Negligence. — Servant held guilty of negligence in uncoupling cars against rule of the company while in motion.—*Sedgwick v. Ill. Cent. R. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 35.

179. MASTER AND SERVANT—Negligence—Injury. — Question as to negligence of conductor of railroad train in prematurely ordering train to start and injuring fellow-servant.—*Central R. R. v. Smith*, S. C. Ga., Dec. 5, 1888; 8 S. E. Rep. 311.

180. MASTER AND SERVANT—Negligence. — Question of negligence on part of railroad company for death of engineer through defects in the track, of which it had notice.—*Worden v. Humerton & S. R. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 26.

181. MASTER AND SERVANT—Negligence. — Question of negligence on part of plaintiff in crossing track at night and on part of defendant in the breaking of coupling link between cars.—*Griffin v. B. & A. R. Co.*, S. J. O. Mass., Jan. 1, 1889; 19 N. E. Rep. 166.

182. MASTER AND SERVANT—Discharge—Evidence—Damages. — Testimony admissible on part of defendant in action to recover damages for wrongful discharge from service.—*Child v. Detroit, etc. Co.*, S. C. Mich., Nov. 23, 1888; 40 N. W. Rep. 916.

183. MECHANIC'S LIENS—Material Men—Husband and Wife—Wife's Separate Estate. — Under act Wis. 1885, amending Rev. St. Wis. § 3314, one furnishing materials to a husband, who is erecting a house on the lands of his wife, with her knowledge and consent, has a lien on the land, though she did not agree or consent to pay for the material.—*Heath v. Solles*, S. C. Wis., Dec. 22, 1888; 40 N. W. Rep. 804.

184. MINES AND MINING—Lease. — Under agreement with owner of mines defendant was limited to work the range to a certain point; *Held*, under the evidence that there was not a new discovery of ore so as to relieve defendant from the original limitation.—*Raisbeck v. Anthony*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 72.

185. MORTGAGE—Deed—Parol Evidence. — *Held*, under the facts that the deed was a mortgage and its character could not be varied by parol evidence.—*Hart v. Eppstein*, S. C. Tex., Nov. 18, 1888; 10 S. W. Rep. 86.

186. MORTGAGE—Deed Absolute. — A bill to declare deed absolute in form a mortgage, held upon the facts that complainant's right of redemption was extinguished by a settlement, the deed thereby becoming absolute.—*McWilliam v. Jewett*, S. O. Ala., Dec. 8, 1888; 5 South. Rep. 145.

187. MORTGAGE—Payment—Evidence. — Evidence sufficient as between a subsequent mortgagee and defendant's wife, who has since bought the equity of redemption to show payment of the mortgage.—*Shipley v. Fox*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 275.

188. MORTGAGES—Sale—Power. — Circumstances which justify court in setting aside sale of property under power in mortgage.—*Chilton v. Brooks*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 267.

189. MORTGAGE—Construction. — Under Code, §§ 3323, 3330, a transaction in which a mortgagee takes a conveyance of the legal title and executes bond to reconvey on payment of debt is a mortgage.—*McElhane v. Shoemaker*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 58.

190. MORTGAGES—Foreclosure—Election of Remedies. — A mortgagee who has taken an assignment of the bid of the purchaser at a sale under a power in the mortgage, and who sues the mortgagor to recover his debt, possession of the land, and for the sale of the land under a decree of foreclosure, by his complaint places at the option of the mortgagor the confirmation or rejection of the sale under the power.—*Martin v. McNeely*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 231.

191. MORTGAGES—Foreclosure—Pleading. — Unless it appears, in a complaint for foreclosure, that a defendant, claiming an interest in the mortgaged premises, occupies the relation of subsequent purchaser, an averment that the mortgage was duly recorded is not essential.—*Mann v. State*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 181.

192. MORTGAGES—Foreclosure. — The purchaser at a sale under a second deed of trust, who took possession, was not liable to a trustee for the rents accruing while he was in possession, and before the trustee attempted to take possession on default.—*In re Life Association of America*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 69.

193. MORTGAGES—Foreclosure—Distribution of Assets. — Where a mortgage is given to secure several notes, without any stipulation as to priority, and the notes are assigned to different persons, the assignees are all entitled to share *pro rata* in the proceeds of foreclosure.—*Fenzel v. Brookmire*, S. C. Ark., Dec. 1, 1888; 10 S. W. Rep. 15.

194. MUNICIPAL CORPORATIONS—Boundaries—Construction of Statute. — Acts Cal. 1875 76, p. 906, defining boundaries of San Diego, include the peninsula within the city limits.—*City of San Diego v. Grannis*, S. C. Cal., Dec. 12, 1888; 19 Pac. Rep. 875.

195. MUNICIPAL CORPORATION—Negligence—Instruction. — Instruction in suit against city for damage by overflow, caused by negligent construction of embankment in raising the grade of street, that proof that no grade was established and that filling the street caused the water to flow in, was sufficient proof of negligence; *Held*, error.—*Kerney v. Thoenanson*, S. C. Neb., Dec. 15, 1888; 41 N. W. Rep. 115.

196. MUNICIPAL CORPORATIONS—Obstruction—Sidewalk. — Where snow has fallen causing some obstruction on the sidewalks of a city, it is the duty of the city authorities within a reasonable time thereafter to remove such obstruction. The falling of snow is sufficient notice.—*Foxworthy v. City of Hastings*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 132.

197. MUNICIPAL CORPORATIONS—Bonds. — Under § 52, art. 2, ch. 14, Comp. St. 1887, the city of K has the right to issue bonds in order to erect necessary buildings for the city.—*State v. Babcock*, S. C. Neb., Dec. 14, 41 N. W. Rep. 155.

198. MUNICIPAL CORPORATIONS—Defective Sewer. — Sufficiency of evidence to show that commissioner of streets waived compliance with formality of written

permit, under city ordinance requiring same, to enable party to drain into a common sewer. — *Sheridan v. City of Salem*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 172.

199. NAVIGABLE WATERS—Obstruction by Bridges.—The grant of a license to railroad company to build bridges over certain rivers, theretofore leased with certain locks and dams, for navigation, provided said bridges do not obstruct navigation, does not impair the right of the lessee of the river. — *Green, etc. Co. v. Chesapeake, etc. Co.*, Ky. Ct. App., Dec. 11, 1888; 10 S. W. Rep. 6.

200. NEGLIGENCE—Sidewalks — Evidence. — In an action against a city for injuries received from a defective sidewalk, testimony of the condition of the walk after the accident is inadmissible, in the absence of evidence that its condition was the same at the time of the accident. — *Hoyt v. City of Des Moines*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 68.

201. NEGLIGENCE—Injury—Violation of Ordinance.—Contributory negligence of plaintiff must be pleaded and proved by defendant. Violation of ordinance regulating speed of trains is *per se* negligence. — *Schlereth v. Mo. Pac. Ry. Co.*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 66.

202. NEGOTIABLE INSTRUMENT—Gift. — In *assumpsit*, for amount of note, given to plaintiff by her father and by her left with defendant her (now) divorced husband: *Held*, that plaintiff's right to recover was not affected by the fact that the note had never been indorsed over to him. — *Letts v. Letts*, S. C. Mich., Nov. 28, 1888; 41 N. W. Rep. 99.

203. NEGOTIABLE INSTRUMENTS—Notice—Pleading. — Where the indorser receives his mail at the place where the note indorsed is payable, a notice of non-payment duly placed in the post-office, and actually received by him on the day following the last day of grace, is sufficient to charge him as indorser. — *Hendershot v. Nebraska Nat. Bank*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 133.

204. OLEOMARGARINE—Exposure for Sale—Open Packages. — Exposing oleomargarine for sale as required by St. Mass. 1886, ch. 317, § 1, but with the top removed so as to expose to view the contents, which are to be sold at retail in small quantities, is not a violation of the law. — *Commonwealth v. Bean*, S. J. C. Mass., Jan. 1, 1889; 19 N. E. Rep. 163.

205. ORDER — appeal. — An order striking a cause from the calendar because prematurely noticed for trial is not appealable. — *Hornston Shooting Club v. Gorsline*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 78.

206. PARTIES—Intervention. — A mere general creditor of a debtor, having no claim or interest in the goods, cannot intervene in an action between lienholders or owners of goods. — *Welborn v. Eskey*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 959.

207. PARTITION—Of Homestead—Use by Minors—Constitutional Law. — Const. Tex. art. 16, § 52, prohibiting the partition of land used as a homestead, does not prevent the homestead from entering into the partition of the estate, providing the right of the minor children to use it during such permission is not infringed by such partition. — *Hudgins v. Sansom*, S. C. Tex., Dec. 7, 1888; 10 S. W. Rep. 104.

208. PARTITION—Equity—Pleading — Multifariousness. — A bill is multifarious which asks for the partition of two tracts of land, of one of which plaintiff's ancestor died seized as tenant in common with his brother, while of the other he died seized as tenant in common with his brother and a third person. — *Rockefus v. Lyon*, Md. Ct. App., Dec. 14, 1888; 16 Atl. Rep. 238.

209. PARTITION—Judicial Proceedings.—In partitioning several parcels of land, the law does not require that a portion of each parcel should be set off in severalty to each tenant in common, but only that the partition shall be so made that each of the tenants shall become owners in severalty in exact proportion in value to his undivided interest. — *Stannard v. Sperry*, S. C. Err. Conn., Jan. 8, 1889; 16 Atl. Rep. 261.

210. PARTITION—Parol — Execution of Deeds. — A parol partition of land, acquiesced in for a long time by the parties, cannot be disturbed, but suit may be main-

tained to ascertain the precise terms on which it was made, and to have deeds of partition executed. — *Frederick v. Frederick*, W. Va. Ct. App., Nov. 24, 1888; 88 E. Rep. 296.

211. PARTITION—Place of Suit.—An action by guardians for sale of land, for division of the proceeds and reinvestment, is properly brought in the county in which the father, from whom the land descended, died, and in which only a portion of it is situated. — *Phalan v. Louisville, etc. Co.*, Ky. Ct. App., Dec. 13, 1888; 10 S. W. Rep. 10.

212. PARTNERSHIP—Pleading—Names of Partners.—Bill brought by partnership in firm name must allege their individual names. — *Lewis v. Chine*, S. C. Miss., Nov. 19, 1888; 5 South. Rep. 112.

213. PARTNERSHIP—Contracts.—Where a promissory note was executed in the firm name by one of the partners, and a chattel mortgage to secure said note was also executed in the firm name by the same partner, the presumption is that the instruments were executed on behalf of the firm. — *Schwank v. Davis*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 143.

214. PARTNERSHIP—Parties.—Action can be maintained by A and B as partners for deceit in quantity of land sold, though the purchase was in the name of one, but the funds furnished by the partnership. — *Peaks v. Graves*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 151.

215. PARTNERSHIP—Appearance—Injunction—Pleading.—In an action by a partner to enjoin a judgment rendered against the firm of which he was a member, upon the ground that he was not served with process, it appeared that he was absent from the State, and service was made upon the managing member of the firm: *Held*, that the service was sufficient to sustain a judgment against the firm so far as to subject firm property. — *Winters v. Means*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 157.

216. PAYMENT—Assignment—Check.—In an action for goods sold, and question of payment arose: *Held*, that the transaction constituted a payment, and not an assignment. — *Tiddy v. Harris*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 227.

217. PAYMENT—Application.—Question of application of payment where purchaser bought one lot and assumed payment on another. — *Blair, etc. Co. v. Hillis*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 6.

218. PLEADING—Variance—Amendment.—A bill to enjoin sale of land: *Held*, under Code Miss. § 1881, that amendment making bill conform to proof should be permitted. — *Jeffries v. Jeffries*, S. C. Miss., Nov. 26, 1888; 5 South. Rep. 112.

219. PLEADING—Vender and Vendee — Title. — On contract to sell real estate, where parties agreed to trade on strength of abstract showing good title, if abstract fails to show this, money can be recovered, even if defendant offered to perfect title. — *Horn v. Butler*, S. C. Minn., Dec. 18, 1888; 40 N. W. Rep. 833.

220. PLEADING—Substitution—Continuance. — In an action after the issues had been made up, it was discovered that the files were mislaid. The court thereupon permitted the filing of a substituted petition *instanter*, and required the defendant to go to trial at once: *Held*, that a reasonable time should have been given the defendant to answer and prepare for trial. — *Fremont, etc. Co. v. Marley*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 948.

221. PRACTICE IN CIVIL CASES — Dismissal — Entry of Judgment.—Under Code Civil Proc. § 581, subd. 6, it is not error to refuse to dismiss an action where six months have not elapsed since the act went into effect, though more than six months have elapsed since verdict. — *Gardner v. Tatum*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 879.

222. PRINCIPAL AND AGENT — Special Agents. — A special agent, who acts within his apparent power, will bind his principal by his contracts, even if he has received private instructions which limit his special authority. — *Howell v. Graff*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 142.

223. PRINCIPAL AND AGENT—Shipping.—A ship's husband cannot, without express authority from the owners, render them liable for money borrowed on the vessel's account.—*Arey v. Hall*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 802.

224. PRINCIPAL AND SURETY—Alteration of Instrument.—The unauthorized insertion in a bond given to secure the performance of his legal duties by one applying for a permit to engage in the liquor traffic, is not such a material alteration as to discharge the sureties on the bond.—*Starr v. Blatner*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 41.

225. PRINCIPAL AND SURETY—Release.—Under the provisions of Civil Code Cal., relating to sureties and guarantors, the same circumstances which would release a guarantor will also exonerate a surety.—*Chafoin v. Rich*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 882.

226. PROHIBITION—Court of Appeals—Jurisdiction.—Prohibition lies to prevent court of appeals from exercising jurisdiction in case where amount exceeds jurisdiction limit.—*State v. Judges*, S. C. La.; 5 South. Rep. 114.

227. PUBLIC LANDS—Swamp Lands.—A purchaser of swamp land for the board of commissioners, who had paid the money and received certificate before the passage of the act of April 2, 1871, acquired the equitable title, which was sufficient, as against purchasers from the corporation.—*Bradford v. Hall*, U. S. C. C. (Miss.), Nov. 20, 1888; 86 Fed. Rep. 801.

228. RAILROAD COMPANIES—Negligence—Violation of Ordinance.—In an action for an injury occasioned by the moving of trains in a yard, allegations in the petition of non-compliance with municipal ordinances regulating the speed of trains should be struck out, such ordinances not being applicable to railroad yards.—*Grube v. Mo. Pac. Ry. Co.*, S. C. Mo., Dec. 30, 1888; 10 S. W. Rep. 185.

229. RAILROAD COMPANIES—Taxation—Exemption.—Under § 8 of charter of Y. & M. V. R. Co., exempting property from taxation on certain conditions, the exemption was intended to commence from completion of the road to the Mississippi river.—*Y. & M. V. R. Co. v. Thomas*, S. C. Miss., Nov. 12, 1888; 5 South. Rep. 108.

230. RAILROAD COMPANIES—Injury—Highway.—A railroad lawfully near a highway has right to operate road in usual manner and give usual signals of danger, without incurring liability for injury by frightened horses.—*Bailey v. H. & C. F. R. Co.*, S. C. Conn., July 7, 1888; 16 Atl. Rep. 234.

231. RAILROAD COMPANIES—Fires.—In an action for setting fire by a locomotive, the defendant having shown the kinds of smoke stacks in common use, and the styles in use upon its road, cannot show the style in use upon other roads.—*Metzger v. Chicago, etc. R. Co.*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 49.

232. RAILROAD COMPANIES—Incorporation.—In the absence of any statute or anything in the articles of incorporation of a railroad company, the company is authorized to begin business as soon as its articles of incorporation are filed in the recorder's office, as provided by Code Iowa, § 1064.—*Johnson v. Kessler*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 87.

233. RAILROAD COMPANIES—Purchase—Foreclosure.—Under charter of railroad company succeeding another company by purchase under foreclosure: *Held*, that defendant having completed the road laid out by the original company became liable for the value of land appropriated.—*Hendrick v. C. C. R. Co.*, S. C. N. Car., Dec. 19, 1888; 8 S. E. Rep. 236.

234. RAILROAD COMPANIES—Mortgages—Foreclosure—Leases.—On foreclosure of the railroad mortgage in this case and the adjustment of claims of intervening creditors, the contract of lease of cars to the mortgage company by the car company dominated by the same persons, cannot be made the basis of an accounting for the use of the leased cars.—*Thomas v. Peoria, etc. Co.*, U. S. C. (Ill.), Aug. 29, 1888; 36 Fed. Rep. 808.

235. REVISION OF CONTRACT—Undue Influence.—Facts sufficient to set aside conveyance on ground of

incapacity and undue influence.—*Kelly v. Smith*, S. C. Wis., Dec. 22, 1888; 41 N. W. Rep. 69.

236. REFORMATORIES—Habeas Corpus—Appeal.—In a proceeding for the commitment of a juvenile offender to the reform school, under the law as it existed in the year 1886, the question of the age of the accused was one of fact, to be decided by the trial magistrate.—*Buchanan v. Mallatieu*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 152.

237. REINSURANCE—Rights of Mortgagees.—Where a mortgagee, to secure his interest in the mortgaged premises, takes out a policy of insurance thereon, running to the mortgageors, containing a stipulation against reinsurance, the policy is defeated by unauthorized insurance obtained on the property by one of the mortgageors.—*Gillett v. Liverpool, etc. Co.*, S. C. Wis., Dec. 29, 1888; 41 N. W. Rep. 78.

238. REPLEVIN—Partition—Pleading.—Averments necessary in partition, under § 196 of the code, in reference to replevin suit.—*Herzhiser v. Jordan*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 147.

239. REPLEVIN—Parties—Intervention.—A party who claims to be the owner of goods which are in controversy, in an action of replevin, may intervene in the case, upon filing a petition before judgment, alleging his ownership.—*Welborn v. Eskey*, S. C. Neb., Dec. 13, 1888; 40 N. W. Rep. 960.

240. SALE—Delivery—Fraud.—Every sale made by a vendor of goods in his possession, unless the same be accompanied by an immediate delivery, and be followed by actual change of possession of the thing sold, is presumed to be fraudulent as against subsequent purchasers in good faith.—*Fitzgerald v. Meyer*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 123.

241. SALE—Pleading—Admission.—In an action for the price of a team, the answer alleged that plaintiff received the note of one G in payment, and gave his own note to defendant for the difference between the price of the team and the amount of G's note: *Held*, an admission that the price of the team was the difference between the amount of plaintiff's note and the sum due on G's.—*McKenna v. Noy*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 29.

242. SALE—Conditional—Failure to Record Contract.—Relatively to subsequent creditors of the purchaser, a conditional sale of chattels, not duly recorded, is the same as an absolute sale.—*Steen v. Harris*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 206.

243. SALE—Evidence.—In an action for the price of goods, testimony of the agent who sold the goods that he sold them to defendant for the price named by plaintiff is not objectionable as stating a conclusion of law.—*Julius King Optical Co. v. Treat*, S. C. Mich., Nov. 28, 1888; 40 N. W. Rep. 912.

244. SCHOOL DISTRICTS—Officers.—No cause of action will accrue to the district as a corporation against the county superintendent for the manner in which he may exercise his discretion in changing the boundary of such district.—*School District v. Wheeler*, S. C. Neb., Dec. 13, 1888; 41 N. W. Rep. 143.

245. SCHOOL DISTRICTS—Powers.—Construction of powers of electors of school districts under Acts Gen. Assem. Iowa, ch. 172, § 7.—*McShane v. Board*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 38.

246. SCHOOLS AND SCHOOL DISTRICTS—Schools—Establishment.—The provision of Pub. St. Mass. ch. 48, § 14, as to establishment of schools is mandatory.—*City of Lynn v. County Commissioners*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 171.

247. SCHOOLS AND SCHOOL DISTRICTS—Annexation and Division—Conclusiveness of Inspector's Return.—Under How. St. Mich. § 5041, a return by the board of school inspectors, stating that the persons consenting are a majority of the resident tax-payers of the districts, is conclusive.—*Gentle v. Board School Inspectors*, S. C. Mich., Nov. 23, 1888; 40 N. W. Rep. 928.

248. SPECIFIC PERFORMANCE—Rescission of Contract—Purchaser with Notice.—A purchaser from the grantee

with notice of the rescission acquires no title to the premises, nor any right to specific performance.—*Kennedy v. Emby*, S. C. Tex., Nov. 27, 1888; 10 S. W. Rep. 88.

249. SPECIFIC PERFORMANCE—Decree—Foreign Corporation.—In this State a personal decree may be rendered for specific performance against a foreign corporation upon which actual service has been had within the State under the provision of our statute.—*Shafer v. O'Brien*, W. Va., Ct. App., Dec. 1, 1888; 8 S. E. Rep. 298.

250. SPECIFIC PERFORMANCES—Description.—Question as to the definiteness and certainty of description of land, sale of which specific performance was sought.—*Minn. & L. R. Co. v. Cox*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 24.

251. STATUTE—Construction—County Treasurer.—Under acts N. C. 1876, ch. 141, § 2, and acts 1881, ch. 362, § 1, by appointment the county justices have the power to restore the office of county treasurer though the sheriff, upon whom its duties had developed during the period of its abolition, had previously entered upon a new term of office.—*Rhodes v. Hampton*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 219.

252. SUBROGATION—Mortgage—Foreclosure.—Question of right of subrogation, upon the facts of the case, under a mortgage.—*Johnson v. Barrett*, S. C. Ind., Dec. 21, 1888; 19 N. E. Rep. 199.

253. TAXATION—Tax-title—Purchaser's Title.—A purchaser at tax-sale under proceedings against the patentee, whose patent is not of record in the county, and who has parted with his title, takes no title as against one claiming under a recorded conveyance from the patentee's grantee, though the intermediate conveyance is not recorded.—*Allen v. Ray*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 153.

254. TAXATION—Redemption—Tax-sale.—Under Code Miss. § 581, a redemption within the time divests all title of a purchaser, though the redemptionist is not the real owner of the land.—*Jamison v. Thompson*, 5 South. Rep. 107.

255. TAXATION—Sale—Injunction.—Under act. Ala. Feb. 17, 1885, providing for the sale of land in the city of Montgomery for unpaid municipal taxes objections must be made before the recorder, and equity will not enjoin a sale on those grounds.—*Strenna v. City Council of Montgomery*, S. C. Ala., Dec. 4, 1888; 5 South. Rep. 115.

256. TAXATION—Exemption—Statutes—Repeal by Constitutional Amendment.—By the constitutional amendment adopted in 1875, all prior special laws exempting property from taxation were abrogated, unless they constituted irrepealable contracts.—*State v. Collector of Chatham*, S. C. N. J., Dec. 26, 1888; 16 Atl. Rep. 226.

257. TAXATION—Wild Lands—Redemption.—Acts Ga. 1880-81, p. 45, §§ 3, 4, providing that wild lands not returned for taxation shall be taxed doubly, etc., do not apply to wild lands regularly returned for taxation.—*Millen v. Howell*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 316.

258. TAXATION—Costs—Tender.—Costs in a suit for taxes are not "taxes, debts or demands due the commonwealth," and a tender of coupons of State bonds in payment of them is not good.—*Ellatt v. Commonwealth*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 246.

259. TAXATION—Taxable Property—Contract.—Four persons entered into a written agreement with a corporation to sell and convey to it certain described real estate for a sum named: *Held*, under all the facts that the debt thus arising from the corporation purchaser was an assessable credit, under the constitution and revenue laws of the State of Minnesota.—*State v. Rand*, S. C. Minn., Dec. 18, 1888; 40 N. W. Rep. 885.

260. TAXATION—Tax-sale.—Under St. Mo. §§ 3494, 3496, providing for suit for taxes against non-residents, the names must be correctly given though the wrong name appears on the recorded deed.—*Troyer v. Wood, Chamberlain v. Blodgett*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 42, 44.

261. TAXATION—Recovery of Tax Paid Under Mistake.—Taxes paid under the belief that the assessment

and collection were legal, when in fact they were unauthorized by law, may be recovered back.—*City of Newport v. Ringo's Ex'x*, Ky. Ct. App., Dec. 6, 1888; 10 S. W. Rep. 2.

262. TAX-SALE—Deed.—A tax-deed, to which the holder of the tax-certificate was entitled three years before the tax-sale under which plaintiff's claimed, and twelve years before plaintiff's tax-deed was executed, having been obtained after the right to it was barred, can not be set up to defeat the tax-title on which plaintiffs rely.—*Johns v. Griffin*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 59.

263. TAX-SALE—Redemption—Description.—Sufficiency of description in notice of and deed under tax-sale.—*Griffiths v. Ulley*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 21.

264. TOWAGE—Negligence—Proceedings in Rem.—Where a canal-boat, while in tow by certain tugs, preparatory to making fast to a steamer which is to convey the tow to its destination, is injured by the negligence of the tugs, proceedings in rem cannot be maintained therefor against the steamer, though owned by the same company owning the tugs.—*Goldsmith v. The Syracuse*, U. S. C. O. (N. Y.), Nov. 14, 1888; 36 Fed. Rep. 880.

265. TOWNS—Officers—Salary of Trustee—Overseer of the Poor.—Under act Ind. March 31, 1879, § 52, one who is the duly elected township trustee, and has been paid, cannot claim a further compensation out of the county treasury, for the same time, for services as overseer of the poor.—*Board of Commissioners v. Templeton*, S. C. Ind., Dec. 20, 1888; 19 N. E. Rep. 188.

266. TOWNSHIP ORDERS—Payment.—Construction of Code Iowa, §§ 969, 971, 997, providing for payment of road orders.—*Bradley v. Love*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 52.

267. TRADE MARK—Infringement.—*Held*, in question of infringement of trade-mark, that the words used and printed were likely to mislead dealers and indicate a purpose to secure an advantage and therefore invade the right of petitioner.—*Keller v. Goodrich Co.*, S. C. Ind., Dec. 21, 1888; 19 N. E. Rep. 196.

268. TRESPASS—Damages—Remote Injuries.—In trespass against a railway company for invading plaintiff's garden and laying its track within 30 feet of the house, no recovery can be had for hazard to the house by the proximity of the tracks and the consequent danger from fire.—*Fore v. Western N. C. R. Co.*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 335.

269. TRESPASS—Fences.—One who causes his cattle to be herded upon the unimproved and uninclosed prairie land of another, without the latter's consent, is liable therefor to the owner, though by the Iowa law a trespass is not committed when cattle running at large entered unclosed land.—*Harrison v. Adamson*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 34.

270. TRIAL—Province of Court—Jury.—Upon facts of the case involving complicated computation of interest: *Held*, that the court's action, in the instructions, was not an interference with the province of the jury.—*People v. Sav. Bank, v. Borough of Norwall*, S. C. Conn., Jan. 8, 1889; 16 Atl. Rep. 257.

271. TRIAL—Remarks of Judge.—Defendant, while a witness, testified to irrelevant matter and made threats and interruptions, in spite of judge's admonitions who finally threatened to commit him for contempt: *Held*, that defendant could not complain that this tended to prejudice him before the jury.—*Bowden v. Bailes*, S. C. N. Car., Dec. 19, 1888; 8 S. E. Rep. 342.

272. TRIAL—Verdict—Special Findings.—Whether a special finding that a party has executed a warranty deed, without setting out its terms, is a conclusion of law, is immaterial in facts of this case.—*Indiana, etc. Co. v. Fennell*, S. C. Ind., Dec. 22, 1888; 19 N. E. Rep. 204.

273. TRIAL—Verdict—Form.—In ejectment, the jury having rendered a verdict for "the amount or quantity of ground claimed," it is proper to direct plaintiff's attorney to formulate the verdict, setting out the land by metes and bounds.—*Goebel v. Pugh*, Ky. Ct. App., Dec. 15, 1888; 10 S. W. Rep. 1.

274. TRUSTS—Presumption—Rebuttal. — Where a conveyance of land is made to a wife at the husband's instance, the presumption of a resulting trust in his favor is rebutted, though he furnished the purchase money.—*Gilliland v. Gilliland*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 189.

275. TRUST—Resulting Trust—Evidence. — Facts in this case held not sufficient to create a resulting trust.—*Adams v. Burns*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 26.

276. TRUST—Constructive Trust—Evidence. — Held, that the evidence justified the finding that no fraud was perpetrated on plaintiff by defendant, and that the latter was not a constructive trustee.—*Nesbitt v. Cavender*, S. C. S. Car., Dec. 7, 1888; 8 S. E. Rep. 193.

277. TRUSTS—Rights of Creditors. — An income, given by the will of the wife to the husband on condition of his executing a release of his estate by the curtesy, which he executes accordingly, is subject to the claims of the husband's creditors, notwithstanding the provisions of the will to the contrary. Distinguishing *Lampert v. Haydel*, 9 S. W. Rep. 780.—*Bank of Commerce v. Chambers*, S. C. Mo., Nov. 26, 1888; 10 S. W. Rep. 38.

278. USURY—Penalties and Forfeiture. — Under 18 Stat. S. Car. (1882) p. 35 § 1, in reference to usury, where a note containing an express agreement that the interest shall run to the maturity of the note at ten per cent., is discounted by a bank at ten per cent. on the principal and interest to accrue, the charge of discount on the interest, to the extent of three per cent., the excess over seven per cent., the legal rate, is usurious.—*Carolina Sav. Bank v. Parrott*, S. C. S. Car., Dec. 7, 1888; 8 S. E. Rep. 199.

279. VENDOR AND VENDEE—Parol Trust. — Under the facts, a pretended sale of real estate was held neither a sale nor an agreement to sell, but an express trust, which, under Code Iowa, § 1984, cannot be established by parol.—*Andrews v. Concannon*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 8.

280. WARRANTY—Deed—Merger. — A warranty deed in the usual form does not merge a prior parol warranty of quality of the land conveyed, so as to preclude the grantee from recovering damages for breach of the warranty.—*Saville v. Chalmers*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 30.

281. WARRANTY—Evidence—Damages. — An order addressed to plaintiff, authorizing him to procure of the manufacturer a machine for which defendant agreed to pay, is not a contract with the manufacturer, it appearing that plaintiff had no authority to make it for the manufacturer.—*Jackson v. Mott*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 12.

282. WATER-COURSES—Diversion of Water—Compensation. — On a hearing, under act Conn. 1870, to assess damages for the withdrawal of water from a stream, a mill owner may testify as to the profits received from his mill in a year after the water was withdrawn.—*Borough of Norwalk v. Blanchard*, S. C. Err. Conn., Sept. 21, 1888; 16 Atl. Rep. 242.

283. WATER-COURSE—Damages—Evidence. — In an action for damage by reason of back water and overflow, estimates of farmers and neighbors as to the quantity of water which flowed through the channel is admissible.—*Noe v. C., B. & Q. R. Co.*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 42.

284. WATER AND WATER-COURSES — Obstruction — License. — A grantee of water privileges, who is without right to dam up the water so as in any manner to overflow a certain spring on the premises, cannot obstruct or affect it injuriously by erecting a dam or embankment across its outlet.—*Ford v. Lukens*, S. C. Ga., Dec. 10, 1888; 8 S. E. Rep. 313.

285. WIDOW'S ELECTION. — A devise of a life-estate to the testator's widow does not bar her right to a distributive share in his realty. — *Howard v. Watson*, S. C. Iowa, Dec. 19, 1888; 41 N. W. Rep. 45.

286. WIFE'S SEPARATE ESTATE. — Where a husband, in good faith, while he is solvent, gives his wife money, and borrows it of her, giving a mortgage to secure it, his creditors, whose debts were contracted long after, cannot charge her with it as garnishee.—*Beck v. Lincoln*, S. C. Iowa, Dec. 22, 1888; 41 N. W. Rep. 61.

287. WILLS—Construction. — Devise to children after death of wife held void, where property is left absolutely to wife.—*McClellan v. Larchar*, N. J. Ct. Chan., Dec. 27, 1888; 16 Atl. Rep. 269.

288. WILL—Construction. — Held, under the terms of the will that three married daughters took the land to the exclusion of a married daughter who had died before her mother, the intestate.—*Robertson v. Garret*, S. C. Tex., Dec. 21, 1888; 10 S. W. Rep. 96.

289. WILLS—Legatees—Interest. — The general rule is that where no time is fixed by the will for the payment of a general legacy, interest will begin to accrue on it at the end of a year from the testator's death. — *Davison v. Rake*, S. C. N. J., Dec. 18, 1888; 16 Atl. Rep. 227.

290. WILLS—Pleading—Attestation. — Sufficiency of averment of non-attestation of will in suit to set it aside. — *In re Burrell's Estate*, S. C. Cal., Dec. 10, 1888; 19 Pac. Rep. 880.

291. WILLS—Construction—Life Estate—Power of Disposal. — A testator, gave the general residue of his estate to his wife, "to her use and behoof and dispose of for her maintenance during her natural life." Held, that she could, acting in good faith, sell the bulk of the property for the consideration of a life-support.—*Richardson v. Richardson*, S. J. C. Me., Nov. 19, 1888; 16 Atl. Rep. 260.

292. WILLS—Devise. — Bequest to wife of property so long as she may live followed by bequest to daughter of so much as may remain at death of wife creates life estate in wife, with power of disposition.—*In re Foster's Will*, S. C. Iowa, Dec. 21, 1888; 41 N. W. Rep. 43.

293. WILL—Construction—Ambiguity. — A testator gave to his wife certain land for use during her life, certain personal property, and a legacy of \$1,000. By a subsequent clause he bequeathed to his daughter, at his wife's death, "all the property of all descriptions that I have heretofore willed to my wife." Held, that under the term "property," the daughter was not entitled to take the legacy of \$1,000 given to the wife; the latter dying before the testator. — *Patterson v. Wilson*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 229.

294. WILLS—Proof—Citation. — Construction of Code N. C. § 2148, providing for proof of uncupative wills.—*In re Haygood's Will*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 222.

295. WILLS—Construction—Ambiguity. — A condition annexed to a devise, avoiding it if the beneficiary marry into the "family" of a person named, in the absence of anything in the context to the contrary, means one of the children of such person. — *Phillips v. Ferguson*, Va. Ct. App., Dec. 5, 1888; 8 S. E. Rep. 241.

296. WILL—Construction. — Question under terms of will whether a sum of money was left absolutely or merely in case of any excess in the estate. — *Noyes v. Pritchard*, S. J. C. Mass., Dec. 31, 1888; 19 N. E. Rep. 162.

297. WILLS—Construction—Description of Devisees. — Testator devised land to his wife for life, "and after her death unto the heirs of my daughter, E and the heirs of my son H, which said heirs shall take as purchasers from me, and not by inheritance or of descent from my said wife." Held, that the heirs of E and H took *per stirpes*, and not *per capita*. — *Preston v. Brant*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 78.

298. WITNESS — Examination — Collateral Matters. — Though it is error to admit evidence to contradict witnesses as to collateral matters, the error is rendered harmless by subsequently recalling such witnesses, and allowing them to explain their former testimony.—*Patterson v. Wilson*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 341.

299. WITNESS—Competency — Transactions with Decedent. — In an action involving title to land, where the question is whether the plaintiff's ancestor owned certain land which he sold in order to buy the land in dispute, testimony of his widow that she saw the deed to the land in dispute to her husband, in her husband's possession, that she saw him start off with the money, and bring back the deed, is not inadmissible under Code N. C. § 590.—*McCall v. Wilson*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 225.

The Central Law Journal.

ST. LOUIS, FEBRUARY 22, 1889.

CURRENT EVENTS.

THERE appears to be a well defined movement, in the direction of a national bankruptcy law. The initiative comes from St. Louis. The Associated Wholesale Grocers, of that city, have sent letters to prominent commercial associations, and business houses in the country, inviting them to send delegates to a national convention, to be held at St. Louis, on February 28, the leading object of which, will be to formulate and present to congress, an equitable bankrupt act, which will "secure protection to the honest merchant, inflict punishment on the dishonest merchant, and establish a uniform system for the collection, preservation and distribution of the estates of insolvents, at a minimum cost." To what extent the commercial associations invited will respond, is not definitely known, but those issuing the invitations, expect that the convention will be thoroughly representative.

It is to be hoped, that this movement will spread, develope, and increase in strength, and that the next congress may be induced to act in the matter. The arguments in favor of a wise, and uniform national bankrupt law, are threadbare, and need not be repeated here. An appreciation of the inadequacy of State insolvency laws, coupled with the increasing volume of trade, and commerce, between sister States, makes the passage, of a universal national bankrupt law seem the more imperative and necessary to the mercantile interests of the country.

A WRITER in the February *Century*, on the subject of "Imperfections of American Law Procedure," discusses, in an interesting way, the relative advantages of English and American litigants, taking the position, that though litigation in England is expensive, it has at least the merit of rapidity, and that it is possible for an English plaintiff, to hurry a rich and influential defendant through their whole

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system of courts, and out at the court of last resort, with a rapidity likely to take away the breath of an American lawyer or judge, and that on the other hand American courts have given sound law, without unconscionable expense, and with entire fearlessness; but that it cannot be said that rapidity is a common characteristic of the forty or more systems of courts kept up by our federal, State and Territorial governments, and that the rich defendant, who wishes to resist the establishment of a point against him, can use our system of appeals, carrying his opponent through all the courts of a State, permitting him just to see daylight in the court of last resort, and then dropping him again to the lower court, to begin the struggle over again.

Whether the statement, as to the English courts, is entirely true, we do not undertake to say, but the slowness of American courts, in general, is so well founded, as to be almost proverbial. Beginning with the highest court of our land, as pointed out in an editorial in a recent issue, the business is so congested, as to cause a postponement of justice for three years, and, indeed, a practical denial of it in many cases. And without possessing the statistics, we venture to assert, that this same condition of the docket exists in the case of a large majority of the State supreme courts, to say nothing of inferior tribunals. It is not our intention, nor is it possible for us to suggest a remedy, but the evil is of grave concern to litigants everywhere, and sooner or later a solution of the problem must be had.

THE recent change of the death penalty in New York, from hanging to that of the more humane method of electricity, suggests the statement, that a still greater revolution has taken place, in public sentiment, in most countries of Europe. In Italy, strange as it may seem, when we consider the hot-blooded character of the people, and their consequent proneness to violence, her law-makers have concluded, that the death penalty has no influence in diminishing the frequency of murder, and have accordingly passed a law abolishing it altogether. It has practically been abandoned in a number of other European countries—Belgium, since 1863—Prussia, Sweden, France and Austria. Portugal, Hol-

land and Roumania have also totally abolished it, and Russia is taking steps in that direction. It is not improbable, that before long most of the others will follow the example of Italy. The agitation in England of the subject of electricity, as a method of execution, leads the London *Lancet* to say:

"Supposing the fatal switch is instantly fatal, in what manner it is more humane than the guillotine, or the easy asphyxia from suspension of the neck, it were, indeed, difficult to explain. But, strangely, the promoters of this new method praise and support it, not for the wholesome dread that it may excite in the mind of the would-be murderer, but for the happy mode of despatch to which all murderers will be subjected when the chair of death comes into public service. Which ever be the right theory on this subject, we believe the use of this new instrument of death, as advanced by its advocates, to be fundamentally unsound. If it be right to have a mode of death for criminals that shall excite some terror, as many wise and logical legislators believe, then we have already the very means for exciting that wholesome alarm, a means also which long time and custom have sanctioned and which had better not be abrogated while this form of punishment lasts. We take the opposite view, that the perfect painlessness of death by the electric shock will divest the punishment of some of its terrors. Then the mere implantation of this notion will only lead a certain class of the worst criminals to set their lives upon the cast, and to accept the more resolutely the hazard of the die. With all respect, then, to our American *confreres*, we do not think that the grounds or reasons they have entered on for a change in the mode of executing criminals are quite worthy of their vocation."

It seems that in New York, the question as to how to sentence a criminal to death, under the new law, as to executions by electricity, is at present puzzling the criminal court judges. The following form is suggested by some one as being terse and to the point:

"I therefore sentence you to be taken to Sing Sing prison, there to remain confined until — the — day of 188—, between the hours of — and —, A. M., when you will be taken to a cell specially designed for that

purpose, be forcibly seated in a properly insulated chair, with one semaphore placed upon the junction of your frontal and parietal suturas and the other just over your medulla oblongata, and then and there made conductor for an alternating current of 1,800 volts intensity from a dynamo constructed for that specific purpose, said current to pass through the ganglia and vasomotor centers of your cerebral tissue until you are dead, dead, dead; and may the Lord have mercy on what is left of you!"

NOTES OF RECENT DECISIONS.

In the case of Minneapolis & St. Louis Ry. Co. v. Beckwith, 9 S. C. Rep. 207, the Supreme Court of the United States was called upon to determine the constitutionality of a statute of the State of Iowa, in which the question of the police power was involved. The statute in contention is one, which can be found upon the statute books of many of the States, making railroad companies which fail to fence their tracks against live stock running at large, at all points, where such right to fence exists, liable to the owner of any stock killed or injured by reason of want of such fence, for the value of the property or damage caused, and further providing that, in order to recover, it shall only be necessary for the owner to prove the injury or damage, and if such railroad company neglect, to pay such damage within thirty days after notice in writing, accompanied by affidavit, has been served on an officer of the company, such owner shall be entitled to recover double the value of the stock killed or injured. The validity of this law is assailed, as being in conflict with the first section of the fourteenth amendment of the constitution of the United States, in that it deprives the railway company of property without due process of law, and in that it denies the company the equal protection of the laws by subjecting it to a different liability for injuries committed by it from that to which all other persons are subjected. The court, in upholding the statute, says:

Equality of protection implies, not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges

and liabilities of every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance it interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease, and danger in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society. When the calling, profession, or business of parties is unattended with danger to others, little legislation will be necessary respecting it. Thus, in the purchase and sale of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacturing or sale of explosive or inflammable articles, or in the preparation or sale of medicinal drugs, legislation for the security of society may prescribe the terms on which he will be permitted to carry on the business, and the liabilities he will incur from neglect of them. The concluding clause of the first section of the fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. Such has been the ruling of this court in numerous instances where that clause has been invoked against legislation supposed to be in conflict with it. (The court then discusses the following cases: *Barbier v. Connolly*, 118 U. S. 27; *Soon Hing v. Crowley*, *Id.* 708; *Railway Co. v. Humes*, 118 U. S. 512, involving Missouri statute somewhat similar to the one in question here: *Railway Co. v. Mackey*, 127 U. S. 205.) From these adjudications it is evident that the fourteenth amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just. The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers. Where the companies have the right to fence in their tracks, and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accident at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. It is true that, by the common law, the owner of land was not compelled to inclose it, so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway, the common law as to inclosing one's land having been established long before railways were known. But the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to insure safety in the movement of its

trains, is plainly implied by the statute of Iowa, which also indicates that the putting up of fences would be such reasonable means of safety. If, therefore, the company omits those means, the omission may well be regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed; and if punitive damages in such cases may be given, the legislature may prescribe the extent to which juries may go in awarding them. See also *Welsh v. Railroad Co.*, 53 Iowa, 632; *Bennett v. Railroad Co.*, 61 Iowa, 355.

A NOVEL question of malpractice arose in the case of *State v. Housekeeper*, 16 Atl. Rep. 382, recently decided by the Supreme Court of Maryland. It was an action for damages (under the statute allowing suit for benefit of children) against defendants, who were physicians, claiming that they caused the death of plaintiff's mother by unskillfully performing a surgical operation in the treatment of a cancer. It appears that the husband objected to the operation. The court says:

If she consented to the operation, the doctors were justified in performing it, if, after consultation, they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to his wife: "You shall die of the cancer; you cannot be cured, and a surgical operation, affording only temporary relief, will result in useless expense." The husband had no power to withhold from his wife the medical assistance which her case might require. *Harris v. Lee*, 1 P. Wms. 482; *Mayhew v. Thayer*, 8 Gray, 172. As was said by the Supreme Court of Michigan in the recent case of *Carstens v. Hanselman*, 28 N. W. Rep. 159: "It would be a cruel rule for her if she cannot, in his absence, at least, or in his presence, if he does not himself provide for her, make a binding agreement for any necessities, whether articles to be purchased or professional help, without becoming a public charge. It is not to be expected that physicians and surgeons will always feel bound to render gratuitous treatment to injured persons, and, when the occasion is pressing, it would be unreasonable to delay until an absent husband is communicated with to learn whether he consents or refuses to assume her contracts. Time will not allow minute inquiries, and humanity will not prompt them. It seems to us that no sensible line can be drawn between contracts for food and clothing and contracts for medical aid." The consent of the wife, not that of the husband, was necessary. The professional men whom she had called in and consulted, being possessed of skill and scientific knowledge, were the proper persons to determine what ought to be done. They could not, of course, compel her to submit to an operation, but if she voluntarily submitted to its performance her consent will be presumed, unless she was the victim of a false and fraudulent misrepresentation, which is a material fact to be established by proof. The court below was therefore right in rejecting the first and third prayers of plaintiff which place the burden of proof in regard to consent on the defendants. If the plaintiff alleges that there was no consent, he must establish his affirmation by proof. The party who allows a surgical operation to be performed is presumed to have employed the surgeon for

that particular purpose. *Gladwell v. Stegall*, 5 Bing. N. C. 733. It was the duty of the professional men to exercise ordinary care and skill, and, this being a duty imposed by law, it will be presumed that the operation was carefully and skillfully performed, in the absence of proof to the contrary. As all persons are presumed to have duly performed any duty imposed on them, negligence cannot be presumed, but must be affirmatively proved. *Best, Pres. 68; Railroad Co v. Chappell*, 21 Fla. 175, 1 South. Rep. 10. This principle is especially applicable in suits against physicians and surgeons for injuries sustained by reason of alleged unskillful and careless treatment. The burden of proof is on the plaintiff to show a want of proper knowledge and skill. *Leighton v. Sargent*, 31 N. H. 119; *Baird v. Morford*, 29 Iowa, 531. The court below committed no error in determining that it was incumbent on the plaintiff to prove affirmatively that the operation was performed without the consent of the patient, and also that her death was caused by unskillful and careless treatment of the physicians. Nor did the court commit any error in granting the defendant's second prayer, which enunciates the proposition that if death was caused by tubercular meningitis or other disease not produced by the operation the defendants are not liable. The defendant's fourth prayer is also correct, and was properly granted. In it the jury are told that even if the disease resulting in death was caused by the operation the defendants are not liable if they performed said operation with the patient's consent, in a careful and skillful manner, and under the belief that said operation was proper to be performed.

THE Supreme Court of Michigan has, in the case of *People v. Armstrong*, 41 N. W. Rep. 275, declared unconstitutional an ordinance of the city of Detroit prohibiting the distribution of any hand-bills or advertising cards upon any of the public streets or alleys of that city. Defendant was convicted under that ordinance for distributing cards in the streets of Detroit, inviting persons to visit the Young Men's Christian Association. The contention by defendant was that the ordinance was invalid: 1st. Because the city council had not power under the city charter to adopt the same. 2d. That it was unreasonable, oppressive and in contravention of constitutional rights. The court, in adopting this conclusion, says:

It is insisted upon the part of the prosecution that the power contained in the charter is sufficient to warrant the passage of the ordinance. There is an express power in the charter to provide for cleaning the highways, streets, avenues, lanes, alleys, public grounds, and squares, cross walks, and side walks, in said city, of dirt, mud, filth and other substance; also to prevent the incumbering or obstructing the streets, lanes, alleys, etc., and to control, prescribe, and regulate the manner in which the highways, streets, etc., shall be used and enjoyed, as well as to prohibit and prevent the flying of kites, and all practices, amusements, and doings therein having a tendency to frighten teams and horses, or dangerous to life or property. This is not an express grant of power to the city of

Detroit to pass a by-law or ordinance to prohibit a person from circulating, distributing, or giving away circulars, hand bills, or advertising cards of any description, in or upon any of the public streets and alleys of said city, and to punish by fine and imprisonment in the county jail or the Detroit house of correction for violation, and there is no such power implied in these provisions of the charter. Even if it could be held that the charter authorized it, this part of the ordinance is not a reasonable exercise of the power granted. It is true that the miscellaneous throwing to the winds of hand bills, circulars, or advertising cards may be an act that would be very desirable to prohibit. Such a distribution of cards or paper of any kind would not only litter up the street, and become a nuisance upon and along the streets, sidewalks, and crosswalks, but naturally would tend to frighten teams and horses hitched upon or being driven along the streets, and great danger might be apprehended to life and limb; yet the reasonableness or unreasonableness of an ordinance is not determined by the enormity of some offense it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder. It is conceded in the present case that these cards were given to those only who expressed, or appeared to express, a desire for the same, and that no cards were to be seen upon the ground or sidewalk at or near the place where the defendant was distributing them; and it is not pretended that the rights of any person were interfered with by defendant, or that any teams or horses were frightened. There was no indiscriminate scattering of the papers to the winds, and the cards of the size of and one-half inches by two inches contained nothing but what was legitimate and proper for publication and distribution. The card itself was not only harmless, but the words printed thereon were an invitation to a moral and Christian assembly of people, gathered together for the public good. If this act can be classed as an offense punishable by fine and imprisonment, then selling or distributing newspapers upon the streets of the city would be punishable in the same way. To render ordinances reasonable, they should tend in some degree to the accomplishment of the object for which the corporation was created and its powers conferred. The unreasonableness of this ordinance is made apparent when we consider the penalty which may be imposed for its violation—a fine of \$100, and costs of prosecution, and, in default of payment, imprisonment in the county jail or Detroit house of correction for a period of six months. If the conviction could be sustained, then any person upon any public street or alley, anywhere within the corporate limits of the city of Detroit, giving away advertising cards, however remote the street or alley from the business centers, could be convicted and punished in like manner. Laws which attempt to regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty. Under our constitution and system of government the object and aim is to leave the subject entire master of his own conduct, except in the points wherein the public good requires some direction or restraint. What direction or restraint is required for the public good in the mere act of giving away an advertising card or hand bill? This part of the ordinance is not aimed at the littering up of the streets, or to the frightening of horses, but the offense is made complete in itself by the mere act of distributing or giving away of these enumerated articles. In *Frazee's Case*, 63 Mich. 396, 30 N. W. Rep. 72, it was held by this court that a city ordinance providing that "no

person or persons, associations or organizations, shall march, parade, ride, or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor of said city," is unreasonable and invalid, because it suppresses what is, in general, perfectly lawful, and leaves the power of permitting or restraining processions to an unregulated official discretion. In that case Chief Justice Campbell, speaking for the court, said: "No one in his senses could regard a penalty of \$500 for such trivial offenses as most of those covered by this by-law as within any bound of reason." Many decisions of the courts of other States are to be found holding by-laws, much less stringent and arbitrary in their terms, unreasonable and invalid. 1 Dill. Mun. Corp. § 253; Clinton v. Phillips, 58 Ill. 102; Klip v. Patterson, 26 N. J. Law, 298; Commissioners v. Gas Co., 12 Pa. St. 318; Com. v. Robertson, 5 Cush. 438. This ordinance not only does not come within the power granted by the charter, but it is also unreasonable and unwarranted.

In the case of *Ruble v. State*, 10 S. W. Rep. 262, the Supreme Court of Arkansas very exhaustively discuss the doctrine as to "former jeopardy" in criminal law. There appellant was convicted of selling liquor without license and fined. He was also indicted for selling liquor to a minor without the consent of his parents or guardian. After conviction under the first indictment, he pleaded such conviction to the second indictment. The inquiry in this case was whether the conviction under the second indictment was lawful. After quoting from the language of Chief Justice Shaw, in *Commonwealth v. Rubey*, 12 Pick. 496, and citing numerous authorities which state the general rule, that the second indictment must constitute the same legal offense or crime as the first, in order to make available the defense of "former conviction," the court says:

Tested by the authorities cited and quoted from, was appellant twice indicted for the same offense? The sale of ardent or spirituous liquor within and of itself is no offense. Whether it be a criminal or not depends on other facts. One statute makes it an offense to sell it without license, and another makes it an offense so sell it to a minor without the consent of his parent or guardian. The objects of the two statutes are entirely different. The object of the first is the enforcement of the law which requires licenses to be granted, and fees therefor to be paid, and of the other to protect the morals of minors, and prevent them from being led into intemperance. The act or circumstance which makes the sale illegal in one case is entirely different from the facts which make it an offense in the other. Under the first statute he was guilty if he had no license, although he sold to a minor with the written consent of his parent or guardian; and under the other he was guilty if he sold to a minor, without the written consent of his parent or guardian, although he had or had not license. The acts necessary to constitute the offenses are so wholly

unconnected and distinct as not to be comprehended, the one within the other. The essential and constituent elements of the same are different. A party may be guilty of one and innocent of the other, or guilty of both; and the acquittal of one is not an acquittal of the other. They are separate and distinct offenses. In holding that the two offenses charged against appellant are not the same we are not without precedents. In South Carolina two statutes were in force at the same time. One imposed a penalty of £50 on persons retailing liquors without licence to persons of any description, and the other a penalty of \$1,000 and imprisonment on those trading with a negro without a ticket. In *State v. Sonnerkalb*, 2 Nott & McC. 280, it was held that a person who sold liquor to a negro without a license and a ticket was lawfully convicted under these statutes of two offenses, and subject to the penalties imposed by both. In *State v. Taylor*, 3 Bailey, 49, the same court held that the act of buying goods of a negro, knowing them to be stolen, subjected the purchaser to two punishments—one for trading with a negro without a ticket, and the other for receiving stolen goods. And it was adjudged in *State v. Inness*, 53 Me. 536, that "to punish a person for keeping a drinking-house and tipping-shop, and also for being a common seller of intoxicating liquors, although the same illegal acts contributed to make up each offense, is not a violation of the law which forbids a prisoner to be put in jeopardy twice for the same offense." In *Com. v. Harrison*, 11 Gray, 308, it was held that a conviction for an illegal sale of intoxicating liquor is no bar to a subsequent charge of keeping open a shop for the transaction of business on the Lord's day, although the business transacted was the sale of liquor for which the party had been previously convicted. And in *State v. Faulkner*, 2 South. Rep. 539, it was held that the accused, who, being intrusted with cotton for a particular purpose by the owner, obtained money on it from a third person, by falsely representing himself as the owner and selling it to him, was lawfully indicted for embezzling the cotton, and for obtaining third person's money under false pretenses, and that the conviction of the latter offense was no bar to a prosecution for the other.

According to the rule laid down by some authorities, one of the tests to determine the identity of offenses is, if the evidence of the facts alleged in the second indictment is not within itself sufficient to convict under the first indictment, the offenses charged in the two indictments are not the same. Tested by this rule, are the offenses charged in the two indictments against appellant the same? In *Com. v. Thurlow*, 24 Pick. 374, it was held that it was necessary, in an indictment for selling spirituous liquors without a license, to allege that the defendant was not duly licensed, and on the trial it was incumbent on the State to produce a *prima facie* evidence of that fact. According to that case, the offenses charged against appellant were clearly not the same. But this court has held that the State, in such trials, is not required to prove that the accused had no license, because, if he has, it is particularly within his own knowledge, and within his power, to produce or prove it; and, if he has not, it is not convenient for the State to prove that he was not licensed. *Hopper v. State*, 19 Ark. 146; *Williams v. State*, 35 Ark. 434. It is nevertheless true that the sale alone does not constitute an offense, and in a trial for selling without a license the State must introduce *prima facie* evidence that the accused had no license when he made the sale, or the defendant fall to prove he had. The failure of the accused

to prove he had, is evidence that he had none; for, if he had, it is presumed he would have proven it. So that proof a sale of spirituous liquor to a minor, without the written consent of his parent or guardian, without other material evidence, would not be sufficient to prove a sale without a license; and, according to the rule, the offenses charged against appellant are not the same. But reverse the order of the indictments, and suppose that the appellant has been convicted upon the first indictment of selling liquor to a minor without the written consent of his parent or guardian, and pleaded such conviction in bar of the second, would the evidence necessary to sustain the second indictment, in that case, have been sufficient to procure a legal conviction on the first? Most unquestionably it would not. Then they are not the same offenses. The evidence of the one will not support the other, and "it is," in the language of Chitty, "inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal (or conviction) of the one will be a bar to the prosecution for the other."

A NOVEL question, as to the liability of carriers of passengers, arose in the case of *Dodge v. Boston, etc. Co.*, 19 N. E. Rep. 373, decided by the Supreme Court of Massachusetts. The question was as to the rights and duties of common carriers in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey. It appeared that defendant's steamer landed at a wharf where there was a restaurant kept by a third person, and remained there long enough to give an opportunity to passengers to get breakfast. Plaintiff was injured on the gang plank while attempting to go on shore, and the question was as to the liability of the company and the degree of care that should be exercised by them. The decision is to the effect that a passenger is entitled to protection during his egress from the boat under such circumstances, as above stated, and contains an enunciation of the rule as to the degree of care required. The court says:

When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation. It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when the passenger, at

the end of his journey, has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged; and that the degree of care to which he is then entitled is less than during the continuance of his contract, as the liability of a carrier for goods is held less strictly after they have reached their destination, and been put in a freight house, than while they are in transit. There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time. And this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments. *Peniston v. Railroad Co.*, 34 La. Ann. 777; *Railroad Co. v. Riley*, 39 Ind. 568. So, where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop he has the rights of a passenger. Of course, during the interval between his departure from the station and his return to it to resume his journey he is not a passenger. To determine the rights of the parties in every case, the questioned to be answered is, what shall they be deemed to have contemplated by their contract? The passenger may do, without losing his rights, while he is in those places to which the carrier's care should extend, whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment where it is reasonable and proper for him to do so, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties. See *Packet Co. v. True*, 88 Ill. 608; *Clusman v. Railroad Co.*, 73 N. Y. 606; *Hrebrick v. Carr*, 29 Fed. Rep. 298; *Dice v. Transportation Co.*, 8 Oreg. 60. In the first of these cases, the defendant was held liable for a defect in a platform of its station to a passenger who had left a train to send a telegraphic message; but the court did not decide whether the plaintiff had the rights of a passenger at the time of his injury, or merely those of a person there by invitation. In the second, a passenger who had taken his place on board a steamship started to go on shore to buy some tobacco, and fell from an unsafe plank, and was drowned. He was held to have had the rights of a passenger, and his administrator was permitted to recover. Upon the undis-

puted facts of the case at bar, we are of opinion that the plaintiff as a passenger, could properly go on shore to get his breakfast at Rockland, and that he had a passenger's right to protection during his egress from the steamer. The defendant's tenth request was for an instruction that, if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer." This request referred to the degree of care which the law requires of carriers of passengers, as distinguished from the ordinary care required of men in their common relations to each other. Because a passenger's life and safety are necessarily intrusted in a great degree to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This rule is held not only in our own State and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stage coaches, steamboats, and sailing vessels. It applies at all times when, and in all places where, the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger. See *Readhead v. Railway Co.*, L. R. 2 Q. B. 412; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Warren v. Railroad Co.*, 8 Allen, 227; *Simmons v. Steamboat Co.*, 97 Mass. 381; *Gaynor v. Railway Co.*, 100 Mass. 208; *McElroy v. Railroad Corp.*, 4 Cush. 400. With this interpretation of the rule, the application of it is easy. As applied to every detail the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular it is the highest which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars. *Warren v. Railroad Co.*, 8 Allen, 227; *Le Barron v. Ferry Co.*, 11 Allen, 315; *Taylor v. Railway Co.*, 48 N. H. 304-316; *Tuller v. Talbot*, 23 Ill. 357. It may be assumed that the plaintiff would have ceased for the time to be a passenger if he had left the steamer and gone away for his breakfast. But he was injured before he had completed exit. Inasmuch as he had a passenger's right of egress, this request for an instruction was rightly refused; for, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank, or the slip.

In the case of *Cook v. Walling*, 19 N. E. Rep. 532, the Supreme Court of Indiana held that where a woman, supposing that her husband, who had been absent and unheard of for more than seven years, was dead, remarried and joined with the second husband in a mortgage of his realty, and the first husband afterwards returns, the mortgage is void, under the statute declaring that a married woman has no power to encumber his real property, except by deed, in which her husband joins, and that she is not estopped from claiming the invalidity of the mortgage, inasmuch as the contract is utterly void, for want of power to make it.

THE PROCEDURE IN HABEAS CORPUS CASES.

Questions of "practice," as they are ordinarily termed, when they arise in proceedings upon *habeas corpus*, are likely to prove embarrassing to court and counsel, inasmuch as they require a speedy determination, and the books contain few rules and precedents that may be relied upon as a guide. The greatest help and guide to be relied upon in such cases is to be derived from a clear conception of the exact nature of the proceeding and the scope and design of the writ.¹ "The reason of the law is the life of the writ."² It is not the design of the following pages to present a full or systematic discussion of the procedure under the writ of *habeas corpus*, but to discuss a few questions of interest and importance that are somewhat involved in difficulty.

In the first place, it should be noted that the writ of *habeas corpus* is a common law remedy, employed by the courts long before the enactment of statutes regulating its use, and that such statutes are not to be construed as diminishing the common law jurisdiction of the courts in the employment of the writ. They are to be regarded as increasing the facilities for procuring it, enlarging the class of officers having jurisdiction in respect of it, imposing penalties for refusing to grant or to obey it, and providing for a speedy return, a prompt trial and discharge of the person, if not held according to the law of the land.³

The writ of *habeas corpus* is defined as "that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained."⁴ It is eminently a writ of *liberty*, designed not to secure the adjustment of questions of property rights, or title or claim to personal services, or questions of guardianship or the like, but to free the person in whose behalf it is invoked from unlawful imprisonment or restraint. A master is entitled to the personal services of his indentured apprentice, and

¹ The writ referred to in these pages is the writ of *habeas corpus ad subjiciendum*, which is the writ relied upon as the security of our personal freedom. *Hurd Hab. Cor.* 143.

² *Comm. v. Killackey*, 3 Brewst. 564.

³ *People v. Liscomb*, 60 N. Y. 550; *Kirby v. State*, 62 Ala. 51; *Deckard v. State*, 38 Md. 186.

⁴ *Hurd Hab. Cor.* 143.

may maintain an action against one who entices him away; but he cannot have the writ for his apprentice, unless the apprentice is detained against his own will.⁵ So a husband may maintain an action for the seduction of his wife, but a *habeas corpus* will not lie unless the wife is detained against her own will.⁶ Nor will the courts determine questions of guardianship over infant children in this proceeding;⁷ and even where the claim of the guardian, whether he be the natural or appointed guardian, is undisputed, the law in the United States seems well settled, that, as the office of the writ of *habeas corpus* is not to recover possession of persons detained, but to free them from all illegal restraints upon their liberty, the guardian will not, upon his mere technical claim, be allowed to maintain the writ.⁸

The proceeding by *habeas corpus* is not a *suit*, in the ordinary acceptation of the term. In contemplation of law an unlawful imprisonment or restraint constitutes a breach of the public peace,⁹ which the State or commonwealth, in its sovereign capacity as the guardian of the liberty of the citizen, is interested in redressing,¹⁰ and the proceeding under this writ is regarded as a special jurisdiction vested in courts and judges for the prompt relief of the citizen against such im-

proper interference with his personal liberty.¹¹ The writ issues and the proceedings are conducted in the name of the sovereign or government, which is regarded as the real plaintiff or prosecutor in the case.¹² The party promoting the proceedings is regarded as a mere informant, being legally known as the "relator." It is, therefore, no objection to the granting of the writ that the applicant is a person not *sui juris*;¹³ nor is it necessary that there should exist any particular legal relation between the applicant and the party in whose behalf the remedy by *habeas corpus* is invoked; if any one person alleges that another is under illegal restraint by anybody, that person, whoever it may be, may apply for a *habeas corpus*, and thereupon the person under whose supposed control or in whose custody the person is alleged to be illegally and without his consent is brought before the court.¹⁴ It has, however, been held that, when the petition or application for the writ is presented by a third party, it should be made to appear either that the proceeding was duly authorized by the party confined or restrained, or that such party is so coerced as to have been unable to grant such authority.¹⁵

Slight or merely technical objections are not allowed to prevail in favor of the issuing of the writ, and when it has once issued the respondent is unconditionally required to obey by producing the body of the person detained and certifying to the court in writing over his signature the cause or reasons of the detention. This production of the body and statement of cause constitute the "return" to the writ.¹⁶ The mandate of the

¹¹ *McFarland v. Johnson*, 27 Tex. 105; *Baker v. Gordon*, 23 Ind. 209.

¹² *Hurd* Hab. Cor. 230; *Cobbett v. Hudson*, 10 Eng. L. & Eq. 818; *Com. v. Briggs*, 16 Pick. 208; *Barry v. Mercein*, 5 How. 108.

¹³ *Cobbett v. Hudson*, *supra*; *Comm. v. Briggs*, *supra*.

¹⁴ *In re Agar-Ellis*, L. R., 24 Ch. D. 317, 326; s. c., 32 W. R. 1, 3; *State v. Philpot*, Dudl. 46; *State v. Scott*, 30 N. H. 274; *Ex parte Des Rochers*, 1 McAll. 68; *In re Ferrens*, 3 Ben. 442.

¹⁵ *In re Hottentot Venus*, 18 E. 195; *Ex parte Child*, 15 C. B. 238; *In re Parker*, 5 M. & W. 32; s. c., 7 Dowl. 208; *Com. v. Killacky*, 8 Brewst. 565; *Com. v. Curby*, *Id.* 610; s. c., 8 Phila. 372.

¹⁶ The writ is addressed directly to the respondent and is served by being delivered to him; but where the writ was applied for and issued in open court, in the presence of the party upon whom it was to be served and read to him, this was held to be a sufficient service. *People v. Brady*, 60 Ill. 390. The cause

⁵ *R. v. Reynolds*, 6 T. R. 497; *R. v. Edwards*, 7 *Ib.* 745; *Ex parte Grocot*, 5 Dowl. & R. 610; *R. v. Fenwick*, 3 Smith, 369; *Lea v. White*, 4 Sneed, 78; *Com. v. Robinson*, 1 S. & R. 352; *Com. v. Moore*, 1 Ashm. 123; *In re McDowle*, 8 Johns. 328.

⁶ *R. v. Clarkson*, 1 Str. 445; *Ex parte Newton*, 2 Smith, 617; *R. v. Leggatt*, 18 Ad. & El., Q. B. 781; *Ex parte Sandilands*, 12 Eng. L. & Eq. 463; s. c., 21 L. J. Rep. (N. S.) Q. B. 342.

⁷ *Ex parte Hopkins*, 3 P. Wms. 151; *In re Edwards*, 42 L. J., Q. B. 99; s. c., *nom. In re Andrews*, L. R., 8 Q. B. 153; *Deringer v. Deringer*, 10 Phila. 190; *Matthews v. Hobbs*, 51 Ala. 210; *Ferguson v. Ferguson*, 6 Mo. 197; *Matthews v. Wade*, 6 W. Va. 464.

⁸ *State v. Baird*, 18 N. J. Eq. 194; *State v. Smith*, 6 Greenl. 462; s. c., 20 Am. Dec. 324; *In re Waldron*, 13 Johns. 418; *In re McDowle*, 8 *Ib.* 328; *People v. Chegaray*, 18 Wend. 637; *People v. Porter*, 1 Duer, 709; *People v. Kling*, 6 Barb. 366; *People v. Mercein*, 8 Paige, 47; *In re Wollstonecraft*, 4 Johns. Ch. 80; *In re Kottman*, 2 Hill (S. C.), 363; *Com. v. Addicks*, 5 Binney, 520; s. c., 2 S. & R. 174; *Com. v. Hammond*, 10 Pick. 274; *Matthews v. Hobbs*, 51 Ala. 210; *Ex parte Boaz*, 31 *Ib.* 425; *State v. Paine*, 4 Humph. 523; *In re Doyle*, 16 Mo. App. 159; *Bustamento v. Analla*, 1 N. Mex. 255; *Heinemann's App.*, 96 Pa. St. 112; *Merritt v. Swimley*, 82 Va. 433; *Coffee v. Black*, *Ib.* 567.

⁹ *Ex parte O'Neill*, 8 Md. 227; *State v. Glenn*, 54 Md. 572; *Gishwiler v. Dodez*, 4 Ohio St. 611; *Corrie v. Corrie*, 42 Mich. 509.

¹⁰ *People v. Bradley*, 60 Ill. 390.

writ is imperative and the respondent cannot ignore or avoid it by setting up allegations of defects or informalities in the proceedings antecedent to the grant or issuing of the writ. Such defects, if at all material, can only be made the subject of objection after the respondent has made his return. To allow the opposite course would defeat the very purposes of the writ.¹⁷

A return not accompanied by the body will be scanned with the most jealous caution. In order to excuse such non-production it must appear either that the person to be produced is in such a physical condition as to render it dangerous to his health to bring him up, or it must be shown that he is not within the power, custody or control of the respondent, and that, therefore, compliance with the mandate of the writ is a matter of impossibility. The return when the body is not produced must not be at all ambiguous or evasive, but must substantially amount to a clear and explicit denial that the party alleged to be detained "is at present, or was at the time of the service of the writ, or at any time since has been, in the custody, power or possession of, or confined, or restrained of his liberty by the respondent."¹⁸ The production of the body, unless omitted for such clear reasons as above stated, is deemed so essential that without it the case has no *status*, and the courts will hear no evidence upon the validity of the imprisonment.¹⁹ The mere statements in the return in such cases of non-production of the body are not at all con-

of detention should be certified on the back of the writ or in a writing annexed to the same.

¹⁷ *Carus Wilson's Case*, 7 Ad. & El. (N. S.) 984, 1,001; *Glynn v. Hutchinson*, 3 Dowl. P. C. 529; *Armstrong v. Stone*, 9 Gratt. 102; *Rust v. Van Wacter*, 9 W. Va. 600; *Hovey v. Morris*, 7 Blackf. 559.

¹⁸ *R. v. Winton*, 5 T. R. 89; *Warman's Case*, 2 W. Bl. 1,203; *In re Stacy*, 10 Johns. 328; *Reg. v. Roberts*, 2 F. & F. 272; *R. v. Wright*, 2 Str. 915; *Reg. v. Clarke*, 7 E. & B. 186; s. c., *nom. In re Race*, 26 L. J., Q. B. 169; *Comm. v. Chandler*, 11 Mass. 83; *Ex parte Coup-land*, 26 Tex. 388.

¹⁹ *Com. v. Chandler*, *supra*. An exception was made in a case of this sort: Where the writ was directed to the matron of an institution for destitute children, upon application of the parents of two children, the court, becoming satisfied that the children were well cared for and that it would be injurious to them to restore them to the relatives or even to allow the relatives to know the place where homes had been found for them, denied the application, without requiring the matron, who had placed them in a good home, to produce them or to disclose their place of residence. *Dumain v. Gwynne*, 10 Allen, 270. Cf. *In re Larson*, 31 Hun, 539.

clusive, but will be carefully investigated with a view to arriving at the exact truth.²⁰ If the respondent has not the party in his power at the time of the *return*, this, generally speaking, is a sufficient excuse, although the mere fact that the party for whom the writ issues has been removed beyond the jurisdiction of the court is not sufficient to defeat the process of the court.²¹ There is a conflict of opinion in regard to the operation of the writ to reach persons restrained beyond the jurisdiction of the court issuing it; but this much seems clearly established: that if the writ can be held at all to operate in such cases, it must be established that the detention abroad is by the agency of the respondent and that the party has been removed from the jurisdiction in which the writ issued for the purpose of defeating proceedings in relation to his custody.²² A failure to make a proper return is in all cases punishable by summary process of commitment for contempt.²³

Pending the examination or hearing the party brought up on *habeas corpus* is, in legal contemplation, in the custody of the court or officer issuing the writ, and subject to its order. He may be bailed on the return, *de die in diem*, or committed to prison or to such other custody as his age and other circumstances may require, under the control of the court or officer issuing the writ, and by its order brought up, from time to time, until the court or officer determines whether it is proper to discharge or remand him absolutely.²⁴

At common law, in strictness, the truth of the return to a *habeas corpus* could not be controverted, nor could the party plead or suggest any matter repugnant to it. This general rule was subject to various exceptions and qualifications, not well defined or

²⁰ *U. S. v. Green*, 3 Mason, 482; *In re Watson*, 9 Ad. & El. 731; s. c., 36 Eng. C. L. 254; s. c., *nom. Reg. v. Batchelder*, 1 Per. & Dav. 516; *Ex parte Bryant*, 2 Tyler, 269.

²¹ *U. S. v. Davis*, 5 Cranch C. C. 522; *People v. Kearney*, 21 How. Pr. 74.

²² *Church Hab. Cor.*, § 108; *In re Jackson*, 15 Mich. 417.

²³ *R. v. Winton*, 5 T. R. 89; *Ex parte Bosen*, 2 Ld. Ken. 289; *R. v. Ferrens*, 1 Burr. 631; *Reg. v. Gavin*, 15 Jur. 329n; *Crowley's Case*, 2 Swanst. 73; *State v. Philpot*, Dudl. 46; *U. S. v. Williamson*, 5 Pa. L. J. Rep. 365; s. c., 3 Am. L. Reg. 729.

²⁴ *In re Kalne*, 14 How. 133; *Barth v. Clise*, 12 Wall. 401; *Deringer v. Deringer*, 10 Phila. 190.

universally agreed upon, so that the condition of the law upon this subject has been aptly designated as "hazy,"²⁵ but now, by statute provisions obtaining in all or very nearly all the States, power is expressly conferred upon courts and judges upon the return of the writ to hear allegations and evidence in contradiction of the return, so that the proceeding by *habeas corpus* may always afford relief against unjust imprisonment or detention.²⁶

Upon the return there may be either an issue of law or of fact. The former arises where the relator desires to deny the sufficiency in law of the facts set forth in the return as a cause of detention. The relator in such case, not denying the allegations in the return to be true in fact, pleads their insufficiency in law, which may be by demurrer,²⁷ or by exception,²⁸ or in some mode designated by statute or established by local practice. The relator may likewise raise an issue of fact, or, as it is sometimes styled, an issue of law and fact, by denying or traversing the material allegations in the return or by confessing and avoiding them, alleging new facts to avoid the effect of the averments in the return.²⁹ Beyond this stage the pleadings or suggestions of the parties to a *habeas corpus* proceeding do not ordinarily extend, as such a thing as a formal joinder of issues is not required, as in ordinary suits. When all the material facts have been alleged by the parties, a motion, either in writing or oral, is made for the discharge of the person brought up by the writ, and the case, to borrow a phrase from another department of the law, may then be said to be "at issue" or in shape for the introduction of evidence, or, if the question presented is one of law, for determination. Such formal matters, however, as motions to discharge and the like, in practice are very little attended to and defects or omissions in this respect are not allowed to prejudice the rights of the party seeking release.

The trial is before the court or judge before whom the writ is made returnable, and hence is commonly called the *hearing*.³⁰ Whatever objections may have ever been

raised to thus leaving all the issues of facts involved in *habeas corpus* proceedings to be determined by the courts, they have been silenced by the long and well settled practice in both England and the United States. A trial by jury can no more be demanded by a prisoner or respondent in a *habeas corpus* proceeding as a matter of right than in a preliminary examination or a chancery proceeding.³¹ In a few instances, however, courts have asserted the right to order an issue of facts to be sent to a jury.³² The circumstances that the proceeding by *habeas corpus* is summary in its nature and the trial is to the court, without the intervention of a jury, have, in practice, led to a modification and relaxation in the application of the rules of evidence in such proceedings, although the general principles and rules of evidence still govern as in other cases.³³

While it is clearly right that, having regard to the high nature and beneficial purposes of the writ, the courts should free themselves from the trammels of narrow rules and mere technicalities, the same reason cannot be brought forward to excuse the vagaries that are often indulged in in entering up judgments or decisions in these cases. The forms of judgments or entries to be used upon the determination of *habeas corpus* proceedings will be here briefly noted. The petition in these cases always prays for the granting of the writ of *habeas corpus*; it is a mere *application for the writ*. If it appears, at the time when the petition is filed, that a *habeas corpus* will not properly lie, the petition should be "denied" or "refused." If, as is often done under the English practice, upon the petition a rule issues to show cause why the writ of *habeas corpus* should not be granted, and, upon cause being shown, the court concludes that the writ should not issue, then the rule should be "discharged" or the petition "dismissed." After the writ has issued, however, the petition has fulfilled its whole design and can no longer be "granted" or "denied." If, after issuing the writ, the court concludes that, for want of jurisdiction or the like cause, the issuing was improvident

²⁵ Hurd Hab. Cor. 288.

²⁶ *Ib.*

²⁷ *In re Booth*, 3 Wis. 1, 12.

²⁸ *Nichols v. Cornelius*, 7 Ind. 611.

²⁹ Hurd Hab. Cor. 302; Church Hab. Cor., § 170.

³⁰ Hurd Hab. Cor. 299.

³¹ Church Hab. Cor., § 173.

³² *Respublica v. Jaller*, 2 Yeates, 258; *Graham v. Graham*, 1 S. & R. 330; *Ex parte Davis*, 18 Vt. 401.

³³ Hurd Hab. Cor. 303; Church Hab. Cor., § 177; *Shortz v. Quigley*, 1 Binn. 222.

and that it should not proceed further under the writ, the same should be "quashed." If the body is not produced and the court becomes satisfied that it is not in the respondent's power to do so, as where he never had the custody or possession, the writ may be "dismissed" or "discharged." After the party alleged to be detained has been regularly produced, being then in the custody of the court, he can only be "remanded," or, if an infant child, "restored" to the same custody or "committed," or, if an infant child, "placed" under another custody, or he may be "discharged" or "released" from further custody. These matters are not extremely important, but where there is a right way it had better be followed.

Obedience to the final order in a *habeas corpus* proceeding may be enforced by summary process of attachment for contempt,³⁴ and a party brought before a court under the writ and discharged will be protected in returning to his place of abode.³⁵ As to the effect to be given to the final adjudication in a *habeas corpus* proceeding, there is considerable conflict of ruling. In the New York case of *Mercein v. People*³⁶ it was held that the principle of *res adjudicata* is applicable to a proceeding upon *habeas corpus* and that the party suing out the writ ought not to be permitted to proceed, *ad infinitum*, before the same court or officer, or before another court or officer having concurrent jurisdiction, to review the former decision, while the facts remain the same. This ruling has been followed in a number of cases,³⁷ but it has been said that the rule is stated in the above quoted case as broadly as courts could well go where liberty is concerned, and any extension of the rule would work injustice.³⁸ On the other hand, it has been held that a person in confinement has a right to call upon every court or judge having jurisdiction of the matter to inquire into the cause of his

being restrained of his liberty.³⁹ The case of *Mercein v. People* was the case of an infant child to whose custody conflicting claims were set up, and there is authority for the doctrine that the decision in such cases concludes the claims of the parties *inter sese*, but that the principle must not be extended so far as to conclude the person held in custody, whether private or under a criminal charge;⁴⁰ but there are also cases which deny the application of the doctrine even in this limited form.⁴¹ LEWIS HOCHHEIMER.

³⁸ *Ex parte Kaine*, 3 Blatch. C. C. 1; *In re Reynolds*, 6 Park. 276, 321.

⁴⁰ *People v. Bechdel*, 84 N. W. Rep. 384; *Brooks v. Logan*, 112 Ind. 183. Cf. *In re Bort*, 25 Kan. 308; *Avery v. Avery*, 33 Ib. 1; *People v. Allen*, 40 Hun. 611.

⁴¹ *In re Doyle*, 16 Mo. App. 159; *In re Nofsinger*, 25 Ib. 118; *Deringer v. Deringer*, 10 Phila. 190.

DEVISE — CONSTRUCTION — RULE IN SHELLEY'S CASE.

WILKERSON V. CLARK.

Supreme Court of Georgia, July 11, 1888.

Where an estate is devised to A to her benefit during her natural life, her husband to have no control, but that it be and remain the property of the heirs of her body after her death: Held, that the words "heirs of her body" are words of limitation, and by the operation of the rule in *Shelley's Case*, A takes under the devise an estate in fee.

BLECKLEY, C. J., delivered the opinion of the court:

This devise, made in 1841, was by a father to his married daughter. He gave to her an equal share with each of his other children in the general residue of his estate, and added, "to her benefit during her natural life, but my will is that [her husband] have no control of her distributive share, but that it be and remain the property of the heirs of her body after her death." That, by this provision of the will, an estate of freehold was conveyed to the daughter, with the ultimate estate of inheritance to the heirs of her body, there is no dispute. Thus far both sides are agreed, and, reduced to its final analysis, the sole question between them is whether the rule in *Shelley's Case* applies; the effect of its application being to raise an estate which would in England be an estate tail, but which in Georgia, by virtue of the statute (Cobb, Dig. 169), is an estate in fee-simple. There could hardly be a more apt instance for the application of the rule. The very things are done which the rule contemplates, namely, an estate of freehold is given to a person, and by the same instrument the ultimate estate of inheritance is given to the heirs of the body of that same person. The appropriate technical words of entail are employed, and what the rule in *Shelley's Case* undertakes to do is to determine

³⁴ *Com. v. Reed*, 59 Pa. St. 425; *Com. v. Hamilton*, 6 Mass. 273; *Comm. v. Nutt*, 1 P. A. Browne, 143; *Com. v. Maxwell*, 6 Law Rep. 214.

³⁵ *Ex parte Hopkins*, 3 P. Wms. 151; *R. v. Clarkson*, 1 Str. 444; *In re Lloyd*, 3 M. & G. 547; *In re McDowle*, 8 Johns. 328; *State v. Baird*, 19 N. J. Eq. 481, 483.

³⁶ 25 Wend. 64; 35 Am. Dec. 658, 668.

³⁷ *In re Da Costa*, 1 Parker, 129, 136; *People v. Fancher*, 1 Hun. 27; *In re Price*, 12 Ib. 500, 511; *People v. Brady*, 56 N. Y. 182; *Ex parte Scott*, 1 Dak. 140.

³⁸ *People v. Fancher*, *supra*.

the classification and effect of the same. According to the rule, they are to be treated as words of limitation, and not words of purchase. The contention here is that though, *eo nomine*, the ultimate estate is given to the heirs of the body, it is not given to them as heirs—in the character of heirs—but as children; and these words, following words importing an estate for life in the daughter, are consequently words of purchase, not words of limitation. This is the very question which the rule solves and settles, unless there are explanatory words or clauses in the instrument which show affirmatively that the testator, though he expressed himself in legal language, did not use that language in a legal sense. Certainly, had he wanted to entail his property to the extent of this one share, he went about it in a right way, and did what would have accomplished his purpose, save for the hinderance of our prohibitory law as to such estates. He made a disposition which, *prima facie* at least, has all the constituents of an estate tail that he could supply, and which would be an estate tail if the law would do its part and vitalize it as such. This the law would not do, and for this reason alone no estate tail was created. It takes two to create an estate, even by the *ex parte* instrumentality of a last will and testament; it takes the testator and the law. Here the testator completed the workmanship of an estate tail on his part, but, the law declining to co-operate, that particular kind of estate was not generated. It is said that though he adapted his work so exactly to the creation of an estate tail, he really had no such estate in contemplation, but meant that his words should be taken as words of purchase, words importing children of the first generation alone, and not also their children after them in indefinite succession to the end of time, or failure of blood. If he meant children in their literal and restricted sense, he could have said so with a single word, and one which was appropriate to his supposed purpose, both legally and colloquially. Still, it is not impossible that he may have used a phrase of four words, "heirs of her body," as the precise equivalent of the one word, "children," for, strange as it would seem, it is often done both in wills and deeds. That such was his purpose is said to be inferable, first, from the express exclusion of his daughter's husband, which, it is suggested, would have been needless had he intended an estate tail, as the bare entailment would have been an exclusion of the husband from participating in the inheritance, supposing the entailment to be effective. But observe that what is said of the husband is that he "have no control of her distributive share," showing a design to create in the wife (testator's daughter) a separate estate, one free from the marital rights of her husband; and this object accounts fully for the presence of the clause respecting him. As our law stood at the date of this will, his marital rights, but for this or some such clause of exclusion, would or might have attached upon whatsoever estate his wife acquired. The will sought to

exclude him, not only from the inheritance, but from control pending the coverture; both of which objects are quite as compatible with an estate tail as with any other. Indeed, one of them, the former, is essential to an estate tail, being involved in the very nature of the estate, and therefore needing no express mention in the instrument seeking to create it. But the latter did need express mention, as, without it, whether the estate in the wife was one for life, in fee, or in tail, the marital rights would or might have attached. It follows that these words respecting the husband are not rendered superfluous by adhering to the general signification, rather than adopting a special and restricted signification for the terms "heirs of her body," as used in this will.

Another circumstance relied on is that other daughters of the testator shared equally with this one in the testator's estate by the provisions of the will, and that their shares were given absolutely, without remainder, and without exclusion of, or restrictions upon, their husbands. The argument is that, as the testator did not provide for keeping in the blood the shares of these other daughters, he had no such design respecting the share of this one. He certainly had no general testamentary scheme embracing the entailment of his property, nor did he have any embracing the exclusion of husbands or of heirs general; yet in this one instance he certainly excluded the husband and heirs general of this daughter. Having deviated so far from the disposition made in behalf of other daughters, and having done so by using words appropriate to the generation of an estate tail, why should it be concluded that he did not intend such an estate for this daughter and her posterity from the fact that he provided otherwise for the other daughters? We think there is too much of guess-work in this reasoning to make it the basis of a legal judgment. Too doubtful and uncertain is the theory of counsel, however stated, that the only purpose the testator had in discriminating among the daughters was to hold off the husband of this particular daughter, and prevent the property from ever vesting in him. We do not know whether that was his only purpose or not, since there is nothing in the will, apart from what he has said in the devise we are construing, to inform us. But grant that such was his only purpose as an end, it would still leave the question whether his purpose, as means to accomplish it, was not to do what he has done; that is to attempt to create an estate tail. That he could have excluded the husband without giving the devise the color and characteristics of an estate tail is certain. Then, how can we conclude, except by mere guess, that he hit upon an apparent entailment by mistake, rather than by design? The truth is that any possible doubt about the matter grows out of the failure of the estate tail to take effect as such. If the law would let the devise have effect as it is written, the title under it to a fee-tail would be impregnable. It would be upheld in any court in any country where the

rule in *Shelley's Case* is recognized and administered. Lastly, it is urged that the testator, having given by the will two small pecuniary legacies, one to the "lawful heirs" of a brother, the other to a sister, "if living, or her lawful heirs if she be not alive," he certainly used "heirs" as synonymous with children in these bequests; whence it follows that he also used "heirs of the body," in a like sense. If he meant children by the terms "lawful heirs," as he possibly did, though that is not more, but rather less, certain than our main question, why he should have changed his vocabulary to "heirs of the body" if his meaning was unchanged, is not easily accounted for. If, in his mind, three sets of immediate children, and they only, were in contemplation, why did he call two of them "lawful heirs," and one of them "heirs of the body?" True enough, he might have done this; but did he do it? Do or can we know it well enough to escape from a rule of law so well settled as the rule in *Shelley's Case*, and so directly in point?

We have gone over all the provisions of the will which were relied upon in the argument to supply qualifying or explanatory words for a reduced interpretation of the words of entail, and in none of them separately, nor in all together, can we discover the slightest reason for adopting the construction contended for. We have felt bound, in good faith, to try this will by the law as it existed prior to the adoption of the Code, for that is the law applicable to it, and the new provisions of the Code should have no influence on the decision. The Code, by sections 2248-2250, abrogates the rule in *Shelley's Case*, wipes it out utterly; but this is only as to conveyances executed since the Code went into effect; that is, since the year 1862. Prior to 1863, the terms "heirs of the body," when used in conveyances, unless modified or controlled by qualifying or explanatory words, were words of limitation, not words of purchase. The Code, § 2250, leaves them still words of limitation, where no less estate than the fee is expressed, and where they are used, not by way of limitation over, but of direct and immediate limitation of the estate granted. When they take effect as words of limitation, they do so as they did prior to the adoption of the Code, under the act of 1821, and pass, not a fee-tail, but a fee-simple. The limitation power of the terms "heirs of the body" is neither more nor less than that of "heirs," but just the same. Legally, they mean heirs general, both under the Code and the act of 1821. The difference is that under the Code they are taken as words of limitation only in the one instance; that is, where they apply directly to the estate granted. It may be suggested, I think, as universally true, that, whenever these words can be treated under the Code as words of limitation, they are superfluous; and the same may be said of the word "heirs." Any word or words which import a fee-simple can have no effect upon the conveyance as to the quantity of the estate, but the conveyance will pass the fee without as ef-

fectually as with them; for, save when a less estate is expressed, the fee always passes, and, if a less is expressed, it cannot be enlarged by construction. Code, § 2248. We deem it unnecessary to fortify our conclusion by analyzing the authorities cited by counsel, though we have not failed to examine them before deciding the question. The cases are as follows: Cited for plaintiffs in error: *Else v. Osborn*, 1 P. Wms. 387; *Jones v. Jones*, 7 Ga. 76; *Benton v. Patterson*, 8 Ga. 146; *Kemp v. Daniel*, *Id.* 387; *Tucker v. Adams*, 14 Ga. 548; *Robert v. West*, 15 Ga. 123; *Dudley v. Porter*, 16 Ga. 617; *Gray v. Gray*, 20 Ga. 826, 832; *Carroll v. Carroll*, 25 Ga. 260; *Sharman v. Jackson*, 30 Ga. 226; *Forman v. Troup*, *Id.* 496; *Burton v. Black*, *Id.* 638; *Lillibridge v. Ross*, 31 Ga. 733; *Clarke v. Harker*, 48 Ga. 596; *Wayne v. Lawrence*, 58 Ga. 19; *Munroe v. Basinger*, *Id.* 118; *Sanford v. Sanford*, *Id.* 260; *Butler v. Ralston*, 69 Ga. 485; *Johnson v. Sirmans*, *Id.* 617; *Ford v. Cook*, 73 Ga. 215; *Gaboury v. McGovern*, 74 Ga. 142. Cited for defendant in error: *Choice v. Marshall*, 1 Ga. 103; *Wiley v. Smith*, 3 Ga. 556; *Jones v. Jones*, 7 Ga. 76; *Holcome v. Tufts*, *Id.* 538; *Miller's Lessee v. Hurt*, 12 Ga. 357; *Tucker v. Adams*, 14 Ga. 548; *Dudley v. Porter*, 16 Ga. 613; *Gray v. Gray*, 20 Ga. 824; *Jones v. Jones*, *Id.* 699; *Childers v. Childers*, 21 Ga. 378; *Pounnell v. Harris*, 29 Ga. 736; *Sharman v. Jackson*, 30 Ga. 224; *Burton v. Black*, *Id.* 638; *Clarke v. Harker*, 48 Ga. 596; *Wayne v. Lawrence*, 58 Ga. 15; *Butler v. Ralston*, 69 Ga. 485; *Nussbaum v. Evans*, 71 Ga. 753; *Gaboury v. McGovern*, 74 Ga. 133. Judgment affirmed.

NOTE.—The rule in *Shelley's Case*, as laid down by Lord Coke, is: "Where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same instrument an estate is limited, mediately or immediately, to his heirs in fee or in fee-tail, the heirs are words of limitation of an estate, and not of purchase."¹

Another way of stating the same rule is: "Where a person takes an estate of freehold legal or equitable, under a deed, or will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of any interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestors to the whole estate."²

Thus where an estate is devised to A for life, and after his death to his heirs forever, the word "heirs" is one of limitation and not of purchase, and A takes an estate in fee,³ and where an estate is given to A for life, and remainder to the heirs of his body, the first taker gets an estate in fee-tail.⁴

¹ 1 Coke Rep. 104.

² Hargrave's Law Tracts, 501; 4 Kent's Com. 215.

³ *King v. Utley*, 85 N. C. 59; *Stacy v. Rice*, 27 Pa. St. 75; *Fewell v. Fewell*, 6 Rich. Eq. (S. C.) 138; *Biggs v. McCarthy*, 86 Ind. 363; *Washburne on Real Property*, 596; *Preston on Estates*, 271; *Gonzales v. Barton*, 45 Ind. 296; *Hockstedler v. Hockstedler*, 7 West. Rep. 75; *Little's Appeal*, 11 Atl. Rep. 530; *Chippis v. Hall*, 23 W. Va. 504; *King v. Beck*, 12 Ohio, 390; 2 *Fearne on Remainders*, 209; *Parish v. Parish*, 37 Ala. 591.

⁴ *Cooper v. Coursey*, 2 Coldw. (Tenn.) 416; *Clarke v.*

The principle difference in effect between acquisition of an estate by purchase, and descent, consists in two points: 1. By purchase the estate acquires a new inheritable quality, and is descendible to the owners blood in general, and not the blood only of some particular ancestor: and 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will.⁵

Application of the Rule.—The rule in Shelley's Case, only applies where a remainder is given to the "heirs" or "heirs of the body" of the first taker. It does not apply to a case where an estate for life is granted with remainder to the issue of the first taker,⁶ or children of the tenant for life,⁷ even where the words "descend to children" are used.⁸ The word "children" in its primary sense is always a word of purchase, and "issue" also is a word of purchase. But "heir" and "heirs" are words of limitation, and not of purchase.⁹ However, the rule in Shelley's Case, is considered as a rule of construction, and not of property,¹⁰ and whether the remainder is given to the heirs, issue or children of the first taker, these words are either words of limitation or purchase, as will best effectuate the deviser's intention.¹¹ If clearly shown that the word "heirs" was used as meaning children, the courts will give it that meaning.¹² Thus, where a testator gave the interest of a fund to his son for life, and, at the decease of the latter the principal sum to his lawful heirs, share and share alike, the term "lawful heirs" was construed to mean children and not next of kin.¹³ And where an estate is given to A for life but not to sell or dispose thereof, and the remainder to his heirs, the word "heirs" is construed as a word of purchase.¹⁴ Also where there is an express declaration in a devise that the first taker shall have only a life estate and the fee-simple vest in his heirs, the rule in Shelley's Case does not apply.¹⁵ And where a will gives only the "use" of land to a devisee for life, with remainder to his heirs, the word "use" makes it clear that the deviser only intended to give a life estate to the first taker.¹⁶ The rule applies as well to the construction of a deed as a devise,¹⁷ and to a devise of personal property, as well as real.¹⁸ Thus the use of slaves granted to A for life, and after his

death to his heirs, gives full property in their use to A.¹⁹

The rule also applies to equitable estates and a devise of lands to A, his heirs and assigns forever, in trust to the separate use of B during her life, and to the use of her heirs at law vests an equitable fee in B.²⁰

Where an estate is given to a married woman for her sole and separate use in trust with remainder to her heirs, the husband being deceased, the devisee takes a fee-simple and has a right to require a conveyance from the trustees of the legal estate.²¹ The rule applies when an estate is given to two or more jointly for life, remainder to their heirs,²² and after the granting of an intermediate estate; for instance, where a devise is made to the testator's widow for life, and after her death to a son for life, and after his death to his heirs forever, upon the death of the widow the son takes the estate in fee-simple.²³

Exceptions to Rule.—If the particular freehold estate, and the estate in remainder are not of the same quality, the rule in Shelley's Case will not operate, as in a devise of an equitable estate for life to the ancestor, and a legal estate in remainder to his heirs.²⁴ Thus, where an estate is devised to B and C, trustees, to secure such estate to the separate use of A for life, and after her death to descend to her heirs, A takes an equitable life estate only,²⁵ and when the annual rent of a farm is given to an ancestor for life, and after his death the farm is to descend to his heirs, the rule does not apply.²⁶

It is essential to the operation of the rule that the remainder should be created by the same instrument which creates the particular estate. When created by different instruments the particular estate will not be enlarged into a fee, though all the other requisites for the application of the rule are present.²⁷ A well established exception to the application of the rule is in the case of a devise of an executory trust.²⁸ When such an estate is devised, which is to be carried into effect by a conveyance from trustees of a legal estate, a court of chancery will direct such conveyance as will effectually carry out the testator's intention, notwithstanding the existence of the rule.²⁹ Where there are words of limitation in a devise inconsistent with the devolution of the estate by inheritance from the first taker, the rule will not be applied;³⁰ nor where there are superadded words of limitation;³¹ thus, where an estate is given to A for life with remainder to his heirs and their heirs forever, A's estate is not enlarged into a fee by the operation of the rule, since the addition of the words "their heirs forever" forms a new stock of inheritance in the heirs of

Smith, 49 Md. 106; Williams v. Williams, 10 Heisk. (Tenn.) 506.

⁵ Vownicle v. Patterson, 5 Cent. Rep. 179.

⁶ Cushman v. Henry, 4 Paige Ch. 351.

⁷ Chambers v. Payne, 6 Jones Eq. (N. C.) 276; Reeder v. Spearman, 6 Rich. Eq. (S. C.) 138; Gernet v. Lynn, 31 Pa. St. 94; Stump v. Jordan, 54 Md. 619; Bannister v. Bull, 16 S. C. 290; Donnelly v. Turner, 60 Md. 81; Jones v. Cable, 6 Cent. Rep. 255.

⁸ Tate v. Townsend, 61 Miss. 316.

⁹ Schoonmaker v. Sheely, 3 Denio, 488.

¹⁰ Ohlton v. Henderson, 9 Gill, 432; Carter v. Reddish, 33 Ohio St. 150; Daniel v. Whartenby, 17 Wall. 639.

¹¹ Cooper v. Collie, 4 T. R. 294; Shriver's Lessee v. Lynn, 2 How. 56; Foxwell v. Craddock, 1 P. & H. (Va.) 250; Doyle's Lessee v. James, 8 Wheat. 495; Perrin v. Blake, 4 Burr. 2579; Bagsheew v. Spencer, 2 Atk. 583; Ohlton v. Henderson, 9 Gill, 432; Wynch's Trust, 23 Eng. Law & Eq. 375.

¹² Shimer v. Mason, 99 Ind. 102; Ridgeway v. Lamphear, 99 Ind. 251; Brumfield v. Drock, 101 Ind. 190; Creswell's Appeal, 41 Pa. St. 238.

¹³ Eldridge v. Eldridge (N. J.), 3 Cent. Rep. 344.

¹⁴ Roberts v. Ogbourne, 37 Ala. 174.

¹⁵ Belasley v. Engel, 107 Ill. 183; Moore v. Brookes, 13 Gratt. 135.

¹⁶ Jenkins v. Jenkins, 96 N. C. 234; Mills v. Thorne, 95 N. C. 363.

¹⁷ Hull v. Beals, 23 Ind. 25.

¹⁸ Parish v. Parish, 1 Ala. (S. C.) 379.

¹⁹ Williams v. Houstler, 4 Jones Eq. (N. C.) 277; Kiser v. Kiser, 2 Jones Eq. (N. C.) 28.

²⁰ Armstrong v. Zane, 12 Ohio, 387.

²¹ Nice's Appeal, 50 Pa. St. 143.

²² Creswell's Appeal, 41 Pa. St. 238; Fuller v. Chamler, 2 Eq. & Law Rep. 682.

²³ Chipps v. Hall, 23 W. Va. 504.

²⁴ Ward v. Armory, 1 Curtis C. C. 419.

²⁵ Wynch's Trust, 23 Eng. Law & Eq. 375.

²⁶ Thurston v. Thurston, 6 R. I. 296.

²⁷ Coale v. Arnold, 31 Eng. Law & Eq. 133.

²⁸ Sicheloff v. Redman, 36 Ind. 257.

²⁹ Wood v. Burnham, 6 Paige Ch. 513; Leonard v. Sussex, 2 Vern. 526; Papillon v. Voice, 2 P. Wms. 471.

³⁰ Montgomery v. Montgomery, 3 Jones & L. 61; Cooper v. Callis, 4 Term Rep. 294; Greenwood v. Rothwell, 6 Scott's New Rep. 670; Robins v. Quinlivan, 79 Pa. St. 333; Fulton v. Harmon, 44 Md. 251.

³¹ Robins v. Quinlivan, 79 Pa. St. 333.

A inconsistent with the descent of the estate from A.³³
Abolition of Rule by Statutes.—Where the rule in Shelley's case has been abolished by statute, the question whether a remainder to the heirs of a person who takes a preceding estate of freehold is vested or contingent must be determined on general principles,³³ and all devises made before the enactment of such statutes will be construed in accordance with the rule.³⁴

DAVID FLESSNER.

³³ McIntyre v. McIntyre, 16 S. C. 270; Schoonmaker v. Sheeley, 3 Denio, 488; Brant v. Gelston, 2 Johns. Cas. 384; Williams v. Beasley, 1 Wins. (N. C.) 102; Moore v. Settel, 40 Barb. 488; Dennett v. Dennett, 48 N. H. 499; Findlay v. Riddle, 3 Binn. 189; Rogers v. Rogers, 3 Wend. 508; Wood v. Burnham, 6 Paige Ch. 518.

³⁴ Williamson v. Williamson, 18 B. Mon. 329.

³⁵ Williamson v. Williamson, 11 Lea (Tenn.), 652; Quick v. Quick, 21 N. J. Eq. 13.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF TRIALS, IN ACTIONS Civil and Criminal. By Seymour D. Thompson, LL.D., in Two Volumes. Chicago: T. H. Flood & Co. 1889.

The author of this work needs no introduction to the profession. He is known, not only as an able judge of the St. Louis court of appeals, and the accomplished editor of the *American Law Review*, but also as an author of many works of permanent and lasting value. There exists, perhaps, to-day, no more indefatigable worker in the domain of legal literature, and his writings, notably, those on Negligence, Homesteads and Exemptions, Liability of Stockholders, Liability of Officers, Thompson & Merriam on Juries, etc., are everywhere regarded as of standard value. There are authors and again there are authors. The average so-called author of to-day is not one in fact. He originates nothing. He has no opinions, at least to judge him by the biblical standard—his works. He does not even think. He is simply a compiler of prepared material. His labor consists chiefly in a skillful use of the United States Digest, and his production is but a digest or compilation of cases. We know, of course, that what the profession want, as a general rule, is the opinions of the courts, and not those of an author, but within reasonable limits it may be permitted to the latter to wander from the beaten paths of adjudicated cases, and if not to cull the fresh and untouched flowers of abstract jurisprudence, at least to cut down the underbrush and lop off the withered branches which stand in the way of progress, if we may be allowed a figure of speech. The number of law book compilers to-day, who are also authors, is unfortunately small, but Judge Thompson may certainly be counted among the number. Every book written by him evinces thought, as well as great industry, mind, in addition to or rather as the director of pen and ink.

The work which we have before us is, as disclosed by the preface, "an attempt to sketch the leading outlines of a trial before a jury or before a judge sitting as a jury, from the impaneling of the jury to the signing and filing of the bill of exceptions," a plan certainly comprehensive, and in the completion of which it is not surprising that it fills two large volumes, each over 1,100 pages, has 2,439 sections, and required the examination of almost sixteen thousand cases. Nearly

every title in the law can be touched upon in a work on trials. As the learned author says, "the gathered learning and experience of a professional life-time may be called into requisition in a single forensic struggle." The subject of this book is not new to the author. He has had it in preparation for years, and it is the outgrowth of smaller works prepared by him on "Charging the Jury" and "Juries." The magnitude and scope of this work is such that it will be impossible within the confines of this article to do more than notice the salient or leading topics treated therein. It begins with the subject of the impaneling of the jury and therein challenges; preservation of order and punishment for contempt. Compulsory process against witnesses, enforcing stipulations and stipulations of counsel. Under the general subject of opening the case and presenting the evidence follows the questions as to the right to open and close, the opening statement, excluding witnesses from the court room, direct, cross and redirect examinations, and of experts and the production and use of papers. An interesting chapter is that as to the argument of counsel, right to argue question of law to the jury and abuses of the right of argument. The most extensive title is that on the province of the court and jury, and the questions arising in the various forms of actions as to what is for the court and what for the jury. Herein the practitioner will find much of value and interest in being able to determine not only what questions are questions of law for the judge and what are questions of fact for the jury, but also the manner in which the questions for the discussion of the jury are to be submitted to them, and to find a great variety of precedents of instructions on questions likely to arise in practice, such as negligence, carriers, fraud, warranty, etc. A readable chapter is that as to the power of juries as judges of the law. Questions as to nonsuits and power of the court to direct a verdict are followed by chapters on the law pertaining to charging the jury and the particular form of charges and instructions sanctioned by the law in the different forms of actions. The doctrines of reasonable doubt and circumstantial evidence, as they enter into instructions, are exhaustively treated. The book concludes with the custody and conduct of the jury and therein books and papers in the jury room, improper methods of arriving at the verdict, misconduct of juries, the verdict, general and special, and motions for new trial, and especially of the time and manner of making same, and finally the bill of exceptions, its form and substance, and the signing and filing of same. From this statement, it will readily be seen how extensive the book is, and of how much value it will be to the practitioner and to the judges of the courts. The lawyer who, in his office, is called upon for an opinion, in the preparation of which time is not of the essence, does not, perhaps, profit so much by the possession of a work of this character, though such a statement might be made of any text-book. But its value lies largely in the fact that its pages are full of matter, the discussion of which often arises suddenly in the heat of trial, and a determination of which must be had at once without the opportunity to collect the authorities, which this book so exhaustively furnishes on every conceivable subject liable to arise in trials, civil or criminal.

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMIRALTY—Appeal. — Construction of Rev. St. U. S. § 631, allowing appeal in circuit court in equity and admiralty cases.—*Providence, etc. Co. v. Wager*, U. S. C. O. (N. Y.), Dec. 20, 1888; 37 Fed. Rep. 59.

2. ADMIRALTY—Collision—Evidence. — Sufficiency of evidence to prove the schooner collided with was not that of libelants. — *The Newport*, U. S. C. O. (N. Y.), Oct. 15, 1888; 36 Fed. Rep. 910.

3. ADMIRALTY—Collision. — Evidence reviewed as to responsibility for collision.—*The Leonard Richards*, U. S. D. C. (N. Y.), Nov. 26, 1888; 36 Fed. Rep. 914.

4. ADMIRALTY—Master's Draft—Negotiability. — A master's bottomry obligation, payable to order on arrival at port of destination, is not such a negotiable instrument as to give the indorsee any better rights than those of the payee.—*The Lykus*, U. S. D. C. (N. Y.), Nov. 27, 1888; 36 Fed. Rep. 919.

5. ADMIRALTY—Objection to Jurisdiction—Waiver. — On a libel for wages, after the claimant has pleaded to the merits, and testimony has been taken, it is too late to object to the jurisdiction, on the ground that the wages were earned by a foreign seaman on board a foreign vessel. — *Lutike v. The Brucklay Castle*, U. S. D. C. (Cal.), Nov. 5, 1888; 36 Fed. Rep. 923.

6. ADMIRALTY—Wharves—Damage—Reasonable Care. — The occupants of a pier, the foundation of which extends outward like stairs, and which has a spike projecting below the water, may, by the exercise of reasonable care, discover the danger, and are liable for injury caused thereby. — *Smith v. Havemeyer*, U. S. C. O. (N. Y.), Dec. 1, 1888; 36 Fed. Rep. 927.

7. ALTERATION—Promissory Note — Intent. — The

unauthorized alteration of a promissory note by inserting after the name of the payee the words, "or bearer," will not avoid the note, if done without any fraudulent or improper motive.—*Crosswell v. Labres*, S. J. C. Me., Dec. 10, 1888; 16 Atl. Rep. 331.

8. ANIMALS—Killing Sheep.—Joinder. — Under act Tenn. 1859-60, ch. 45, § 1, where two dogs owned by different persons, injure sheep, the owners cannot be sued therefor jointly. — *Dyer v. Hutchins*, S. C. Tenn., Jan. 5, 1889; 10 S. W. Rep. 194.

9. APPEAL—Opening Streets—Commissioners' Report. — A proceeding to establish a public place in New York city under Laws N. Y. 1884, ch. 451, is within the operation of the general street opening acts, in which an appeal to the court of appeals from an order confirming the report of commissioners is not authorized. — *In re Board of Street Improvement*, N. Y. Ct. App., Dec. 18, 1888; 19 N. E. Rep. 283.

10. APPEAL — Record. — A party on appeal cannot substantially argue a question not raised in court below. — *Spickerman v. McClesney*, N. Y. Ct. App., Dec. 11, 1888; 19 N. E. Rep. 266.

11. APPEAL—Exception. — Exceptions to the exclusion of admissible testimony cannot be sustained where the same testimony was admitted at another stage of the trial without objection. — *Thomson v. Sebastick*, U. S. C. Me., Dec. 10, 1888; 16 Atl. Rep. 332.

12. APPEAL — Time of Taking. — An appeal taken thirteen years after entry of judgment will be dismissed; Code Civil Proc. Cal. § 983, requiring appeal to be taken within one year. — *Gray v. Winder*, S. C. Cal., Dec. 13, 1888; 20 Pac. Rep. 47.

13. APPEAL—Violation of Ordinance — Municipal Corporation. — A prosecution for the violation of a municipal ordinance punishable by imprisonment, but not punishable by general statute, is not criminal, and the corporation is entitled to an appeal therein.—*City of Greeley v. Hamman*, S. C. Colo., Dec. 22, 1888; 20 Pac. Rep. 1.

14. APPEAL—Bond—Amount—Dismissal. — Under a statute requiring an appellant to file a bond, a bond is not void because given for a stated amount. — *Hicks v. Oliver*, S. C. Tex., Nov. 20, 1888; 10 S. W. Rep. 97.

15. APPEAL—Mortgages—Foreclosure—Sale. — It is no defense to a rule on a master requiring him to make a deed to the purchaser at a sale under a decree of foreclosure, that an appeal has been taken from the decree, where the appeal does not operate as a *superseas*. — *Union Mut. Life Ins. Co. v. Windett*, U. S. C. O. (Ill.), Dec. 3, 1888; 36 Fed. Rep. 838.

16. ASSIGNMENT — Interest in Partnership — Assignee. — An assignment of a partner's interest in partnership property, real and personal, vests in the assignee the right to sue for a copartnership accounting.—*Greenwood v. Marvin*, N. Y. Ct. App., Nov. 27, 1888; 19 N. E. Rep. 228.

17. ASSUMPSIT — Money Paid. — Where a draft is sent to a bank for collection, and the agent of the bank, through mistake only collects a portion of the draft, marking it "paid," and the bank pays the entire amount of the draft to the holder, taking the notes of the agent for the amount, which he failed to collect, an action by the agent for money paid will lie against the drawee. — *Beard v. Horton*, S. C. Ala., Jan., 7, 1889; 5 South. Rep. 207.

18. ATTACHMENT—Wrongful Issuance—Damages. — Creditors of an insolvent attached his stock of goods, which were claimed by a third person as a *bona fide* purchaser. Other creditors placed attachments upon the goods while they were in the hands of the marshal awaiting sale on the first attachment: *Held*, that the creditors first attaching, if liable to the vendee at all, were liable for the whole damages. — *Stix v. Keith*, S. C. Ala., Dec. 11, 1888; 5 South. Rep. 184.

19. ATTACHMENT—Levy—Lien. — Under Code Civil Proc. Colo. 1883, §§ 99, 101, a levy on real estate by filing a copy of the attachment, with a description of the

property attached, in the county recorder's office, creates a valid lien, although no service is had upon the defendant until afterwards.—*Raymonds v. Ray*, S. C. Colo., Dec. 22, 1888; 20 Pac. Rep. 4.

20. ATTORNEY AND CLIENT—Compensation—Burden of Proof. — In an action to recover for professional services rendered in prosecuting a former suit in the name of the present defendant, the burden is on the plaintiff to prove that the services were rendered at the defendant's request. — *Wright v. Fairbrother*, S. J. C. Me., Dec. 9, 1888; 16 Atl. Rep. 380.

21. BANKS AND BANKING—Set-off. — As to the right of set-off by depositor of insolvent bank of money on deposit against notes given bank, some of which are in hands of third parties.— *Louis Snyder Sons v. Armstrong*, U. S. C. O. (Ohio), Oct. 8, 1888; 37 Fed. Rep. 18.

22. BANKS AND BANKING — Liability to Stockholders—Pledges. — A pledgee of shares of stock in a national bank, who does not appear, by the books of the bank or otherwise, to be the owner, is not liable for an assessment upon the shares of the insolvency of the bank, under Rev. St. U. S. § 5151.— *Welles v. Larrabee*, U. S. C. O. (Iowa), Dec. 11, 1888; 36 Fed. Rep. 866.

23. BAIL—Sheriff—Justice of the Peace. — A verbal order of a justice of the peace, directing the sheriff to take the bond of a party against whom he has a warrant of arrest, is sufficient to authorize the sheriff to accept an appearance, provided the amount thereof has been fixed by the magistrate.— *State v. Hendricks*, S. C. La., Oct. 27, 1888; 5 South. Rep. 177.

24. DEED—Delivery—Presumption. — Where the intention of the grantor evidently is to settle the property on his wife, and he conveys to one who immediately conveys it in trust for the benefit of the grantor's wife, the delivery of the first deed will be presumed though both deeds are in the grantor's possession at his death ten years later.— *Ewing v. Buckner*, S. C. Iowa, Jan. 16, 1889; 41 N. W. Rep. 164.

25. DEPOSITIONS—Dedimus—Certificate. — Depositions taken for use in the federal courts of Iowa under Rev. St. U. S. § 866, by virtue of a *dedimus* to a commissioner need have no certificate that the commissioner is disinterested. — *Giles v. Pazzon*, U. S. C. O. (Iowa), Dec. 8, 1888; 36 Fed. Rep. 892.

26. DIVORCE—Abandonment—Cruelty. — A husband who sues for a divorce on the ground of abandonment will not be entitled to a decree if it is made to appear that she was compelled to leave the home by reason of his cruel treatment. — *Kikel v. Kikel*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 180.

27. DOWER—Ratification of Deed—Estoppel—Rules of Court. — An agreement between husband and wife by which the former conveys lands to the latter, in consideration of her relinquishments of all her interest in other lands of his, being void under Code Iowa, § 2208, is not ratified by her taking possession of the lands conveyed to her, and claiming them as her own.— *Shane v. McNeill*, S. C. Iowa, Jan. 15, 1889; 41 N. W. Rep. 166.

28. DRAINAGE—Assessment—Complaint. — A complaint by a drainage commissioner to enforce an assessment need not aver that the person upon whose petition the assessment was made were land-owners.— *Johnson v. State*, S. C. Ind., Dec. 22, 1888; 19 N. E. Rep. 298.

29. CARRIERS OF GOODS—Connecting Liens—Injury to Freight. — Under a special contract to deliver a carload of apples to a connecting line within a given time, so as to avoid the danger of cold weather, the first carrier is liable for damage to the apples by freezing, while being transported over the connecting line, caused by the former's delay in delivering them. — *Fox v. Boston & M. E. Co.*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 222.

30. CARRIERS—Passengers — Negligence. — No recovery can be had for injuries received while attempting to board a moving train without the advice or direction of defendant's agent. — *Mo. Pac. R. Co. v. T. & F. R. Co.*, U. S. C. O. (La.), June 16, 1888; 36 Fed. Rep. 879.

31. CHATTEL MORTGAGE—Record. — The filing of a

chattel mortgage in the county recorder's office under provisions of § 14, ch. 82, Comp. St. makes such mortgage a part of the records of the county.— *Hall v. Atken*, S. C. Neb., Jan. 8, 1889; 41 N. W. Rep. 192.

32. CLERK OF COURT — Fees. — Under Code N. C. § 3789, prescribing the fees of the clerk of the superior court, the clerk is not entitled to any fee for entering a *nolle prosequi*.— *State v. Johnson*, S. C. N. Car., Dec. 20, 1888; 8 S. E. Rep. 360.

33. CONSTITUTIONAL LAW—Titles of Acts— Amendment. — Under const. Tenn. art. 2, § 17, acts. Tenn. 1887, ch. 85, attempting to amend the mechanic's lien law, but merely reciting "that § 2746, of the revised Code shall read as follows," is unconstitutional. — *Burnett v. Turner*, S. C. Tenn., Nov. 12, 1888; 10 S. W. Rep. 195.

34. CONSTITUTIONAL LAW — Obligation of Contract — Taxation. — Const. Miss. art. 12, §§ 18, 20, which provide that the property of all corporations for pecuniary profits shall be subject to taxation the same as the property of individuals, and that taxation shall be equal and uniform, apply to corporations wholly private, and do not prevent the grant of an exemption to a corporation of a *quasi* public character, which shall be irrepealable.— *Yazoo, etc. Co. v. Board of Levee Commrs.*, U. S. C. O. (Miss.), Nov. 12, 1888; 37 Fed. Rep. 24.

35. CONSTITUTIONAL LAW. — Const. Ala. art. 4, § 30, providing for public printing, etc., and under such regulations as shall be prescribed by law, is operative only to the extent that vitality has been imparted to it by supplemental legislation. — *Brown v. Seay*, S. C. Ala., Jan. 8, 1889; 5 South. Rep. 216.

36. CONTEMPT—Punishment—Imprisonment.— Under Code Civil Proc. N. Y. § 111, providing commitment upon a fine for contempt of court in the non-payment of alimony in a divorce case, the time during which the prisoner was committed to the custody of his counsel, pending *habeas corpus* proceedings, is not to be included in computing the term.— *People v. Grant*, N. Y. Ct. App., Dec. 21, 1888; 19 N. E. Rep. 281.

37. CONTEMPT—Petition for Rehearing — Disavowal. — A petition for rehearing made objectionable personal statements. *Held*, that counsel drafting the petition was guilty of contempt committed in the face of the court, notwithstanding a disavowal of disrespectful intention. — *McCormick v. Sheridan*, S. C. Cal., Dec. 11, 1888; 20 Pac. Rep. 24.

38. CONTRACTS—Note—Consideration. — An instrument in the form of a promissory note, payable at a bank, but with the seal of the maker attached, does not come within Code Ala. § 2094, and failure of consideration may be shown by the maker, in a suit by a *bona fide* holder, who took for value and before maturity.— *Muse v. Dantsler*, S. C. Ala., Dec. 18, 1888; 5 South. Rep. 178.

39. CONTRACT—Construction. — Construction of the words "payable monthly" in a contract of sale. — *Coleman v. Cummings*, S. C. Cal., Dec. 15, 1888; 20 Pac. Rep. 77.

40. CONTRACT—Construction. — An agreement by a manufacturer and seller of lead to "protect and guaranty" a customer until arrival of agent, means that the manufacturer will supply the article to his customer as low as the most favorable market price at the time of delivery.— *Beymer, etc. Co. v. Haynes*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 828.

41. CONTRACT — Guaranty. — Promise of father to pay for goods furnished his son is an original undertaking and not within statute of frauds. — *Waters v. Shape*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 181.

42. CONTRACT—Damages. — Under contract requiring employee to remain sober: *Held*, that a sum agreed to be paid was liquidated damages and not a penalty.— *Keeble v. Keeble*, S. C. Ala., Dec. 8, 1888; 5 South. Rep. 149.

43. CONTRACTS—Construction. — A written contract, by which plaintiff agrees to sink an artesian well for defendant, supplying a given quantity of water, does not require that the water should be fit for washing, though plaintiff knew defendant was a hotel keeper,

and desired water of that character.— *Amer. Well Works v. Rivers*, U. S. C. O. (La.), June, 1888; 86 Fed. Rep. 880.

44. CONVERSION—Realty Acquired by Administrator—Rights of Alien Heirs. — Under Rev. St. Mo. 1836, § 2, where an administrator completed payment under a contract made with the deceased, and took title "as administrator," the property was not constructively changed to personalty, and held for the benefit of the next of kin, but remained realty for the benefit of the heirs. — *Harney v. Donohoe*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 191.

45. CORPORATION—Devise—Heirs—Charities—Validity of Bequest—Power of Devisee to Take. — Where there is a prohibition against the taking of property beyond a certain value by a corporation, a devise or bequest to a corporation which will exceed that value is void as to the excess, and the title to the property vests in the heir or next of kin, who can raise the question of the validity of the bequest. — *In re McGraw's Estate*, N. Y. Ct. App., Dec. 12, 1888; 19 N. E. Rep. 283.

46. CORPORATIONS—Officers—False Returns. — Pub. St. Mass., ch. 106, § 60, providing penalty for officers of a corporation, who knowingly make a false certificate, applies as well to debts existing when the certificate is made as to future debts.—*Felker v. Standard Yarn Co.*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 220.

47. CORPORATIONS—Consolidation—Statute.—Construction of Act. Ky. Feb. 20, 1884, providing for consolidation of corporations. — *Botts v. Simpsonville, etc. Co.*, Ky. Ct. App., Dec. 18, 1888; 10 S. W. Rep. 124.

48. CORPORATIONS—Officers—Ratification.—Where a corporation is made party defendant to an action by service upon its president, and is represented by its attorney, it will be presumed to know what transpires in the action.—*Cambell v. Pope*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 187.

49. COSTS—Attorneys' Fees—Party Acting as Attorney.—The docket fee and fees for depositions "allowed to attorneys, solicitors and proctors" by Rev. St. U. S. §§ 823, 824, cannot be taxed in favor of a party not an attorney, who conducts his own cause.—*Gorse v. Parker*, U. S. C. O. (Ill.), Nov. 5, 1888; 86 Fed. Rep. 840.

50. COSTS—Actions Against Executors. — Under Code Civil Proc. N. Y. §§ 3228, when plaintiff recovers against an executor or administrator, costs cannot be awarded to defendant, though by other sections of the Code they are denied to plaintiff.—*Hopkins v. Lott*, N. Y. Ct. App., Dec. 18, 1888; 19 N. E. Rep. 273.

51. COUNTIES—Bridges.—Acts Ind. 1886, p. 203, does not relieve the county of the duty of keeping bridges in repair, where such repairs would cost less than \$75. — *Sullivan County v. Arnett*, S. O. Ind., Jan. 3, 1889; 19 N. E. Rep. 299.

52. COUNTIES—Claims—Vested Right. — Whatever effect the statute of 1869, which authorizes the disallowance of claims against county after they are allowed, may have, it can only apply to claims allowed since the act took effect.—*State v. Cathers*, S. O. Neb., Dec. 14, 1888; 41 N. W. Rep. 182.

53. COURTS—Jurisdiction. — Under Code Va. 1878, ch. 167, § 53, a judge of the hustings court of Richmond, sitting as chancery judge under act July 11, 1870, is, for the time, a judge of that court, and a decree entered by him in vacation is valid. — *Morris v. Virginia Ins. Co.*, S. O. Va., Dec. 18, 1888; 8 S. E. Rep. 383.

54. CRIMINAL LAW—Offenses Against Postal Laws.—Act Cong. 26th September, 1888; amending § 2, of the act of 18th June, 1888, relating to non-mailable matter, changes all former penalties provided for that offense.—*United States v. Barber*, U. S. D. C. (Neb.), Nov. 1888; 37 Fed. Rep. 55.

55. CRIMINAL LAW—Conduct of Trial. — In a trial for murder, where certain clothing had been identified as that worn by deceased at the time of the killing, it was not error, after the jury had retired, to allow it to be sent to them at their request; the defendant's coun-

sel, in defendant's presence, consenting thereto. — *People v. Mahoney*, S. C. Cal., Dec. 14, 1888; 20 Pac. Rep. 73.

56. CRIMINAL LAW—Postal Laws—Obscene Matter.—Sending a written communication of a personal and private nature from one person to another, under cover of a sealed envelope, is not sending obscene matter through the mails, within the meaning of Rev. St. U. S. § 3893, though the letter contains indecent or obscene matter.—*United States v. Mathias* U. S. C. O. (S. Car.), Dec. 1, 1888; 86 Fed. Rep. 892.

57. CRIMINAL LAW—Homicide—Declarations of Deceased.—Declarations of deceased that he was afraid P would kill him; that P and others were engaged in a conspiracy to take his life, and that he had nothing against defendant, but that the latter would be induced by P to kill him, are not admissible in evidence, even for the purpose of showing the existence of a conspiracy.—*People v. Irwin*, S. C. Cal., Dec. 12, 1888; 20 Pac. Rep. 56.

58. CRIMINAL LAW—Perjury—Indictment.—The allegations of the indictment in this case for falsely making an affidavit to a claim presented to the county court, puts in issue nothing but the value of the articles, and admits that they were furnished. — *Thomas v. State*, S. O. Ark., Dec. 15, 1888; 10 S. W. Rep. 193.

59. CRIMINAL LAW—New Trial—Evidence.—The newly discovered evidence on which motion for new trial is based being only of facts tending to impeach the State's witnesses, the discretion of the judge in denying new trial will not be interfered with.—*Dominick v. State*, S. C. Ga., Dec. 22, 1888; 8 S. E. Rep. 432.

60. CRIMINAL LAW—Circumstantial Evidence.—Where all the evidence connecting the accused with the theft is circumstantial, failure to charge with reference to circumstantial evidence is reversible error.—*Crowley v. State*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 217.

61. CRIMINAL LAW—Conspiracy—Declarations.—As to whether the declarations herein were admissible as evidence of a conspiracy and in furtherance of common design. — *Bronkser v. State*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 219.

62. CRIMINAL LAW—Homicide—Instructions.—Under Pen. Code Tex., art. 570, making homicide to prevent theft at night justifiable, it is error to omit to instruct the jury as to the meaning of the word "night," where the evidence shows that the killing occurred at or after sunset.—*Laws v. State*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 220.

63. CRIMINAL LAW—Threatening Letters—Indictment.—An indictment charging that the accused did so send the letter with intent to extort money, does not charge the offense of delivering a letter with such purpose, under Pen. Code Tex., art. 813.—*Landa v. State*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 218.

64. CRIMINAL LAW—Burglary—Evidence.—Notwithstanding strong evidence of good character, guilt may be established by chain of circumstances.—*Steadman v. State*, S. O. Ga., Dec. 5, 1888; 8 S. E. Rep. 420.

65. CRIMINAL LAW—Receiving Stolen Goods—Indictment.—Under Pen. Code N. Y., § 560, and Code Crim. Proc. N. Y., § 285, an indictment for criminally receiving stolen property is sufficient, though not alleging that such property was received with felonious intent.—*People v. Weldon*, N. Y. Ct. App., Dec. 18, 1888; 19 N. E. Rep. 279.

66. CRIMINAL LAW—Resisting Officer—Assault.—In an indictment for obstructing a police officer in the discharge of his duty, an allegation that the assault was made with a dangerous weapon may be rejected as surplusage.—*Commonwealth v. Delahan*, S. J. O. Mass., Jan. 2, 1889; 19 N. E. Rep. 221.

67. CRIMINAL LAW—New Trial—Misconduct of Jury.—Granting or refusing a new trial in a criminal case, for alleged misconduct of the jury, is in the discretion of the presiding judge, under all the evidence.—*Commonwealth v. White*, S. J. O. Mass., Jan. 5, 1889; 19 N. E. Rep. 222.

68. CRIMINAL LAW—Burglary—Evidence.—Evidence sufficient to justify conviction, under Code N. Oar., § 996, for entering dwelling house in day time with intent to steal.—*State v. Christmas*, S. O. N. Oar., Dec. 19, 1888; 8 S. E. Rep. 361.

69. CRIMINAL LAW—Prostitution—Evidence.—In a prosecution, under Laws Wis. 1887, ch. 214, for inducing girl under 21 years to enter house of ill-fame, the court properly allowed the jury to determine from the girl's personal appearance, or from view only, the question whether the defendant knew that she was under the age of 21 years.—*Hermann v. State*, S. O. Wis., Dec. 22, 1888; 41 N. W. Rep. 171.

70. CRIMINAL LAW—Jury—List in Capital Cases.—Under acts Ala. 1886-87, p. 151, § 10: *Held*, that where the trial is set for a day of the same week in which the order is made, the list served should contain only the names of the special list drawn for that case, and the panel organized for that week.—*Goley v. State*, S. O. Ala., Dec. 18, 1888; 5 South. Rep. 167.

71. CRIMINAL LAW—Bastardy.—A declaration in a bastardy proceeding, alleging that the child was begotten "at" the shop of R. & Co., in a certain town and county, is sufficiently definite as to place.—*Kaler v. Twfts*, S. J. C. Me., Dec. 10, 1888; 16 Atl. Rep. 336.

72. CRIMINAL LAW—Appeal—Record.—Where an appeal is taken in a criminal case upon the judgment roll alone, and the record shows that oral instructions, not made part of it, were given, the judgment will not be reversed for the erroneous refusal to give instructions requested.—*People v. Von*, S. O. Cal., Dec. 29, 1888; 20 Pac. Rep. 35.

73. CRIMINAL LAW—Assault with Intent to Kill.—Although, under Pen. Code Cal., § 240, an essential element of the crime is a present ability to do it, yet where the evidence shows that whoever committed the assault did have the present ability, an omission to instruct as to such element is harmless.—*People v. Leong*, S. O. Cal., Dec. 28, 1888; 20 Pac. Rep. 27.

74. CRIMINAL LAW—Carrying Weapons—Justification.—Under Code Ala. 1886, § 2775, an instruction which predicates an acquittal upon defendant's mere belief that he was in danger of an attack, and not upon the fact that he had good reason to apprehend it, is properly refused.—*Davenport v. State*, S. O. Ala., Dec. 17, 1888; 5 South. Rep. 152.

75. CRIMINAL LAW—Larceny—Possession.—Evidence to explain possession of a stolen horse, sufficient to justify acquittal.—*Arispe v. State*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 111.

76. CRIMINAL LAW—Murder—Ball.—Evidence of connecting defendant with murder, not strong enough to justify refusal of ball.—*Ex parte Jones*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 114.

77. CRIMINAL LAW—New Trial—Continuance.—Evidence of absent witness in trial for perjury: *Held*, material and probably true, and continuance should have been granted.—*Simmons v. State*, Tex. Ct. App., Dec. 5, 1888; 10 S. W. Rep. 116.

78. CRIMINAL LAW—Larceny—Ownership of Property.—On conviction for theft under an indictment alleging that the articles stolen was the property of some person unknown, a new trial will be granted where it does not appear that reasonable diligence was used to discover the name of the owner.—*Langham v. State*, Tex. Ct. App., Dec. 12, 1888; 10 S. W. Rep. 113.

79. CRIMINAL LAW—Conspiracy Against United States—Indictment.—Sufficiency of allegations charging a conspiracy against United States in indictment, under Rev. Stat., § 5440.—*U. S. v. Mitner*, U. S. O. C. (Ala.), Sept. 2, 1888; 26 Fed. Rep. 890.

80. CRIMINAL LAW—Indictment—Public Lands.—Sufficiency of allegation in indictment for fencing public lands in violation of 28 Stat. U. S., p. 322, § 2.—*U. S. v. Cook*, U. S. D. C. (Cal.), Oct. 15, 1888; 26 Fed. Rep. 896.

81. CRIMINAL LAW—Homicide—Evidence.—Evidence sufficient to justify verdict of murder in the second de-

gree.—*State v. Woods*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 187.

82. CRIMINAL LAW—Homicide—Resisting Arrest.—It is the duty of officers, when resisted in lawful attempt to make an arrest, to use force sufficient, not only to protect himself but to overcome resistance.—*State v. Dearberger*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 188.

83. CRIMINAL LAW—Homicide—Instructions.—On a trial for murder, evidence of previous threats, made by deceased against defendant, should be admitted, and instructions covering the law of self defense given, though defendant has testified that the homicide was accidental.—*State v. Stevens*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 172.

84. EJECTMENT—Defenses—Adverse Possession—Continuity.—Where defendant in ejectment relies only on adverse possession, it may be shown that the continuity of his possession was broken by dispossession under the judgment of a court of competent jurisdiction, in an action of unlawful detainer.—*Bishop v. Truth*, S. O. Ala., Dec. 7, 1888; 5 South. Rep. 154.

85. EJECTMENT—Adverse Possession.—Where defendant, in ejectment, proves continuous adverse possession of the land in controversy for 16 years under title bond and 15 years under deed from his vendor, it is error to assume in an instruction that plaintiff has made out a perfect title from the commonwealth.—*Bailey v. Tygart, etc. Co.*, Ky. Ct. App., Dec. 22, 1888; 10 S. W. Rep. 284.

86. EJECTMENT—Adverse Possession—Evidence.—In ejectment against a railroad company, it was not permissible to prove that any of the officers of the railroad company recognized plaintiff's title to the land, by offering to purchase a part of the premises from her, unless the authority of such officer was first established.—*Moblie, etc. R. Co. v. Coggsbill*, S. O. Ala., Dec. 19, 1888; 5 South. Rep. 158.

87. ELECTION AND VOTERS—Canvassers—Certiorari.—The rulings of the commissioners of a county sitting as a board of canvassers, after an election, to ascertain the result thereof in the county, are subject to review by the circuit court on writ of certiorari.—*Alderson v. Commissioners*, S. O. App. W. Va., Dec. 5, 1888; 8 S. E. Rep. 271.

88. ELECTIONS AND VOTERS—Carrying Weapons.—Where defendant is charged with carrying arms within half a mile of a voting place on election day, the presumption is that the election is legal.—*Cooper v. State*, Tex. Ct. App., Dec. 15, 1888; 10 S. W. Rep. 216.

89. EMINENT DOMAIN—Infant.—Under Sess. Acts Ala. 1884-85, p. 223, relating to condemnation of land by defendant company, it need not be alleged nor proved in the case of lands owned by an infant, although he has a guardian, that any previous attempt has been made to agree on the damages.—*Brown v. Rome, etc. R. Co.*, S. O. Ala., Dec. 18, 1888; 5 South. Rep. 195.

90. EMINENT DOMAIN—Procedure—Trial by Jury.—In proceedings to condemn land for railway purposes, the right of trial by jury, guaranteed by Const. Mo., art. 12, § 4, is not waived by the appearance of the owner before the judge in vacation pursuant to notice, and the appointment of commissioners at his request.—*Kansas City, etc. R. Co. v. Story*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 208.

91. EQUITY—Practice.—After a suit has been decided in favor of the complainant, and the cause referred to a master to take an account of damages, the court will not reverse its former decision and dismiss the bill, except for clear and decisive mistake.—*Coupe v. Weatherhead*, U. S. O. C. (R. I.), Nov. 15, 1888; 27 Fed. Rep. 16.

92. EQUITY—Cancellation—Mental Incapacity.—Evidence sufficient to set aside deed on ground of mental incapacity.—*Clark v. Kirkpatrick*, N. J. Ct. Chan., Dec. 28, 1888; 16 Atl. Rep. 309.

93. EQUITY—Adequate Remedy at Law—Pleading.—Where plaintiff has an adequate remedy at law, it need

not be pleaded by defendant in order to oust a court of equity of jurisdiction. — *Humphreys v. All. Milling Co.*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 140.

94. EQUITY—Cancellation—Fraud. — *Held*, error in decree cancelling deed from husband, attained by fraud, to make amount paid by alleged purchaser from the fraudulent grantee a lien on the land. — *Kyle v. Powell*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 166.

95. EXECUTION—Sale—Abandonment. — A sheriff may readvertise and resell, under the same execution, land already struck off to a bidder at a former sale, which appears to have been abandoned by mutual consent of the sheriff and the bidder, and of which no memorandum was made to satisfy the statute of frauds. — *Maher v. Etina Life Ins. Co.*, S. C. Ind., Jan. 9, 1889; 19 N. E. Rep. 305.

96. EXECUTION—Sale—Confirmation. — In Nebraska, the title of a purchaser at execution sale is not complete until confirmation of the sale by the court. — *Young v. DePruison*, U. S. C. O. (Neb.), Dec. 17, 1888; 87 Fed. Rep. 46.

97. EXECUTORS AND ADMINISTRATORS — Payment of Debts—Taxes. — A testator devised land to his executor upon a trust which was at the suit of his only heir decreed invalid. Before the rendition of this decree it was sold subject to unpaid taxes and bought in by the heir. *Held*, that such purchase did not amount to an undertaking by the heir to pay the taxes nor relieve the executor from the requirement of 2 Rev. St. N. Y. p. 2, ch. 6, tit. 3, § 27. — *Smith v. Cornell*, N. Y. Ct. App., Dec. 11, 1888; 19 N. E. Rep. 271.

98. EXECUTORS AND ADMINISTRATORS — Error in Settlement. — *Held*, upon the facts that a bill to surcharge and falsify the account was maintainable, under Code Ala. § 3837, providing for the correction of an error in the settlement of an estate to the injury of any interested person, without his fault or neglect, by bill in chancery. — *Hall v. Pegram*, S. C. Ala., Jan. 8, 1889; 5 South. Rep. 209.

99. EXECUTORS AND ADMINISTRATORS — Foreign Administrator. — An administratrix who recovers judgment makes the debt hers individually, and she may sue thereon out of the State where she was appointed. — *Newberry v. Robinson*, U. S. C. O. (N. Y.), Dec. 20, 1888; 36 Fed. Rep. 841.

100. EXECUTORS AND ADMINISTRATORS — Assets — Real Property. — The word, "assets," as used in Code Ala. § 2013, includes land situated in the county where the administration is granted. — *Nicrosi v. Gully*, S. C. Ala., Dec. 17, 1888; 5 South. Rep. 156.

101. EXECUTORS AND ADMINISTRATORS — Payment of Debts—Commissions. — Under the Alabama statute, lands descended or devised are charged only with debts due by decedent at the time of his death, and cannot be sold to pay commissions allowed on final settlement to executors. — *Beadle v. Steele*, S. C. Ala., Dec. 14, 1888; 5 South. Rep. 169.

102. EXEMPTIONS—Illegal Levy — Cow and Calf. — Under Gen. St. Ky. 1883, p. 431, a levy on the only cow and calf of a housekeeper is illegal, though he has helpers not exempt primarily, and does not offer to deliver them or any other property to the officer, in lieu of the cow and calf, before the sale. — *Stirman v. Smith*, Ky. Ct. App., Dec. 18, 1888; 10 S. W. Rep. 131.

103. EXEMPTIONS—Earnings of Physician. — Under Code Ga. § 2026, earnings of a physician are not exempt, though arising from services in rendering which he used a house, horse, and professional books, included in his homestead or exemption. — *Staples v. Keister*, S. C. Ga., Dec. 19, 1888; 8 S. E. Rep. 421.

104. FACTORS AND BROKERS—Release—Conversion. — Where A left with B certain machines to sell, one being on commission, and before sale executed release, while the release discharged obligations of B as factor it did not transfer A's property in the machines and A could maintain trover for their value. — *Binose v. Oak*, S. C. N. J., Jan. 2, 1889; 16 Atl. Rep. 535.

105. FEDERAL COURTS—Following State Practice. — In an action at law, in the federal court sitting in Iowa, on an insurance policy, it appeared from the petition that the person named in the policy as the party assured was not the real party in interest. The court sustained a demurrer for want of interest in the assured, but granted plaintiffs leave to file a bill in equity for reformation of the contract. *Held*, that such order was not contrary to Code Iowa, § 2654, which provides that on the decision of a demurrer, if the unsuccessful party fails to amend, the same consequences shall ensue as though verdict had passed against him. — *Rosenbaum v. Council Bluffs Ins. Co.*, U. S. C. O. (Iowa), Dec. 22, 1888; 87 Fed. Rep. 7.

106. FEDERAL COURTS—Following State Decisions. — The United States circuit court in Louisiana should be governed by the decision of the State supreme court, the matter being as conceded by the United States supreme court, one for its determination, and the parties being all of them Louisiana corporations. — *N. O., etc. Co. v. Southern, etc. Co.*, U. S. C. O. (La.), June, 1888; 36 Fed. Rep. 833.

107. FEDERAL COURTS — United States Marshal. — The circuit court of the United States has not original jurisdiction in suits on United States marshal's bonds where the amount in controversy does not exceed \$500. — *Pierson v. Phillips*, U. S. C. O. (Tex.), Dec. 18, 1888; 36 Fed. Rep. 837.

108. FRAUDULENT CONVEYANCES—Insolvency. — The value of personality sold by a debtor before, but of which he retains possession until after, insolvency proceedings are begun by him, can be recovered by the debtor's assignee in insolvency, against a mere volunteer, who claiming under the vendee, has converted the property, under Civil Code Cal. § 3440. — *Brown v. Bank of Napa*, S. C. Cal., Dec. 15, 1888; 20 Pac. Rep. 71.

109. GUARANTY — Release. — *Held*, that under the facts release of a debtor operated to release a guarantor. — *Irons v. Manus. Nat. Bank*, U. S. C. O. (Ill.), Dec. 8, 1888; 36 Fed. Rep. 843.

110. HIGHWAYS—Commission. — Procedure necessary under ch. 78 Comp. St. 1887, to give county clerk jurisdiction to appoint commissioner to view proposed public road. — *Howard v. Board*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 185.

111. INJUNCTION—Order—Discretion of Judge. — The order granting an injunction is to be construed in the light of the prayer for the same. Thus construed, the injunction as to assets not in dispute was only to restrain the executor from using or disposing of the same otherwise than as directed by the will. — *Powell v. Hammond*, S. C. Ga., Dec. 19, 1888; 8 S. E. Rep. 426.

112. INJUNCTION—Waste — Action by Remainder-man. A contingent remainder-man may maintain an injunction to restrain waste by the life-tenant. — *University v. Tucker*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 410.

113. INJUNCTION—State Land Grant. — An injunction will not be granted to one making a junior entry on land to restrain one making a senior entry from receiving, and the secretary of State from issuing a grant, where the application for the injunction is based solely upon alleged void irregularities in the senior entry. — *Brem v. Houck*, S. C. N. Car., Dec. 18, 1888; 8 S. E. Rep. 855.

114. INJUNCTION — Execution — Marshalling of Assets. — Where judgments have been docketed against the grantor before the registration of a conveyance, and are therefore under Acts N. C. 1885, ch. 147, a superior lien, the grantee is not entitled to enjoin the levy of executions against the grantor, and to compel a settlement of his entire estate among all his creditors, in order to save the land conveyed, until all other discoverable assets have been exhausted. — *Francis v. Herren*, S. C. N. Car., Dec. 21, 1888; 8 S. E. Rep. 353.

115. INJUNCTION — Bond — Pending Appeal. — The Supreme Court of California will not grant an order restraining the prosecution of an action on bond given on the issuing of a restraining order, pending an appeal by

the obligor from the action of the court in vacating his restraining order.—*Adams v. Andross*, S. O. Cal., Dec. 11, 1888; 20 Pac. Rep. 26.

116. INJUNCTION—Illegal Tax. — An injunction to restrain the collection of a tax alleged to have been fraudulently assessed, will not be refused on the ground that a proceeding by *certiorari* to correct the assessment is pending in the State court. — *Hazzard v. O'Bannon*, U. S. C. C. (Mo.), Dec. 12, 1888; 36 Fed. Rep. 864.

117. INJUNCTION—Rights Protected. — Devise to A was upon trust to convey the property of the State of South Carolina upon certain conditions. The devisee, after this bill was filed, addressed a letter to the general assembly of South Carolina asking its acceptance of the property, and of the conditions annexed to it. The general assembly at once put an act on its passage for this purpose: *Held*, that the right of complainant to assert her claims in this court was imperiled, and an interlocutory injunction was issued.— *Lee v. Simpson*, U. S. C. C. (S. Car.), Dec. 18, 1888; 37 Fed. Rep. 12.

118. INDICTMENT—Description of Offense—Accessories. — Under Pen. Code Cal. § 971, abrogating the distinction between an accessory before the fact and a principal in felony, an information alleging that defendant did encourage and advise, and also that he did aid, assist, and procure one G to commit a felony, but without alleging whether he was present at its commission, is sufficient. — *People v. Rozelle*, S. O. Cal., Dec. 31, 1888; 20 Pac. Rep. 36.

119. INTEREST—Note — Bond. — Recital in bond for deed held to determine the question whether interest on note given for purchase money was to be paid annually.—*Carter v. Carter*, S. C. Iowa, Jan. 16, 1889; 41 N. W. Rep. 168.

120. INTOXICATING LIQUORS—Illegal Sale — Evidence. — Evidence complete and sufficient to prove sale of intoxicating liquors.—*Commonwealth v. Finnerty*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 215.

121. INTOXICATING LIQUORS—Illegal Sales—Province of Jury. — Whether cider is a vinous or spirituous liquor within the meaning of act Pa. 1887, prohibiting the sale, without license, of malt, brewed, vinous, or spirituous liquor, is a question of fact for the jury.—*Commonwealth v. Reysburg*, S. C. Penn., Jan. 14, 1889; 16 Atl. Rep. 351.

122. INTOXICATING LIQUORS—Seizure—Officers Return. — Validity of officers return upon warrant for seizure of intoxicating liquors.—*State v. Hall*, S. J. C. Me., Dec. 9, 1888; 16 Atl. Rep. 529.

123. INTOXICATING LIQUORS—Illegal Sale—Clerk. — Evidence of a sale of alcohol by defendant's clerk, in the regular course of defendant's business, is sufficient to warrant a finding that the sale was authorized by defendant.—*Commonwealth v. Perry*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 212.

124. INTOXICATING LIQUORS—Illegal Sale — Ignorance of Vendor. — That defendant supposed the liquor, for the sale of which he is prosecuted, to have been a beverage of a different character, not intoxicating, is no defense.—*Commonwealth v. Daly*, S. J. C. Mass., Jan. 5, 1889; 19 N. E. Rep. 209.

125. JAIL AND JAILOR—Warden—Payment of Debts.—Under Rev. Stat. Ind. §§ 6140, 6141, it is the imperative duty of the warden to draw a warrant for fuel sold and delivered to him for the use of the institution, and he cannot excuse himself from doing so by simply alleging that the directors rejected the account because of fraud or mistake.—*Patten v. State*, S. C. Ind., Jan. 4, 1889; 19 N. E. Rep. 303.

126. JUDGMENT—Default — Publication. — Question of weight of evidence in question on affidavits as to proper publication or service in divorce case.—*McBlane v. McBlane*, S. C. Cal., Dec. 12, 1888; 20 Pac. Rep. 61.

127. JUDGMENT—Res Adjudicata. — A judgment of the supreme court reversing a judgment of the trial court, on the ground that the case should have been submitted to the jury, is not *res adjudicata* between the parties, so as to preclude the court of appeals from passing on law points involved, on a subsequent appeal

from a second judgment affirmed by the supreme court.—*Siedenbach v. Riley*, N. Y. Ct. App., Dec. 11, 1888; 19 N. E. Rep. 276.

128. JUDGMENT—Res Adjudicata—Parties. — Where the plaintiff in a suit for trespass, in which judgment has been obtained against defendant, is not the same as the plaintiff in a second suit for the statutory penalty, against the same defendant for the same trespass, defendant cannot set up the recovery in the former suit as a bar to the latter.—*Altkson v. Little*, S. O. Ala., Jan. 7, 1889; 5 South. Rep. 221.

129. JUDGMENT—Costs. — As to what constitutes a sufficient judgment awarding costs, under Missouri practice and Rev. Stat. Mo. § 1019.—*Flynn v. Edward*, U. S. C. C. (Mo.), Dec. 10, 1888; 36 Fed. Rep. 878.

130. LANDLORD AND TENANT—Trespass. — For the landlord to go upon the rented premises before the year has expired, break open a locked outhouse, and take therefrom the tenant's cotton, against his protest and remonstrance, is a trespass for which punitive damages may be awarded.—*Shores v. Brooks*, S. C. Ga., Dec. 23, 1888; 8 S. E. Rep. 429.

131. LIFE INSURANCE — False Representations. — Question of weight of evidence as to false representations of health in suit on policy of insurance.—*Maine Benefit Assn. v. Parks*, S. J. C. Me., Dec. 10, 1888; 16 Atl. Rep. 339.

132. LIMITATION OF ACTIONS—Running of the Statute—County Bonds—Interest Coupons. — When an installment of interest due on a municipal bond cannot be recovered by a suit on the coupon by reason of lapse of time since the coupon matured, the same installment of interest cannot be recovered along with the principal debt in a suit on the bond.—*Griffin v. Macon County*, U. S. C. C. (Mo.), Dec. 5, 1888; 36 Fed. Rep. 885.

133. LIMITATION OF ACTIONS—Common Law—Admiralty—Discretion of Court. — The period of limitation fixed by statute in common law actions should not be extended by discretion in admiralty cases, except for some cause of practical inability to sue, or for some peculiarity of a maritime nature.—*Nesbit v. The Amboy*, U. S. D. C. (N. Y.), Nov. 27, 1888; 36 Fed. Rep. 925.

134. MANDAMUS—Record. — Construction of § 27, ch. 19, Comp. Stat. 1887, requiring clerk of district court to keep a record of proceedings.—*State v. LeFevre*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 184.

135. MANDAMUS—Parties—Municipal Corporations. — The rule that when the question presented is one of public right, and the object of the action is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a citizen, applies more particularly to cases where the failure to perform the duty affects all the members of the community alike.—*State v. City of Kearney*, S. C. Neb., Dec. 14, 1888; 41 N. W. Rep. 175.

136. MANDAMUS—To Transfer Case to Supreme Court. — *Held*, that if it had been the duty of a court during a term to transfer a cause, and it had failed, *mandamus* would lie to compel the transfer, after the term expired, though the court could not then transfer the cause of its own motion.—*State v. Phillips*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 182.

137. MASTER AND SERVANT—Negligence. — Liability of railroad company for injury to passenger who, instead of paying his fare, put himself under the conductor to work his way.—*Sparks v. Railroad Company*, S. C. Ga., Dec. 19, 1888; 8 S. E. Rep. 424.

138. MASTER AND SERVANT—Negligence—Appliances. — Master not liable to servant for injury which might have been averted by use of appliance which was a new invention and not in common use.—*Norfolk, etc. R. Co. v. Jackson*, S. C. App. Va., Nov. 22, 1888; 8 S. E. Rep. 870.

139. MECHANIC'S LIEN—Contractors. — Code N. Car. § 1781, gives a lien, not only to mechanics and laborers as such, who themselves do the work, but also to contractors by whom they are employed.—*Lester v. Houston*, S. C. N. Car., Dec. 20, 1888; 8 S. E. Rep. 866.

140. MINES AND MINING—Trespassers.—Parties who attempt to enter, beneath the surface, within the side lines of the lands of another, and to mine and take ore therefrom, are *prima facie* trespassers.—*Cheesman v. Shreve*, U. S. C. C. (Colo.), Dec. 13, 1888; 87 Fed. Rep. 38.

141. MINES AND MINING—Violation of Statute.—Evidence sufficient to sustain judgment for plaintiff in suit, under the Illinois statute, providing for the safety of employees in coal mines.—*Niantic Coal Co. v. Leonard*, S. C. Ill., June 15, 1888; 19 N. E. Rep. 294.

142. MORTGAGE—Foreclosure—Parties.—In an action by heirs of a deceased mortgagor to redeem from foreclosure, where all payments on the debt were made by the heirs, the personal representative of the estate is not a necessary party.—*Jones v. Richardson*, S. C. Ala., Dec. 19, 1888; 5 South. Rep. 194.

143. MORTGAGES—Notice.—A disclosure made by an execution defendant on a poor debtor's examination, in presence of the plaintiff's attorney, of the existence of a prior unrecorded mortgage on his land, affects the plaintiff with actual notice of such mortgage, so as to postpone subsequent levies made by the latter to the mortgage, though the levies are recorded first.—*Bunker v. Gordon*, S. J. C. Me., Dec. 10, 1888; 16 Atl. Rep. 241.

144. MUNICIPAL CORPORATIONS—Defective Sidewalks—Evidence.—In an action against a city for personal injuries caused by falling into a hole in a sidewalk, testimony is not admissible that one of plaintiff's witnesses fell into the same hole on the same night.—*Moore v. City of Richmond*, S. O. App. Va., Dec. 13, 1888; 8 S. E. Rep. 267.

145. MUNICIPAL CORPORATIONS—Obstruction in Street.—In an action for injuries caused by an obstruction in a public street, it was error to refuse to instruct that the fact that the obstruction was placed there by an abutting owner, under an ordinance of defendant city, would not relieve the city of the duty to maintain proper lights at night to warn travelers of the danger.—*McCull v. City of Manchester*, S. C. App. Va., Dec. 13, 1888; 8 S. E. Rep. 379.

146. MUNICIPAL CORPORATIONS—Obstruction of Street—Liability.—Where, by order of the judge of a State court, a rope is put across a public street of a city to prevent travel and the resulting noise, which disturbs the court, and a traveler is injured thereby, the city is not liable.—*Belvin v. City of Richmond*, S. O. App. Va., Dec. 13, 1888; 8 S. E. Rep. 378.

147. MUNICIPAL CORPORATIONS—Assessments—Lien.—Property of the State is not subject to the provisions of the charter of the city of Rahway (P. L. N. J. 1865, p. 499, § 57), making assessments for city improvements alien prior to any mortgage or incumbrance on the land; and it is immaterial that the complainants, assignees of such mortgage, have never recorded the assignment, as the only penalties for failure to record an assignment are prescribed in the recording act. (Revision, p. 708, p. 32.) *Trustees of Public Schools v. Shotwell*, N. J. Ct. Chan., Dec. 7, 1888; 16 Atl. Rep. 308.

148. MUNICIPAL CORPORATIONS—Taxation—Liquor License.—Under § 13, of the city charter of Frankfort, distillers may be taxed on whiskey stored in their warehouses and owned by them, though they have paid a tax on the business of wholesale liquor merchants.—*City of Frankfort v. Gaines*, Ky. Ct. App., Dec. 18, 1888; 10 S. W. Rep. 123.

149. MUTUAL BENEFIT SOCIETY—Suspension—Reinstatement.—*Held*, that compliance with the other laws governing reinstatement in case of suspension of member of mutual benefit society was not necessary where no suspension had been declared by the society.—*McDonald v. Supreme Commrs.*, S. C. Cal. Dec. 31, 1888; 20 Pac. Rep. 41.

150. NEGLIGENCE—Railroad Company—Injury to Child.—Question of contributory negligence of child ten years of age crossing railroad track.—*McGuire v. C. M. & S. P. Ry. Co.*, U. S. C. C. (Minn.), Jan. 2, 1889; 37 Fed. Rep. 54.

151. NEGLIGENCE—Defective Bridge.—Facts upon which court held plaintiff guilty of contributory negli-

gence in going over defective bridge, by which he was injured.—*Morrison v. Shelby County*, S. C. Ind., Jan. 4, 1889; 19 N. E. Rep. 316.

152. NEGLIGENCE—Shooting.—A person who unlawfully shoots another, and wounds him, whether intentionally or through negligence, is liable for the damages thereby sustained by the party injured.—*Carmichael v. Dolen*, S. C. Neb., Jan. 3, 1889; 41 N. W. Rep. 178.

153. NEGLIGENCE—Railroad Companies.—Respecting contributory negligence of plaintiff in crossing railroad track, where he saw and heard approaching train.—*Galveston H. & S. A. Ry. v. Porpert*, S. C. Tex., Dec. 21, 1888; 10 S. W. Rep. 207.

154. NEGOTIABLE INSTRUMENTS—Consideration—Assumption of Husband's Debts by Widow.—A widow who, after electing to take under her husband's will, of which she is a sole beneficiary, without administering on the estate, proceeds to sell the assets and pay debts, cannot plead failure of consideration, against a note given by her and a surety for a debt of testator, by which the time of payment is extended.—*Kayser v. Hodopp*, S. C. Ind., Jan. 3, 1889; 19 N. E. Rep. 297.

155. OFFICE AND OFFICER—Title to Office—Collateral Attack.—On suit by tax payers under Pub. St. Mass. ch. 27, § 129, to enjoin the city of Boston from appropriating money to pay the salaries of the board of police, on the ground that the statute creating them is unconstitutional: *Held*, that the court will not in this indirect manner try the title to a public office.—*Prince v. City of Boston*, S. J. C. Mass., Jan. 3, 1889; 19 N. E. Rep. 218.

156. OFFICE AND OFFICER—Town Marshal.—Town existing under Code, §§ 774 779, is not liable for compensation beyond the time he actually served to one who was its marshal *de facto* and under other facts of the case.—*Miller v. Town*, S. C. Ga., Dec. 19, 1888; 8 S. E. Rep. 428.

157. OFFICE AND OFFICERS—Court Officials—Proceeds of Fines—Application.—Under Code Ga. §§ 4655a, 4655b, the county is not entitled to prorate for detaining prisoners, and bringing them into court, with the officers of court, in the distribution of such proceeds.—*Gordon County v. Harris*, S. C. Ga., Dec. 19, 1888; 8 S. E. Rep. 427.

158. PARTIES—Power of Attorney.—Where two join in a power of attorney authorizing a third person to collect their respective shares in an intestate estate, it is not necessary, in an action by one of them to recover his share so collected, to make the other a party thereto.—*Best v. Siaz*, S. C. Wis., Dec. 23, 1888; 41 N. W. Rep. 169.

159. PARTNERSHIP—Evidence.—In suit for ejectment *held*, that evidence did not report finding of title in a partnership.—*Allen v. Logan*, S. C. Mo., Dec. 20, 1888; 10 S. W. Rep. 140.

160. PARTNERSHIP—Firm and Individual Creditors.—One who has advanced money to enable one partner to purchase an interest of another, has no equity superior to that of the partnership creditors, though the advancement was made on the promise of the partner to secure him by mortgage, and at a time when there were no partnership debts.—*Ames v. Ames*, U. S. C. C. (Minn.), Dec. 11, 1888; 37 Fed. Rep. 80.

161. PARTNERSHIP—Evidence of—Letters.—In an action on a contract against persons whom plaintiff alleges to be partners, a letter signed with the names of both defendants, and relating to the subject-matter of the contract, is admissible to prove partnership.—*Zachary v. Phillips*, S. C. N. Car., Dec. 19, 1888; 8 S. E. Rep. 359.

162. PATENTS—Infringement—Measure of Damages.—The measure of damages for infringement of a patent is to be ascertained by considering the amount of profits or savings made by defendant by the use of the infringing device, beyond what he could have made by the use of tools free to the public.—*McMurray v. Emerson*, U. S. C. C. (Mass.), Nov. 21, 1888; 36 Fed. Rep. 901.

163. PLEADING—Allegation—Interest in Land.—In an action in rem against land, it is sufficient, in making

one a party defendant, to allege that he has, or claims to have, some interest in the land, without alleging the nature of such interest. — *Otis v. DeBoer*, S. C. Ind., Jan. 5, 1889; 19 N. E. Rep. 817.

164. PLEADING—Complaint—Averment of Residence—County Courts. — Under Const. Amend. N. Y. 1873, and Code Civil Proc. N. Y. § 340, the complaint must aver that defendant is a resident of the county in which the action is brought. — *Gilbert v. York*, N. Y. Ct. App., Dec. 11, 1888; 19 N. E. Rep. 268.

165. PLEADING—Release. — Plea of release *purs darsin continuance* is defective which does not allege the place where the release was made. — *Field v. Cafer*, S. J. C. Me., Dec. 9, 1888; 16 Atl. Rep. 326.

166. PLEADING—Complaint—Suit for Commissions. — In an action by real estate brokers to recover commissions, an averment that plaintiffs found purchasers at the prices fixed by defendant, and that he refused to consummate the sale, is fatally defective, on demurrer, in not alleging that such purchasers were able, ready and willing to carry out the sale. — *Sayre v. Wilson*, S. C. Ala., Dec. 11, 1888; 5 South. Rep. 187.

167. PRACTICE IN CIVIL CASES — Agreement to Arbitrate. — A motion to set aside a judgment, and restate the case, on the ground that the parties had agreed to arbitrate, and to have the case, when called, continued for that purpose, is properly denied, where such agreement was not communicated to the court, and no motion for a continuance was made when the case was called. — *Camp v. Morgan*, S. C. Ga., Dec. 19, 1888; 8 S. E. Rep. 422.

168. PRACTICE IN CIVIL CASES — Entry of Motion — Docket. — Under act Ga. Sept. 25, 1888, a motion in Atlanta city court, after judgment by default, involving as issue as to whether defendant was served, having been entered on the motion docket, should be dismissed therefrom, and should be entered on the issue docket, but should not be dismissed from court. — *Harris v. Lowe*, S. C. Ga., Dec. 8, 1888; 8 S. E. Rep. 419.

169. PRACTICE IN CIVIL CASES — Amendment — Objections. — Allegations, in an answer to an amended complaint, that the latter changes the form of the action, are properly stricken out as irrelevant and redundant. — *Wheeler v. West*, S. C. Cal., Dec. 31, 1888; 20 Pac. Rep. 45.

170. PRACTICE IN CIVIL CASES—Action. — Construction of Code Iowa as to service of notice at commencement of action. — *Hintrager v. Nighthale*, U. S. O. C. (Iowa), Dec. 18, 1888; 36 Fed. Rep. 847.

171. PRINCIPAL AND AGENT — Settlement. — Where an agent, authorized by a principal to purchase supplies for the use of the principal, and instructed to purchase only for cash, purchases in his own name, upon credit, of a seller who supposes the agent to be buying for himself only, and the principal pays or settles with the agent for the supplies in good faith, supposing that the agent had purchased them for cash or upon his personal credit, he is not liable over again to the seller for the price of the supplies. — *Fradley v. Hyland*, U. S. O. C. (N. Y.), Dec. 1, 1888; 37 Fed. Rep. 49.

172. PRINCIPAL AND SURETY — Fraud — Estoppel. — Facts upon which court held that the ward was not estopped to assert the liability of surety on bond of guardian, though the latter had obtained final discharge of his trust. — *Gillette v. Wiley*, S. C. Ill., June, 1888; 19 N. E. Rep. 287.

173. PRINCIPAL AND AGENT—Ratification. — An agent placed in charge of a retail store with instructions not to purchase on credit, cannot bind his principal by a purchase of goods on credit, though made from persons ignorant of the limitation of his authority, unless they show that the principal, by ratification or acquiescence in previous acts of the agent, had extended his authority. — *Wheeler v. McGuire*, S. C. Ala., Dec. 18, 1888; 5 South. Rep. 190.

174. PRINCIPAL AND SURETY — Right to Collaterals — Equity. — A surety has no ground for relief in equity

under a contract with the creditor to transfer to the surety the collaterals received from his principal, upon payment of the sum for which he is surety, where it appears that the principal has himself paid the debt. — *Dilburne v. Youngblood*, S. C. Ala., Dec. 17, 1888; 5 South. Rep. 175.

175. PROHIBITION—Ministerial Officer. — The writ of prohibition lies from a superior court, not only to inferior judicial tribunals properly and technically denominated such, but also to inferior ministerial tribunals, possessing incidentally judicial powers, such as are known in the law as *quasi* judicial tribunals, and even, in extreme cases, to purely ministerial bodies, when they attempt to usurp judicial functions. — *Fleming v. Commissioners*, W. Va. Ct. App., Nov. 28, 1888; 8 S. E. Rep. 267.

176. PUBLIC LANDS—Application. — Pol. Code Cal. § 3500, applies to all lands, no distinction being made between lands suitable for cultivation and lands not suitable. — *Taylor v. Weston*, S. C. Cal., Dec. 15, 1888; 20 Pac. Rep. 62.

177. PUBLIC LANDS — Sale of School Lands — Filing Statement. — To make valid a purchase of public school land, under act Tex. April 12, 1888, § 7, there must be a classification of the land, and the filing of a tabulated statement in the office of the surveyor of the county where the land is situated. — *Martin v. McCarty*, S. O. Tex., Dec. 4, 1888; 10 S. W. Rep. 231.

178. PUBLIC LANDS — Lease — Rejection of Bids. — Although the land board has no authority to increase the minimum price per acre prescribed by act Tex. April 12, 1888, relating to renting public school lands, yet it may make a regulation reserving the right to reject any or all bids. — *Coleman v. Lord*, S. O. Tex., Dec. 14, 1888; 10 S. W. Rep. 92.

179. RAILROAD COMPANIES—Taxation — Constitutional Law. — Act 1885, (Laws Mo. 1885, p. 280,) amending Rev. St. § 6890, is not invalid, under Const. art. 10, § 11, providing that for the purpose of erecting school buildings the rates of taxation therein limited may be increased by vote, and § 5, authorizing the taxation of railroad companies for school purposes. — *Chicago & A. R. v. Lamkin*, S. O. Mo., Dec. 20, 1888; 10 S. W. Rep. 200.

180. RAILROAD COMPANIES—Killing Stock — Evidence. — Evidence sufficient to justify verdict for damages in killing mule crossing the track. — *Crawley v. Ga. R. R.*, S. O. Ga., Nov. 30, 8 S. E. Rep. 417.

181. RAILROAD COMPANIES—Killing Stock — Crossings. — In an action against a railroad company for killing stock in an open field, 800 or 400 yards from a public crossing, it is error to instruct the jury that it was defendant's duty to slacken the speed of its train when approaching the crossing. — *Nashville, etc. Co. v. Hembres*, S. C. Ala., Dec. 14, 1888; 5 South. Rep. 173.

182. RAILROAD COMPANIES—Traffic Associations. — Under Const. Tex. art. 10, § 5, prohibiting railroad corporations from controlling competing lines, an agreement forming a traffic association between a number of such corporations for the purpose of "preventing sudden and extreme changes in Texas rates, is illegal." — *Gulf, C. & S. F. Ry. Co. v. State*, S. C. Tex., Dec. 21, 1888; 10 S. W. Rep. 81.

183. RECORD—Amendment. — Where a clerk has no list of the amounts of the delinquent taxes and costs for which judgment is asked, and those items are therefore omitted from the various columns in the record of the judgment, the record cannot be amended after the term closes. — *Frew v. Danforth*, S. C. Ill., June 15, 1888; 19 N. E. Rep. 393.

184. REMOVAL OF CAUSES—Aliens. — An alien sued in the State of his residence by citizens of another State upon an ordinary debt cannot remove the action to the circuit court of the United States under the provisions of act Cong. March 3, 1867. — *Cudaky v. McGeech*, U. S. O. C. (Wis.), Dec. 12, 1888; 37 Fed. Rep. 1.

185. REMOVAL OF CAUSES—Filing Petition. — Petition for removal to United States court under act 1875 must

be filed at the term of the court at which it is first ready for hearing and trial. — *Kennedy v. Ehen*, S. C. W. Va., Nov. 24, 1888; 8 S. E. Rep. 398.

186. REPLEVIN—Pleading. — As to what is sufficient allegation of ownership in answer in replevin suit. — *M. McIntire v. Eastman*, S. C. Iowa, Jan. 15, 1889; 41 N. W. Rep. 162.

187. SALE—Crops—Possession. — As to what, under the facts, constitutes sufficient change of possession on sale of growing cotton, to pass title as against seller's creditors. — *Hopkins v. Partridge*, S. C. Tex., Oct. 30, 1888; 10 S. W. Rep. 214.

188. SHERIFFS AND CONSTABLES — Salary. — Construction of act Cal. 1883, and act March 14, 1885, providing compensation for sheriff. — *Santa Clara County v. Brankham*, S. C. Cal., Dec. 26, 1888; 20 Pac. Rep. 75.

189. SHIPPING—Charter Party — Consignment. — A memorandum indorsed on a charter-party, and signed by the master at a port in the course of the voyage, whereby he agrees to consign the vessel, on arrival at the destination, to a certain firm, if a contract at all, is one between the master and the charterers. — *La Scala v. Boughton*, U. S. D. C. (N. Y.), Nov. 23, 1888; 37 Fed. Rep. 62.

190. TAXATION—Tax-sale—Publication Notice — Printer's Fee. — If the printer who publishes the notice of sale of real estate for delinquent taxes falls for fourteen days after the date of the last publication, to transmit to the county treasurer an affidavit of such publication, his fee therefor does not become a charge against the county. — *Blanchard v. Hatcher*, S. C. Kan., Dec. 8, 1888; 20 Pac. Rep. 15.

191. TENANTS IN COMMON — Rents and Profits — Improvements. — Where a wife's name was signed to a conveyance of her husband's land without her consent, and pending an action by her after her husband's death, in which a decree establishing her title and right of possession to an undivided third was rendered, one holding in good faith a part of the land under the conveyance made valuable improvements, the wife, though entitled to her proportion of the rents of such part, under Rev. St. Ind. 1881, § 288, is not entitled to share in the enhanced rental value resulting from the improvements. — *Carver v. Fennimore*, S. C. Ind., Dec. 11, 1888; 19 N. E. Rep. 103.

192. TOWNS—Treasurer—Authority. — A town treasurer has no power to convey real estate in behalf of the town, unless expressly authorized by vote, and a note given in payment of such unauthorized deed is without consideration, and void. — *Monson v. Tripp*, S. J. C. Me., Dec. 8, 1888; 16 Atl. Rep. 327.

193. TOWNS—Repair of Highways—Surveyors. — Under Pub. St. Mass. ch. 52, §§ 3-5, power is given the surveyor to contract for the town to the amount of \$10 only, and he cannot bind the town by contract, to the extent of the money appropriated for highways, and unexpended at the time of the contract. — *Blanchard v. Inhabitants of Ayer*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 209.

194. TRUST — Husband and Wife. — Evidence sufficient to show express trust in land conveyed by grantor and then by grantee to grantor's wife, where there was no consideration. — *Lane v. Laue*, S. C. Me., Nov. 19, 1888; 16 Atl. Rep. 823.

195. TRUST—Implied — Agreement to Purchase. — Facts upon which court held an implied trust. — *Dupree v. Estelle*, S. C. Tex., Dec. 21, 1888; 10 S. W. Rep. 93.

196. VENDOR AND VENDEE—Vendor's Lien. — Unless waived, a vendor's lien exists against the land of persons to whom the purchaser conveys it with his vendor's consent, for the amount of notes given by the vendor, vendee, and subvendees to a third person, in lieu of the original unpaid purchase-money notes which were secured by such a lien, and which were the property of and surrendered by such third person. — *Woodall v. Kelly*, S. C. Ala., Dec. 13, 1888; 5 South. Rep. 164.

197. VENDOR AND VENDEE — Vendor's Lien. — The English doctrine of the vendor's equitable lien for unpaid purchase money, upon an absolute conveyance of land, has not been generally adopted in the United States, and this court will not enforce the lien in a State where it has not been established by statute, or is not recognized as in force by the same tribunals. — *Rice v. Rice*, U. S. C. C. (Del.), Dec. 12, 1888; 36 Fed. Rep. 338.

198. VENUE IN CIVIL ACTIONS—Non-Residents. — A non-resident may sue another non-resident in any county in which the defendant is personally served with process. — *Rice v. Brown*, S. J. C. Me., Dec. 10, 1888; 16 Atl. Rep. 334.

199. WAREHOUSEMEN—Mortgaged Goods. — Warehousemen who receive mortgaged goods for storage from the mortgagors, and thereafter deliver them to a third person on production of the warehouse receipt, are liable in trover to the mortgagee whose mortgages are recorded in another county, though they have no actual notice of his claim. — *Hudmon v. Du Bose*, S. C. Ala., Dec. 12, 1888; 5 South. Rep. 162.

200. WATERS AND WATER COURSES—Adverse Use. — An adverse, exclusive, and uninterrupted use and enjoyment by one person, and of all the water of a creek, taken therefrom by means of a ditch, and conveyed to certain mining grounds for mining purposes, for any period beyond that of the statute of limitations prescribing the time in which entry shall be made upon real property, will bar the owner of the land through which the creek runs of his riparian rights. — *Huston v. Bybee*, S. C. Oreg., Dec. 19, 1888; 20 Pac. Rep. 51.

201. WILL—Devisee. — Construction of will as to intention of testator in use of the word "children." — *Bowker v. Bowker*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 213.

202. WILL — Construction. — Construction of will giving to wife certain property for life or until she married, the remainder to her children. — *Adams v. Mason*, S. C. Ala., Jan. 7, 1889; 5 South. Rep. 219.

203. WILLS—Construction — Possession. — Where property is left to one for life, with unlimited discretion as to the use both of the principal and interest, she is entitled to the possession and control of the property. — *Pierce v. Stidworthy*, S. J. C. Me., Dec. 10, 1888; 16 Atl. Rep. 333.

204. WILLS — Revocation — Birth of Child. — Construction of Pub. St. R. I., ch. 182, § 12, providing that a child born after execution of parent's will, shall inherit as if parent died intestate. — *Mer. Trust Co. v. R. I., etc. Co.*, U. S. C. C. (R. I.), Sept. 29, 1888; 36 Fed. Rep. 563.

205. WITNESS—Impeachment. — A bill of exceptions, showing testimony of a witness in another case, is not admissible to impeach him, though approved by the court; it not having been read or assented to by the witness. — *Reid v. State*, S. C. Ga., Dec. 22, 1888; 8 S. E. Rep. 431.

206. WITNESS—Mileage of Non-resident. — A non-resident witness cannot charge mileage, there being no provision authorizing it, and his attendance not being enforceable. — *Stern v. Herren*, S. C. N. Car., Dec. 17, 1888; 8 S. E. Rep. 221.

207. WITNESS — Competency — Transaction with Deceased Person. — The statute which provides that in all actions wherein an executor or administrator is a party the opposite party shall be precluded from testifying, applies to an action on a note indorsed by deceased, brought against the maker only, a stranger to the estate, where the executor indemnifies the defendant, and takes upon himself the defense of the suit. — *Hillman v. Schwenk*, S. C. Mich., Nov. 29, 1888; 40 N. W. Rep. 924.

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CURRENT EVENTS.

THE subject of the leading article in this issue—"Constitutionality of Registry Laws"—suggests a few thoughts, which it would be well for legislators, who are casting about for effective election laws, to consider. In a recent number of this JOURNAL, we reviewed the Australian system of voting, which is the basis for most of the proposed enactments in this country, and the cardinal features of which are, as pointed out by us, compulsory secret voting, and official ballots prepared by the government. These innovations are wise, and tend, in a large measure, to correct some of the admitted evils of the old system, such as bribery, intimidation, and improper influence of a voter. But are these all the evils, to which our system of voting has given birth? In the first place, a wise, and effective registration law (in cities at least), is as important, as a reform in the manner of depositing the ballot. For, without the former, the latter will be of little use. It accomplishes nothing, in the desired direction, to secure to a voter freedom from violence, intimidation, or interference, or to remove him from the impossibility of bribery, if that voter has no right to vote, or, if by fraud, his name appears upon the registration lists. Nor does it conduce to a satisfactory election, to secure the fullest, fairest, and freest expression of choice, on the part of those, whose names appear entitled to vote, where, by accident, or design, a considerable number of names of legal voters have been left off the official poll list. Therefore, we need wise registration laws, so framed, as to prevent the registration of those not entitled to vote, and to secure the registration of all who have the right of suffrage, and who have complied with the requirements of the registry act; and this beyond the power of partisans, to destroy by dropping their names from the official list. In another feature, it seems to us, that the Australian system does not provide a remedy. Though the registry of

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voters may be strictly accurate, and contain a true list of those entitled to vote; though the election may be free from bribery, or intimidation, and the ballots, that go into the box, absolutely represent the free choice of the voters, what security is provided against a false count, or miscount, on the part of judges of election? What is to prevent a destruction of ballots? A fraudulent count of ballots is even worse, and may be more serious, in its results, than bribery. Again, an effective election law should provide against a possible tampering with the returns, after they have left the returning officers, and when on the way to, or actually in the custody of, the officer whose duty it is to receive them.

These are all questions, which must be met in the consideration of the subject of a reform of election laws, and it is to be hoped that the many legislatures, now engaged in the work, may realize the great importance of guarding against fraud or errors at every step.

It will be interesting to note the opinion of the Supreme Court of the United States which may shortly be expected, in the Mormon church case, recently submitted to them. The case is of interest, not only on account of its social significance, but also by reason of the novel and important questions of law involved. To be strictly accurate, it is a suit brought by the United States against "The Late Corporation of the Church of Jesus Christ of Latter Day Saints" in the Supreme Court of the Territory of Utah, wherein, under and by authority of acts of congress, passed in 1862 and 1887, judgment was rendered against defendants, escheating all the personal property belonging to the above corporation and declaring forfeited all its real property. The acts of 1862 and 1887, were intended to repeal former acts of congress, under which defendants obtained legal existence and acquired the right to own property, etc., in so far as they established and countenanced polygamy, and they also declare the corporation, by reason of such acts, dissolved and its property forfeited and escheated to the United States, granting authority to the attorney general to institute proceedings to wind up its affairs, in the hands of a receiver.

The contention made by the Mormon church and its adherents is, in effect, that the acts under which proceedings were instituted are unconstitutional, in so far as they attempt to dissolve the corporation or purport to forfeit or escheat the property of defendants; that the charter granted the latter in 1851 as a corporation for religious and charitable purposes was a contract, which, by its acceptance, became an executed contract; that, relying thereon, it had acquired valuable property, and that it was without the power of congress to thus destroy and take away vested rights of the defendant. Though the admission is made that so far as political rights are concerned congress is supreme in its legislative power over the Territories, and may to-day pass a law in the direction indicated which to-morrow they may repeal or effectually change; but when it comes to civil rights, congress cannot violate those fundamental principles of the constitution by which the personal rights of every citizen are guarded. This was the doctrine announced by the supreme court in the Sinking Fund cases. It is claimed, therefore, that congress had not the power to annul a charter of incorporation previously granted by it. While it is conceded that the clause of the United States constitution which says that no State shall pass any law impairing the obligation of contracts, does not apply to congress, yet it is claimed that the principles which underlie it do apply to that body and that congress, when it has granted a franchise or given a tract of land, cannot take it back. Furthermore, it is contended that there is no such thing known to the jurisprudence of the United States as the doctrine of escheat and forfeiture under which defendant's property has been taken. It is conceded that only a small proportion of the Mormons actually practice polygamy, while on the other hand the religious and charitable features of the corporation are many and praiseworthy, and hence, the question is asked, should ninety-nine persons out of one hundred be despoiled of their property because of the practices of the other individual? Indeed, the legal position taken by the defendants on the question of vested rights, goes to the full length of the question as to whether there is any law which would authorize the escheat to the government of property

because of the moral delinquences of the parties who happen to own it.

We shall look eagerly for the decision of this case, involving, as it does, personal and vested rights of property, and the existence, continuance and permanency of a social system, which has rights and probable merit, independent of its immoral features, though the latter has secured its condemnation, and are a menace to our institutions

NOTES OF RECENT DECISIONS.

An important case, involving the question as to the power of a United States court in equity to set aside the orders of a State court, is *Arrowsmith v. Gleason*, 9 Sup. Ct. Rep. 237, recently decided by the Supreme Court of the United States. The proceeding sought to be annulled was the order of a probate court of Defiance county, Ohio, for the sale by a guardian of his ward's real estate. The bill filed herein, in behalf of the minor, alleged various grounds of fraud and collusion in obtaining the order and sale thereunder by which the land was sold at a grossly inadequate price, and that defendant fraudulently obtained confirmation of the sale, and prayed that it and the deed be vacated. Defendant demurred upon the ground (1) that plaintiff had an adequate remedy at law; (2) that the circuit court of the United States was without jurisdiction to make such a decree. The court says:

If by this is meant only that the circuit court cannot by its orders act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmenting in his life-time, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some State court of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the circuit court is not bound to give relief according to the recognized rules of equity, as administered in the courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such courts. A leading case upon this point is *Payne v. Hook*, 7 Wall. 426, 430. That was a suit, in the cir-

cuit court of the United States for Missouri, by a citizen of Virginia, against a public administrator, to obtain a distributive share of an estate then under administration in a court of Missouri. It was objected that the complainant, if a citizen of Missouri, could obtain redress only through the local probate court, and that she had no better or different rights by reason of being a citizen of Virginia. But this court, observing that the constitutional right of the citizen of one State to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal would be worth nothing if the court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress, said: "We have repeatedly held that the jurisdiction of the courts of the United States, over controversies between citizens of different States, cannot be impaired by the laws of the States which prescribes the modes of redress in their courts, or which regulate the distribution of their judicial power. If legal remedies are sometimes modified to suit the changes in the laws of the States and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same as that the high court of chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union. The circuit court of the United States for the district of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case as disclosed in the pleadings." While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper circuit court of the United States may, without controlling, supervising, or annulling the proceedings of State courts, give such relief, in a case like the one before us, as is consistent with the principles of equity.

A PECULIAR phase of the question, as to the right to recover on an illegal contract, was before the Supreme Court of Indiana, in the case of *Pape v. Wright*, 19 N. E. Rep. 459. There, the owner of a patent right employed plaintiff to procure purchasers for it, agreeing to pay him a commission therefor. Copies of the letters patent had not been filed with the clerk of the county court, nor had affidavits of genuineness been made, as required by Indiana statute, before offering a patent for sale. Plaintiff found purchasers to whom defendant sold, and plaintiff now sues for his commission. The defense contends that, as the defendant had no right, under the law, to sell, his contract with plaintiff was unlawful. Elliott, C. J., in overruling this defense insists that the plaintiff was a "middleman," whose office was to bring the parties together,

leaving to them the consummation of the sale, and he does not sell, or offer to sell, but simply sets in train preliminary negotiations. If a middleman is entitled to compensation when he procures a purchaser, then he can enforce his contract, notwithstanding the fact that his employer violates the law, for its enforcement does not require that he shall bring to his assistance the illegal contract of selling or offering to sell patented articles. The rule upon the general subject is, that a recovery may be adjudged whenever it can be reached without the aid of an illegal contract. *Louisville v. Buck*, 19 N. E. Rep. 453; *Sondheim v. Gilbert*, 18 N. E. Rep. 687;¹ *Bank v. Bank*, 16 Wall. 483. The court concludes:

Closely analyzing the pleadings, and recapitulating somewhat, we shall find these elements present: That the undertaking was to find a purchaser; that the appellee had no knowledge of any intention on the part of his employer to violate the law; that the employer has had the benefit of the appellee's services, and that a recovery may be enforced without validating the illegal acts of the appellant. These elements are important, for they discriminate the case from that of an agent joining with his principal in a known illegal act. They mark it as a case where the principal is seeking to use his own wrong to escape payment for services rendered at his request, and they prove it to be a contract not blended with the illegal conduct and purpose of the wrong-doer. The question is not, what are the rights of the public as against the appellee, but the question is as to the rights of a principal, upon whom, chiefly and primarily, rested the duty of performing the acts required by the law, as against a middleman who has done what the principal employed him to do. Proceeding upon the general principles we have stated, and guided by the authorities we have cited, our course, if we keep in the straight path marked out by them, would lead us, even without decisions more directly in point, to the conclusion that the answer is bad. But our search for direct decisions has not been unrewarded, for we have found cases strongly in point. See *Crane v. Whittemore*, 4 Mo. App. 510; *Curtis v. Gokey*, 68 N. Y. 304; *Ormes v. Dauchy*, 82 N. Y. 443. We do not, of course, question the soundness of the general rule that one who contracts to do an illegal act, or to aid in doing a wrong cannot recover compensation for his services. On the contrary we affirm as strongly as possible the justice of that rule, but we quite as strongly deny its applicability to such a case as is here presented by the pleadings properly before us. To apply the general rule to a case like this would result in constituting every broker a censor and guardian of his employer, and, in every case where the subject of the sale was a patented right, impose upon him the duty of ascertaining that his employer was not a law-breaker, and all for the benefit of the employer, who repudiates his obligation, and endeavors to get the benefit of his broker's services without paying him any compensation.

¹ See this case, annotated, on p. 218 of this issue.

In *Sharp v. Sharp*, 10 S. W. Rep. 228, the Supreme Court of Arkansas decide an in-

interesting question in the law of homicide. It is there held, after a careful review of the authorities, that one who wilfully and unlawfully inflicts upon another a wound, not in itself mortal, though dangerous, and death ensues therefrom, is guilty of murder, though it may appear that the deceased might have recovered but for the maltreatment of the physician who attended him. The court says:

The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound, or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But, however this may be, it is certain that the rule of law, as stated in the authorities, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy, in many cases of homicide, to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment. See 1 Russ. Crimes (7th Am. ed.), 505; Rosc. Crim. Ev. (3d ed.) 703, 706; 3 Greenl. Ev. § 139; Com. v. Green, 1 Ashm. 289; Reg. v. Haines, 2 Car. & K. 368; State v. Baker, 1 Jones (N. C.), 267; Com. v. McPike, 3 Cush. 184; Com. v. Hacker, 2 Allen, 141; Reg. v. Holland, 2 Moody & R. 351; State v. Morphy, 33 Iowa. 270; Smith v. State, 8 S. W. Rep. 941.

The Supreme Court of Nebraska, in *Huff v. Slife*, 41 N. W. Rep. 289, decided a question as to negotiable instruments, upon which the decisions of courts are not uniform and cannot be harmonized. It was there held that one who, before maturity, guarantees the payment of a promissory note becomes absolutely liable upon default of the maker, and that no notice of nonpayment or demand is necessary in order to charge such guarantor, and that the neglect to sue the maker does not discharge the guarantor, although the maker becomes insolvent. The court, after citing *Humphford v. O'Brien*, 34 N. W. Rep. 161; *Brown v. Curtiss*, 2 N. Y. 225; *Roberts v. Riddle*, 79 Pa. St. 468; *Roberts v. Hawkins* (Mich.), 38 N. W. Rep. 575;

Fuller v. Tomlinson (Iowa), 12 N. W. Rep. 127; *Clay v. Edgerton*, 19 Ohio St. 549; *Allen v. Rightmere*, 20 Johns. 364, says:

These cases go upon the theory that the guaranty is absolute and unconditional and not like the conditional contract of indorsement, which is to pay on demand being made on the maker, and notice of dishonor given to the indorser in case payment is not made by the maker. In *Brown v. Curtiss*, *supra*, Judge Bronson, in delivering the opinion of the court, says that "in such cases the guarantor is neither the maker nor indorser of a promissory note. On the contrary, he has in very plain terms made a contract of a different kind from either of those—one well known to the law—and by that contract he must either stand or fall. He has guaranteed the payment of G. F. Brown's note, and we have no right to turn that contract into one of a different kind. This is so plain a principle that it would seem to be enough to mention it without saying anything more." But the writer of that opinion enters upon a thorough discussion of the question, in which a great number of cases are cited and considered. In *Clay v. Edgerton*, *supra*, Chief Justice Brinkerhoff, in writing the opinion, says: "We are aware that cases may be found in which the point has been ruled otherwise, but it seems to us that the reasoning of Bronson, J., in *Brown v. Curtiss*, *supra*, is unanswerable and irresistible." The latter case was one in which, as in this, the holder of a promissory note transferred it, and indorsed thereon the following: "I guarantee the payment of the within note to C. Edgerton or order. Isaac Clay." It was held that this was an absolute and unconditional guaranty, and no affirmation in the petition of demand and notice was requisite to make a *prima facie* case for recovery upon it. This case would dispose of that portion of the answer of plaintiff in error which seeks to defend upon the ground that no demand had been made, nor notice given of non-payment. In *Allen v. Rightmere*, Chief Justice Spencer, in delivering the opinion of the court, which was in a case similar to the one at bar, says: "The undertaking here is not conditional. It is absolute that the maker shall pay the note when due, or that the defendant will himself pay it." If, then, the contract of plaintiff in error was absolute and unconditional, it would follow that the district court did not err in its rulings.

In the case of *Powell v. Campbell*, 20 Pac. Rep. 156, will be found an interesting discussion and review of the authorities by the Supreme Court of Nevada, on the question as to the power of the court in divorce proceedings, at the instance of the wife, to set apart a necessary portion of the husband's property for the support of herself and children. The case arose under the statute, substantially enacted in many of the States, making such provision by way of alimony, and the question is here as to the general construction and effect of that statute. The contention was that the "setting apart" of the husband's property did not mean to clothe the wife with the absolute title to it, giving her the fee-simple. After reviewing *Maguire v. Maguire*,

7 Dana, 187; *Berthelsmy v. Johnson*, 3 B. Mon. 90; *Rogers v. Vines*, 6 Ired. 293; *Calame v. Calame*, 25 N. J. Eq. 540; *Broadwell v. Broadwell*, 21 Ohio St. 657, the court concludes that if, in the proper accomplishment of the primary object of the statute—the support of the wife and children—it is reasonably necessary to invest the wife with the husband's title to property; if, in other words, without an investiture of the title, the object of the statute will be defeated—then the statute permits such investiture in the wife, as one of the means of securing her support. It was further declared that in an action for divorce, where the complaining wife alleges her necessities and the defendant's abilities and asks that certain particularly described real estate be set apart for her support, the rule of *lis pendens* can be invoked by her against one who purchases *pendente lite* with actual notice of the divorce suit.

THE question as to the right of a surviving partner to make a general assignment of the partnership property for the benefit of creditors, is discussed in the case of *Shattuck v. Chandler*, 20 Pac. Rep. 225, by the Supreme Court of Kansas. It is there held that, independent of statute, a surviving partner has such a right. *Clogston, J.*, says:

In many of the States the doctrine is held that a surviving partner cannot make a general assignment, and in those States the theory upon which the decisions were rendered is that at the death of one partner the surviving partner becomes trustee of the partnership estate, and that he has no power to transfer the trust so created to another trustee. This seems to be the doctrine held in New York. See *Nelson v. Sutherland*, 38 Hun, 327; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Cushman v. Addison*, 52 N. Y. 628; *Tiemann v. Malliter*, 71 Mo. 512; *Vosper v. Kramer*, 31 N. J. Eq. 420. On the other hand, it has been held by some of the States that the surviving partner may make a general assignment of a partnership; and to this effect are numerous decisions, among which is *Emerson v. Senter*, 118 U. S. 3, in which case the court held that the surviving partner could make a general assignment. This seems to be the settled doctrine of the Supreme Court of the United States, and should be followed, unless there is some statute making a different rule. This assignment was made under the laws of Illinois, and should be interpreted thereunder; but in this case no statute of Illinois was offered disclosing what provisions had been made in that State by statute for the winding up of partnership business, and, in the absence of any showing of this kind, we must presume that the statute of Illinois is like that of Kansas. This brings up the question, is there any statute in Kansas that conflicts with the rule laid down by the Supreme Court of the United States in the last case cited?

The court thereupon consider the scope of art. 2, ch. 37, Comp. Laws 1885, providing for the winding up of partnership estates, and conclude that the legislature by one of its provisions intend to provide a trustee to wind up the partnership upon the death of a member of the firm, and that the statute creates a trust in the surviving partner which he has no power to transfer to another. If the surviving partner under that statutes may transfer his trust to an assignee, then the assignee would close up the entire partnership business in the court having jurisdiction of the assignment and estate thereunder, and would be entirely free from the jurisdiction of the probate court, and the statute above cited would be without any force or effect. This means of winding up a partnership business has been prescribed by the legislature, and, in the absence of any proof of the statutes of Illinois to the contrary, we must presume that this is the manner of closing up partnership estates in that State.

IN *Pond v. Metropolitan Elevated Ry. Co.*, 19 N. E. Rep. 487, the Court of Appeals of New York, reversing the supreme court of that State, lay down the rule of damages resulting from interruption of the easement of light. The question there was whether in a common law action brought by the owner of premises abutting on a street in the City of New York through which defendant's railway has been constructed to recover damages resulting therefrom through the interruption of light, the plaintiff can recover complete damages, once for all, as for a final and complete destruction *pro tanto* of the easement invaded by the act of defendant, or is confined to a recovery of such temporary damages as have accrued up to the commencement of the action, leaving him at liberty to bring a new action, in case the obstruction is not discontinued, for subsequent damages. The court adopted the latter rule, saying:

The argument that under the peculiar circumstances, and in view of the nature of the right invaded, as well as the probable permanent character and public purpose of the defendant's structure and franchise, the rule allowing permanent damages to be recovered, thereby giving finality to the controversy, has been pressed upon us with great force by the counsel for the respondent. But we think the question is not now open to controversy, and that the rule must now be regarded as settled by former decisions that an abutting owner, in a common law action of this character, can recover only such temporary damages as have been

sustained up to the time of its commencement, and that he is not entitled to damages measured by the permanent diminution in value of his property, upon the assumption that the wrong is permanent and irremediable. *Reviewing Story Case*, 90 N. Y. 122; *Uline Case*, 101 N. Y. 98; *Lahr Case*, 104 N. Y. 270; *Bank v. Railway Co.*, 108 N. Y. 660. We think these cases have settled the rule that permanent depreciation cannot be recovered in an action like this. It is understood that this has been the interpretation of our decisions upon which the courts below have acted in cases. It might be productive of less inconvenience on the whole if an opposite rule could be adopted; but the rule established is consistent with legal principles. A recovery of judgment for damages for a trespass or the invasion of an easement does not operate to transfer the title of the property to the defendant, either before or after satisfaction, nor does it extinguish the easement. By the ordinary rule it is an indemnity for a past wrong, leaving unaffected the plaintiff's right to his property.

CONSTITUTIONALITY OF REGISTRY LAWS.

- I. The Doctrine Stated.
- II. Authority to Enact.
- III. Enactments to be Reasonable.
- IV. Uniformity of Registration.
- V. Remedy to Compel Registration.

I. *The Doctrine Stated.*—It is established by an overwhelming weight of authority that, notwithstanding, the constitution may have prescribed conditions precedent to the exercise of the elective franchise, yet the legislative power may impose regulations that tend in a reasonable manner to insure a fair and honest ballot.

"The provision for a registry law deprives no one of his right, but is only a reasonable regulation under which the right may be exercised."¹

The validity of such laws was first sustained and most satisfactorily upheld by Chief Justice Shaw, in an opinion so clear and exhaustive, and the conclusions of which have since become so well established, that almost every court in the United States which has since had the question under consideration has followed and approved that decision. It was held in that case, that the acts of 1821-22 providing for a registration of voters in the city of Boston, and requiring that, previous to an election, the qualifications of voters should be proved, and their names be placed on an alphabetical list or register, was not to be regarded as prescribing a qualification in

addition to those, which by the constitution entitled a citizen to vote, but only as a reasonable regulation of the mode of exercising the right of suffrage, which it was competent for the legislature to enact.²

II. *Authority to Enact.*—It might be inferred from some reported cases, that registry laws cannot be validly enacted, unless expressly authorized by the constitution. But whether the organic law provides for or is silent upon the subject of registration, is clearly not the test. The constitutions of many of the States are silent as to the time, place, and manner of conducting elections, and are absolutely devoid of any provisions to secure the purity of the ballot, but will it be contended from this that the legislative authority may not, in the absence of express authorization, regulate the time, place and manner, and provide reasonable regulations by registration or otherwise, to prevent frauds and insure an honest expression of the sovereign will, the final arbiter in a free republic?

"It is believed that no case goes so far as to deny the power of the legislature of a State to pass a registration act, when the constitution is silent upon the subject."³

Although the constitution confers the right of suffrage, it does not execute itself. The legislature under the authority of the constitution, either expressed or implied, prescribes such reasonable regulations, whether by registry or otherwise, as will attain purity in elections and secure the integrity of the ballot. In order that there may be a valid election it must be under statutory regulation, for there is no inherent right in the people to hold an election; and if the statute requires registration as a prerequisite to a valid election, an election in disregard of the registry law is invalid.⁴

² *Capen v. Foster*, 12 Pick. 485; s. c., 23 Am. Dec. 632; *Brightly's Lead. Cases on Elections*, 51. See also *Hyde v. Brush*, 24 Conn. 454; *Edmonds v. Banbury*, 28 Iowa, 267; s. c., 4 Am. Rep. 177; *People v. Laine*, 33 Cal. 55; *Webster v. Byrnes*, 34 Cal. 273; *Davis v. School District*, 44 N. H. 398; *McMahon v. Mayor of Savannah*, 66 Ga. 217; s. c., 42 Am. Rep. 65; *Hawkins v. Carrol County*, 50 Miss. 735; *State v. Albin*, 44 Mo. 346; *Hardesty v. Taft*, 23 Md. 512; *Anderson v. Baker*, 1b. 531; *Patterson v. Barlow*, 60 Penn. St. 54, 78; *State v. Butts*, 31 Kan. 537; s. c., 2 Pac. Rep. 618; *In re Polling Lists*, 13 R. I., 729; *Auld v. Walton*, 12 La. Ann. 129.

³ *McCrary on Elections* (3d ed.) 63; *Ensworth v. Albin*, 46 Mo. 453.

⁴ *People v. Kopplekom*, 16 Mich. 342; See *McDowel*

¹ *Cooley's Const. Lim.* (5th ed.) 756.

In the Michigan case cited, the supreme court unanimously sustained the validity of a registry law which prohibited any voter from voting whose name was not registered. The circumstances of the case show that there having been no acting board of registration it was impossible for the electors to comply with the requirements of the law, and an election was held without such registration; but the court upheld the registry law, and declared such ballots illegal and void.

And in Iowa,⁵ where an election was held without previous registry, although registration was required by law, it was held that the election was void. Many statutory regulations respecting registration are not simply directory; they are in their substance imperative and mandatory, and to allow discretion in the authorities charged with the execution of them would lead to public and private wrong, and often defeat the elector's right to vote.⁶ Authority to require the registration of voters must be by statute, and a municipality, unless empowered to do so by its charter, has no authority to order such registration.⁷ It is absolutely essential to the validity of an election that it be held under legislative regulation. This has been repeatedly affirmed in numerous cases.⁸

III. *Enactments to be Reasonable.*—The conclusion might be drawn from some reported decisions that, unless expressly authorized, registration laws are *per se* unconstitutional; but it will appear from an examination of the cases that it is because of the *unreasonableness* of their provisions, which impair the constitutional privileges of the elector, that such laws have been declared invalid. This unreasonableness may consist in abridging or otherwise impairing the constitutional guaranty; and a statute which does either of these things, although under color of regulation, manifestly subverts and injures the enjoyment of that right guaranteed by the constitution, and must therefore be invalid.

v. Rutherford Ry. Constr. Co., 96 N. C. 514; s. c., 2 S. E. Rep. 351.

⁵ Neffger v. D. & St. P. R. Co., 36 Iowa, 642.

⁶ Smith v. Wilmington, 98 N. C. 343; s. c., 4 S. E. Rep. 492; Neffger v. D. & St. P. R. Co., *supra*. But see People v. Wilson, 62 N. Y. 126.

⁷ Smith v. Wilmington, *supra*.

⁸ McCune v. Weller, 11 Cal. 49; People v. Martin, 12 Cal. 409; Sawyer v. Haydon, 1 Nev. 75; State v. Collins, 2 Nev. 351; State v. Robinson, 1 Kan. 17; State v. Jenkins, 48 Mo. 261.

Illustrations of this may be found in many adjudicated decisions.

It is a quite frequent provision of registry laws that the period of registration should cease or determine at a day certain before the general election, in order that the proper officers may revise, correct, and complete the list of registered names, and the question has arisen whether a person can be denied the right to vote who has not registered, either because of absence or physical disability.

In *People v. Hoffman*,⁹ the Supreme Court of Illinois answer this question in the affirmative, sustaining the constitutionality of an act requiring registration to be complete by the "third Tuesday before the election." The court say: "If cases can be supposed where three weeks' requirement will deprive qualified electors of the privilege of depositing their votes, cases can also be supposed where one day's requirement will work the same result. * * * It would be a physical impossibility for the judges of election to receive the votes and make up the registry at the same time, and on the same day. * * * If closing the registry three weeks before election may deprive a few persons becoming qualified during that period of the privilege of casting their ballots, keeping it open until a late date may admit to the polls hundreds of persons who should never have been allowed to vote."

Again, in Rhode Island, an act requiring the registry lists to be closed four days before the election has been sustained.¹⁰ And in an able opinion pronounced by Judge Brewer of Kansas, it was held by the supreme court of that State, that a statute which directed registration to be complete ten days before election was valid.¹¹ Such limitation as to time is mandatory and must be observed, as where the statute of Florida directed the registration to be made between the first Monday of October, and ten days previous to any general election, the supreme court of that State held, in the case cited, that names added to the lists after the expiration of that time were not duly registered.

⁹ *People v. Hoffman*, 116 Ill., 587; s. c., 56 Am. Rep. 793; s. c., 5 N. E. Rep. 596.

¹⁰ *In re Polling Lists*, 18 R. I., 729.

¹¹ *State v. Butts*, 31 Kan. 587; s. c., 2 Pac. Rep. 618. And see *State v. Commissioners of Sumpter Co.*, 20 Fla., 859.

While such regulations are upheld by many well-considered authorities,¹² which may be accepted as the prevailing doctrine, yet there are cases holding the contrary opinion, namely, that such regulations are invalid.¹³

In *Stearns v. Conner* (Nebraska), just cited, the court held that a registration law which absolutely deprived an elector of the right to vote, unless registered on one of four days, the last day being ten days prior to the election, was unconstitutional and void.

The case of *Daggett v. Hudson*, *supra*, is also an extreme case illustrating the flagrant impairment of an elector's right to vote. From the statement it appears there were only seven days in the year when voters were allowed to register. The court unanimously declared such an act to be void. In the Oregon case cited, the chief justice held, in what is styled the opinion of the court, that "every law which requires previous registry as a prerequisite to the right to vote, is *ipso facto* void." But Mr. Justice Lord, who concurred in the result, based his concurrence upon certain objectionable features of the act, and in no way recognizes the reasoning of the chief justice, while Mr. Justice Thayer dissented *in toto*. The syllabus of the case is entirely unauthorized and misleading.

It should be observed that in the preceding cases no provision was made for registration after the closing of the registry. This injustice is obviated in many States by allowing an unregistered elector to make an affidavit before the board of registration, or the election or other proper officers, setting forth his qualifications and excuse for not registering, and produce such other proof as may establish his right to vote.¹⁴

In a recent case, in Massachusetts,¹⁵ where the constitutional qualification was residence

"within the commonwealth one year, and within the town or district * * * six calendar months preceding any election," it was held that an act of the legislature, providing that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization," was unconstitutional and void as being an unreasonable requirement not contemplated by the constitution. This case is similar in principle to those cases in which registration laws have been declared invalid, because they extend the period of residence required by the constitution. As, in North Carolina, where the constitution required "thirty days' residence in a county," it was held that a registration law requiring "ninety days' residence" was void as not being warranted by the constitution.¹⁶

IV. *Uniformity of Registration*.—The constitutions of many States declare that "all elections shall be free and equal,"¹⁷ but it is settled that this does not necessarily mean that there must be a uniformity of regulations. "It was never heard of as a general principle of republican government, that the mode of conducting an election, and declaring its result, in one city, village or town of a State shall be exactly the same as the mode pursued for the same purpose in every other city, village or town in the State."¹⁸ In the case cited, the court construe that clause in the bill of rights of Illinois in the following clear and satisfactory language: "Elections are *free* when the voters are subject to no intimidation or improper influence, and when every voter is allowed to cast his ballot as his own judgment and conscience dictate. Elections are *equal* when the vote of every elector is equal in its influence upon the result to the vote of every other elector; when such ballot is as effective as every other ballot."¹⁹

The question of uniformity in registration laws was elaborately considered in two Pennsylvania cases.²⁰ The constitution of that

¹² *Capen v. Foster*, *supra*; *Cooley's Const. Lim.* (5th ed.) 756; *Well v. Calhoun*, 25 Fed. Rep. 865; *Patterson v. Barlow*, 60 Penn. St. 54.

¹³ *Stearns v. Conner*, 22 Neb. 265; s. c. 34 N. W. Rep. 499; *Daggett v. Hudson*, 43 Ohio, St. 558; s. c., 54 Am. Rep. 882; s. c., 3 N. E. Rep. 538; *State v. Baker*, 38 Wis. 86; *Dells v. Kennedy*, 49 Wis. 555; s. c., 35 Am. Rep. 786; s. c., 6 N. W. Rep. 246; *White v. Multnomah Co.*, 13 Oreg. 817; s. c., 10 Pac. Rep. 484.

¹⁴ *Farren v. Comms. Buffalo Co.*, 37 N. W. Rep. (Dak.) 756; *Edmonds v. Banbury*, 28 Iowa, 267; s. c., 4 Am. Rep. 177; *Hyde v. Brush*, 34 Conn. 454; *Byler v. Asher*, 47 Ill. 101.

¹⁵ *Kinneen v. Wells*, 144 Mass. 497; s. c., 59 Am. Rep. 105; s. c., 11 N. E. Rep. 916.

¹⁶ *People v. Canaday*, 73 N. C. 198; s. c., 21 Am. Rep. 465; *Page v. Allen*, 58 Penn. St. 333; *State v. Williams*, 5 Wis. 306; *Quinn v. State*, 35 Ind. 435.

¹⁷ Const. Ill. 1870, Bill of Rights, § 18; *Poore's Charters and Constitutions*, p. 472.

¹⁸ *People v. Hoffman*, 116 Ill. 587; s. c., 58 Am. Rep. 793; s. c., 5 N. E. Rep. 506.

¹⁹ *People v. Hoffman*, *supra*.

²⁰ *Page v. Allen*, 58 Penn. St. 351; *Patterson v. Barlow*, 60 Penn. St. 53.

State provided that "elections shall be free and equal."²¹ The court in *Page v. Allen*, held that a registry law imposing certain duties upon the electors of Philadelphia, and not demanded of voters in other parts of the State, was unreasonable, vexatious and inconsistent with the clause mentioned in the bill of rights, declaring that "elections shall be free and equal." The decision in this case, however, was overruled in the later case of *Patterson v. Barlow*, which involved a construction of the same clause. It will be noticed that the dissenting judges in *Page v. Allen*, owing to a change in the bench, were in the majority in the subsequent case of *Patterson v. Barlow*, and they held that uniformity in conducting elections, and regulating registration was not guaranteed by the provision that "elections shall be free and equal," but that such a clause was a guaranty to the elector that he should be allowed to vote without intimidation or interruption, and that his ballot should be as effective as the ballot of any other voter. This conflict of judicial construction, however, led to such controversy that it was finally settled by inserting in the new constitution of 1873, the following amendment: "All laws * * * regulating the registration of electors, shall be uniform throughout the State."²²

V. Remedy to Compel Registration.—It might be added that should a qualified elector be refused registration, the proper remedy would be *mandamus* of the registrar.²³

HENRY Z. JOHNSON.

²¹ Const. Penn. 1838, Bill of Rights, § 5; Poore's Charters and Constitutions, p. 1564.

²² Const. Penn. 1873, art. VIII, § 7; Poore's Charters and Constitutions, p. 1583.

²³ *Davis v. McKeeby*, 5 Nev. 369; *High on Extr. Legal Remedies* § 66; *State v. Huston*, 4 S. L. Rep. 50, 52.

CONFLICT OF LAWS—GAMBLING CONTRACT—FUTURES—NEGOTIABLE INSTRUMENT.

SONDHEIM V. GILBERT.

Supreme Court of Indiana, November 27, 1888.

1. *Conflict of Laws—Contract.*—A contract valid where it is made and is to be performed is valid everywhere, unless it is contrary to good morals or to the positive law or policy of the State in which it is sought to be enforced.

2. *Gambling Contract—Futures—Negotiable Instrument—Innocent Holder.*—A note executed and payable in New York to the maker's own order, and indorsed and negotiated by him for the purpose of raising money to deal in options, is governed by the statute of New York rather than by that of Indiana, where it is sought to be enforced and is not void in the hands of a *bona fide* holder under the New York statute, which provides that all wagers, bets or stakes shall be unlawful; that all contracts for or on account of any money, property or thing in action so wagered shall be void, and that all securities, any part of the consideration of which is money won by playing at any game, or by betting on the hands of such as do play, or to repay any money knowingly lent at the time and place of such play to any person so playing, shall also be void.

MITCHELL, J., delivered the opinion of the court:

This was a suit by Samuel and Henry P. Sondheim, partners doing business under the firm name of Sondheim Bros., against John Gilbert, assignee of Miller Bros., insolvents, to establish a claim against the partnership estate of the latter, in the hands of the assignee. It is averred in the complaint that Conrad and Jacob Miller had theretofore been partners doing a general mercantile business in the city of Evansville, under the firm name of Miller Bros., and that on the 11th day of December, 1885, they executed their promissory note, payable to themselves in six months after date, in the city of New York, \$7,264.11. It is averred that Miller Bros. afterwards negotiated the note by indorsement in blank, and that, after it passed through the hands of divers persons, the plaintiffs became the owners of the note, before its maturity, having paid therefor the full face value, without any notice whatever of the consideration for which it was given. The law of the State of New York, the note having been executed and made payable in that State, is set out in the complaint, and it appears therefrom that notes drawn in the form of that sued on are negotiable according to the custom and law of merchants. The case was disposed of in the court below by a ruling on a separate demurrer to certain answers, which set up, substantially, the following facts, viz.: That at the date of the execution of the note the Miller Bros. were engaged in the dry goods business in the city of Evansville, and that Conrad Miller, one of the members of the firm, made an agreement with Morris Ranger, without the knowledge or consent of Jacob Miller, the other member of the firm, that they (Ranger and Conrad Miller) should engage on joint account in speculating in cotton futures upon the New York

Cotton Exchange; that they agreed to buy, on joint account, 50,000 bales of cotton, to be nominally delivered during some months in the future; and that it was understood and agreed between them that no cotton was to be actually bought, sold, received, or delivered, but that after making pretended purchases, if the price should advance or decline on the New York Stock Exchange, there was to be a settlement of the differences accordingly, as the current price might be higher or lower than that nominally agreed upon at the time of the pretended purchase. It is averred that, in pursuance of the foregoing arrangement, Conrad Miller executed the note sued on, together with a large number of other notes, without the knowledge or consent of his partner, and that the notes so executed were indorsed in blank by Conrad Miller, in the name of Miller Bros., and placed in the hands of Ranger, to be used by him solely for the purpose of paying or securing losses or margins which were required to be put up in the contemplated transactions, which, it is alleged, were to be merely gambling or wagering speculations in cotton futures, and that the note sued on was made and indorsed for no other consideration whatever. In some of the paragraphs of answer, which set up substantially the foregoing facts, certain sections of a statute against gaming, and affecting certain contracts and securities, alleged to be in force in the State of New York, are set out. The court overruled the demurrer to the answers, and, the plaintiffs declining to reply, judgment was rendered disallowing the claim. The plaintiffs prosecute this appeal, and assign for error the ruling of the court in overruling the demurrer to the defendant's answers. Upon a determination of the propriety of this ruling, the judgment of the court below must be either affirmed or reversed.

Whether or not contracts, notes, bills, and other securities, growing out of transactions similar to those contemplated by Ranger and Miller, as disclosed by the facts admitted by the demurrer to the answers, are valid and collectible, has been the subject of much consideration in the courts. As related to legitimate commercial transactions, and the recognized methods of conducting the mercantile businesses of the day, the importance of the question cannot readily be overestimated. Formerly the rule was that articles which had no actual or potential existence at the time of the contract were not the subjects of sale; but this was found to be such an impediment to commerce that some relaxation in the rule was deemed necessary. It is now established upon indisputable authority that a contract for the sale and future delivery of a commodity of a designated kind or class, which the seller does not own, and which has at the time no actual existence, but which may be supplied by purchase in the market at the proper time, is a valid contract, provided it is the intention of the parties, or of one of them, at the time the contract is made, that the commodity shall actually be procured by the seller and sup-

plied to the purchaser at or before the maturity of the agreement. *Cobb v. Prell*, 15 Fed. Rep. 774, 22 Am. Law Reg. 609, and note. *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. Rep. 713, 1 Am. St. Rep. 745, and note. In such a case, it does not invalidate the transaction that the parties, or either of them, may have deposited money as a margin to secure the performance of the contract, or as indemnity against loss in case one or the other fails to consummate his agreement. As has been said, "present ownership is of less consequence than the intention of the contracting parties." *Cockrell v. Thompson*, 85 Mo. 510; *Wall v. Schneider*, 59 Wis. 352, 18 N. W. Rep. 443; *Whitesides v. Hunt*, 97 Ind. 191; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390. While contracts for the sale of property to be delivered in the future are valid, where the parties, or either of them, actually contemplate a delivery of the subject-matter of the contract, yet if, under the guise of a contract which has the appearance of validity upon its face, the real intention is merely to speculate on the rise or fall of the market, without any purpose that any property shall be delivered or received, but with the understanding that at the appointed time the account is to be adjusted by paying or receiving the difference between the contract and the current price, then the whole transaction is illegal, as against public policy, and falls under the condemnation of the law. *Whitesides v. Hunt*, *supra*, and cases cited; *Irwin v. Williar*, 110 U. S. 499, 4 S. C. Rep. 160. The facts stated in the answer make it clear that the transactions contemplated by Morris Ranger and Conrad Miller were not the actual purchase and acceptance of cotton, but were speculative wagers upon the price of that commodity, from time to time, as it might be quoted on the New York Stock Exchange. This was an agreement to engage in mere wild speculation, in the nature of gambling or wagering upon the fluctuations in the price of cotton. Such transactions demoralize and embarrass legitimate trade, and are subversive of all correct business principles, destructive of commercial integrity and morality, and result, directly or indirectly, in most of the bankruptcies, defalcations, and forgeries which startle and distract business circles. Between the parties to such a transaction, and all others who participate in the specific illegal design, with the intention of aiding in its execution, so as to become principals or accessories thereto, any contract or other security resulting therefrom will be wholly invalid. But in the absence of a statute in direct terms prohibiting transactions of the character of that in question, and declaring them unlawful, or expressly declaring promissory notes growing out of such a transaction invalid, while the courts will, on general common law principles, declare such notes invalid between the parties and those who were accessory to the illegal act, yet, in order to invalidate a note or other security in the hands of one who advanced money which the borrower intended to and did employ in carrying

on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and borrower that the money furnished should be used in aid of and to promote the unlawful enterprise that they became *particeps criminis*. *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. Rep. 356; *Waugh v. Beck*, 114 Pa. St. 422, 6 Atl. Rep. 923; *Tracy v. Talmage*, 14 N. Y. 162; *Arnot v. Coal Co.*, 68 N. Y. 558. Thus it was held in *Bickel v. Sheets*, 24 Ind. 1, that a contract for the sale of property which the purchaser intended to use for gaming purposes, in violation of a statute, was not void, although the seller was informed at the time of the sale of the purpose for which the property was to be applied. *Cummings v. Henry*, 10 Ind. 109; *Feinman v. Sachs*, 33 Kan. 621, 7 Pac. Rep. 222; *Distilling Co. v. Nutt*, 34 Kan. 724, 10 Pac. Rep. 163; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. Rep. 927; *Oil Co. v. Boyett*, 44 Ark. 230. There must be knowledge of and participation in the illegal or immoral purpose.

It is not necessary, however, that we pursue this feature of the case further, and it is conceded upon the record that the note in suit came to the hands of the plaintiffs in the due course of trade, before maturity, for value, and without notice of the purpose for which it was executed or drawn. In order, therefore, to uphold a judgment which invalidates commercial paper in the hands of innocent holders, such as the plaintiffs are conceded to be, it is essential that a statute should be shown governing the case which in direct terms declares that transactions such as those here involved are unlawful, and that notes given under the circumstances exhibited by the facts in this case are absolutely void. The principle may be considered as well established that when a statute in express terms pronounces contracts, notes, bills, securities, and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon; and the doctrine that transactions which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authority. *New v. Walker*, 108 Ind. 365, 9 N. E. Rep. 386; *Thompson v. Bowie*, 4 Wall. 463; *Vallett v. Parker*, 6 Wend. 615; 1 Daniel, Neg. Inst. §§ 197, 807. In such a case the note will be declared void in the hands of an innocent holder, in pursuance of the peremptory words of a statute which embraces in its terms the contract or obligation under consideration. *Town of Eagle v. Kohn*, 84 Ill. 292. The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the

hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill, or note, void; but unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note, in the hands of an innocent holder for value, will be held valid and enforceable. *Hatch v. Burroughs*, 1 Woods, 439; *Town of Eagle v. Kohn*, *supra*; *Bank v. Tinsley*, 11 Mo. App. 498; *Bank v. Harrison*, 3 McCrary, 316, 10 Fed. Rep. 243; *Edwards v. Dick*, 4 Barn. & Ald. 212; *Day v. Stuart*, 6 Bing. 109; *Chit. Bills*, 492; 2 Rand. Com. paper, § 511.

It is argued, however, in support of the ruling below, that, because the note sued on was negotiated in consideration of money advanced with which to prosecute a wagering or gambling speculation, it is nevertheless void in the hands of an innocent holder, within the provisions of section 4950, Rev. Stat. Ind. 1881, which declares, in effect, that all notes, bills, etc., when the whole or any part of the consideration thereof shall be for money or other valuable thing won on the result of any wager, or for repaying money lent at the time of such wager, for the purpose of being wagered, shall be void. The note in suit having been executed and made payable in the State of New York, and it appearing that the alleged illegal transactions contemplated by the parties concerned in issuing and putting the note in circulation were to be engaged in and consummated in the State of New York, the law of that State must be looked to primarily in determining the validity of the contract, the rule in that respect being that a contract valid by the law of the State in which it is made and is to be performed is valid and enforceable everywhere, unless it is clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced. *Tildon v. Blair*, 21 Wall. 241; *Bank v. Low*, 81 N. Y. 566; *Hawley v. Bibb*, 69 Ala. 52; *Stix v. Matthews*, 75 Mo. 96; *Swann v. Swann*, 21 Fed. Rep. 299; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. E. Rep. 230; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Hyatt v. Bank*, 8 Bush, 193; *Milliken v. Pratt*, 125 Mass. 374. A contract, although valid where made, will not be enforced if, by the laws of the State whose jurisdiction is invoked, the contract which is sought to be enforced is stigmatized as unlawful, and so prohibited. Relying upon the invalidity of the note by force of the *lex loci contractus*, the appellee has, as we have seen, pleaded the statute of the State of New York relating to gaming contracts, in one of the paragraphs of his answer. In the other paragraph he relies upon the statute of our own State to invalidate the note. By section 8 of the New York statute (2 Rev. St. ch. 20, tit. 8, § 8), all wagers, bets, or stakes, made to depend upon any lot, chance, casualty, or unknown or contingent event, are declared to be unlawful, and all contracts for

or on account of any money, property, or thing in action so wagered, bet, or staked are declared void. The other section (2 Rev. St. ch. 20, tit. 8, § 16) declares, in effect, that all securities, any part of the consideration of which is money won by playing at any game, or by betting on the hands of such as do play at any game, or to repay any money knowingly lent, at the time and place of any such play, to any person so playing, shall be utterly void. This last section can have no possible application to a transaction such as that disclosed by the facts in the present case. It would be an unwarranted perversion of common and correct speech to hold that the consideration of a note which had been executed in order to obtain money with which to purchase options, or to put up as margins in cotton speculations, was money won by playing at a game, or by betting on the hands of others who do play, or to repay money lent at the time and place of such play. However much dealing in options may resemble gambling or betting, and demoralizing and pernicious as it may be, it cannot with any degree of propriety be said to be winning or losing money by playing at or betting upon any game within the meaning of the statute. Statutes involving penal consequence cannot be extended by construction so as to include acts not in terms forbidden, merely because of their resemblance to the acts prohibited, or because they may be equally demoralizing and injurious. *Shaw v. Clark*, 49 Mich. 384, 13 N. W. Rep. 786. The purpose of the legislation in enacting the statute was to avoid securities, any part of the consideration of which was money won by playing at any game, etc. The words of the statute are not to be enlarged by intentment, so as to extend beyond the mischief contemplated, where such a construction would be injurious to innocent third persons. A statute ought not to be enlarged, by mere construction, so as to permit the very persons guilty of the offense prohibited to retain money obtained, contrary to the statute, from third persons guilty of no violation of law whatever. *Edwards v. Dick*, *supra*. The statutes against gaming, which render all wagers, bets, and stakes unlawful, and avoid all contracts for or on account of any money wagered or bet, or any notes or other securities, when the whole or any part of the consideration thereof shall be for money won or lost on any game or wager, and statutes which make it a criminal offense to bet upon any game, or the like, although not applicable in terms to the purchase of options, are sufficiently indicative of the policy of the law as respects mere wagering contracts, of whatever description or name, to require the court to pronounce all such contracts and securities invalid in the hands of those who were implicated in violating public policy by specifically aiding or directly participating in the furtherance of such transactions. They do not, however, go to the extent of destroying commercial securities in the hands of innocent holders for value, even though such securities may have had

their inception in a transaction thus condemned. In respect to section 8, above referred to, it may be said the distinction between contracts for or on account of any money, etc., wagered, bet, or staked upon any game, and securities, bills, notes, etc., any part of the consideration of which shall be money won or lost by playing at any game, etc., is obvious. The contracts mentioned are the agreements of the parties, by which they undertake beforehand to bind themselves to pay or deliver to the winner the money, property, or thing wagered, bet, or staked on the game or contingent event. These are declared unlawful and void, and so they are, in whose ever hands they may be found. The things in action, notes, bills, securities, etc., referred to in the other section, are the evidences of indebtedness given for money won or lost by playing at any game, or by betting on the hands of those who play, after the event, or for money knowingly lent at the time and place of such play, to a person so playing; and these are declared to be utterly void, and so they are, without regard to their form or the fact that they may be in the hands of an innocent holder. *City of Aurora v. West*, 22 Ind. 88; 1 Daniel, Neg. Inst. § 807; *Chit. Bills*, 92; *New v. Walker*, *supra*; *Greenland v. Dyer*, 2 Man. & R. 422; 2 Rand. Com. Paper, § 511. The note sued on does not fall within the terms of either section of the New York statute. The paper was made by, and was payable to, Miller Bros. It was indorsed by them, or in their name, and delivered to Ranger, who advanced no consideration for it, but negotiated it to persons who took it for full value, in the regular course of business, without notice. Until the paper was negotiated for a consideration, it had no legal inception as a promissory note. In the hands of the parties to the illegal transaction contemplated, it was not a note given upon an illegal consideration, but it was a paper without any consideration, signed merely for purposes of accommodation. After it was negotiated, it became a promissory note, the consideration which was money advanced by persons who had no notice of the illegal purpose for which the parties contemplated using it, and who were in no way or sense parties implicated in the illegal confederacy. Having reached the conclusion that the statutes of the State of New York do not, in terms, render void mercantile notes executed in consideration of money, which the parties receiving the money intended to embark in gambling speculations on the stock market, it only remains that we say that the statutes of our own State already referred to indicate such a coincidence in the policy of both States as that the courts of this State will not hesitate to enforce the liability of a maker of a note such as that involved in the present case, in the hands of an innocent holder. It is not necessary that we should remark further upon the effect of the Indiana statute, as applied to notes growing out of transactions such as that under consideration, when such notes are executed and payable in this State. It is enough to say that we are no

disposed to indulge in a forced and strained construction of the language of our own statute, in order to reach the conclusion that, to enforce payment of a commercial note in the hands of an innocent holder, which is not within the inhibition of the statute of the State where the note was executed and made payable, would be either opposed to public morals, or violative of the policy or law of this State. These conclusions lead to a reversal of the judgment. The judgment is accordingly reversed, with costs.

NOTE.—Conflict of Laws.—The general rule is well settled that the validity of a contract is to be determined by the *lex loci contractus*,¹ unless it is to be performed in another State or country, and in that event it is generally governed by the law of the place of performance.² This rule has been applied in many cases to negotiable instruments.³ Thus, the rights of the original parties to a bill or note are determined by the law of the place where it is made and payable,⁴ but if payable in another State the law of the place of payment will govern.⁵ Each indorsement is regarded as a new contract, and the rights and liabilities of the indorsers are determined by the law of the place where the indorsement is made and executed.⁶ But these rules are subject to one well-defined exception. If the note or other contract is clearly contrary to good morals or repugnant to the policy or statutes of the State in which suit is brought, it will not be enforced in that State.⁷ In Louisiana, however, it has been held that, while as a general rule the court "will not enforce the laws of another country to the injury of their own citizens, yet if a citizen goes abroad and makes a contract under the law of the place he must be bound thereby."⁸

"Futures" and "Options."—A *bona fide* sale of per-

sonal property may be valid, notwithstanding the property is to be delivered in the future, and even though the seller has no other means of getting it than to go into the market and buy it.⁹ "But if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate in the rise or fall of prices and the goods are not to be delivered, but the difference between the contract and market price only to be paid, then the transaction is a wager and the contract void."¹⁰ "Margins" deposited in pursuance of such illegal transaction cannot be recovered, as it is the policy of the law to leave the guilty parties where it finds them.¹¹ The test of the validity of a contract for the sale of goods not to be delivered at the time is found in the intention of the parties when it was made.¹² To render the transaction invalid as to both parties both must have intended it as a risk upon prospective differences rather than as a *bona fide* sale in pursuance of which the property was to really be delivered.¹³ And if the contract was entered into at the time of its execution in good faith and without any illegal intent, it is perfectly legitimate for the parties to afterwards agree upon a settlement by payment of differences instead of by actual delivery of the property.¹⁴ So, a "margin" may be required to be deposited as security without rendering the contract illegal if it is otherwise valid.¹⁵ And delivery may be made in warehouse receipts.¹⁶ Nor is a contract for the sale of goods to be actually

¹ *Satterthwaite v. Doughty*, 59 Am. Dec. 554, and note; *Webster v. Howe Machine Co.*, 8 Atl. Rep. 482; *Gilman v. Stevent*, 63 N. H. 342; *Marvin Safe Co. v. Norton*, 48 N. J. L. 415; s. c., 7 Atl. Rep. 418; *Pritchard v. Norton*, 106 U. S. 134; *Laird v. Hodges*, 26 Ark. 356; *Well v. Golden*, 141 Mass. 364.

² *Fitch v. Remer*, 8 Am. L. Reg. 654; *Hyde v. Goodnow*, 8 N. Y. 266; *Lewis v. McCabe*, 49 Conn. 141; *Thurman v. Kyle*, 71 Ga. 628; *Pomeroy v. Aulworth*, 23 Barb. (N. Y.) 118; *Andrews v. Pond*, 3 Pet. 65; *Bank v. Daniel*, 13 Pet. 32. See also *Leve Peck*, 27 Cent. L. J. 188, and note.

³ See *Story on Prom. Notes*, §30; note to *Ford v. Buckeye Ins. Co.*, 20 Am. Dec. 663, and authorities hereinafter cited.

⁴ *Mendenhall v. Gately*, 18 Ind. 149; *Emerson v. Partridge*, 27 Vt. 8; *Lawrence v. Bassett*, 5 Allen (Mass.), 140; *Commercial Bank v. Simpson*, 90 N. C. 467.

⁵ *Murray v. Gibson*, 2 La. Ann. 811; *Coffman v. Bank*, 41 Miss. 212; *Faut v. Miller*, 17 Grat. (Va.) 47; *Peck v. Hibbard*, 26 Vt. 698; *Smith v. Mead*, 3 Conn. 253; *Hunt v. Standart*, 15 Ind. 33.

⁶ *Dunnigan v. Stevens*, 25 Cent. L. J. 542; *Briggs v. Latham* (Kan.), 24 Cent. L. J. 468, and note; *Aymar v. Sheldon*, 12 Wend. (N. Y.) 430; s. c., 27 Am. Dec. 187; *Everett v. Vendres*, 19 N. Y. 433; *Hunt v. Standart*, 15 Ind. 35; *Scudder v. Union Nat. Bank*, 91 U. S. 412. Compare *Vansant v. Arnold*, 81 Ga. 210.

⁷ *Ivey v. Lalland*, 42 Miss. 444; *Warner v. Jaffray*, 96 N. Y. 248; s. c., 48 Am. Rep. 616; *Bryan v. Bristol*, 26 Mo. 423; *Greenwood v. Curtis*, 6 Mass. 578; *Armstrong v. Toler*, 11 Wheat. 258, 260; *Thrasher v. Everhart*, 3 Gill. & J. (Md.) 224.

⁸ *Arayo v. Ourrell*, 1 La. 528; s. c., 20 Am. Dec. 286. Compare *Cambioso v. Maffett* Wash. C. C. 98; *Biggs v. Lawrence* T. R. 454

⁹ *Hibblewhite v. McMorine*, 5 Mees. & W. 462; *Thacker v. Hardy*, 18 Am. L. Reg. (N. S.) 238, and note; *Melohert v. Am. Union Tel. Co.*, 5 McCrary, 521; *Porter v. Viets*, 12 Fed. Rep. 193, and note; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Cobb v. Prell*, 5 McCrary, 80; s. c., 22 Am. L. Reg. 609, and note; *Hatch v. Douglass*, 48 Conn. 116; s. c., 40 Am. Rep. 154; *Conner v. Robertson*, 37 La. Ann. 814; s. c. 55 Am. Rep. 521; *Gregory v. Wendell*, 39 Mich. 337; s. c., 33 Am. Rep. 390; *Cockrell v. Thompson*, 85 Mo. 510; *Crawford v. Spencer*, 92 Mo. 498; s. c., 1 Am. St. Rep. 745, and note; *Bigelow v. Benedict*, 70 N. Y. 202; s. c., 28 Am. Rep. 573; *Seeligson v. Lewis*, 65 Tex. 215; s. c., 57 Am. Rep. 598; *Whitesides v. Hunt*, 97 Ind. 191; s. c., 49 Am. Rep. 441; *Wall v. Schneider*, 59 Iowa, 364; s. c., 48 Am. Rep. 520; *Benj on Sales* (4th ed.), § 542; 2 *Addison Cont.* § 1157; *Bishop Cont.* § 534.

¹⁰ *Crawford v. Spencer*, 92 Mo. 498; s. c., 1 Am. St. Rep. 745, 748, per Black, J.; *Whitesides v. Hunt*, 97 Ind. 191; s. c., 49 Am. Rep. 441; *Dunn v. Bell* (Tenn.) 4 S. W. Rep. 41; *Waugh v. Beck*, 114 Pa. St. 423; *Rudolf v. Winters*, 7 Neb. 125; *Beadles v. McElrath* (Ky.), 3 S. W. Rep. 152; *Irwin v. Williar*, 110 U. S. 499; *Bangs v. Hornick*, 30 Fed. Rep. 97; *Lowe v. Young*, 59 Iowa, 364; *Kinnsey v. Berry*, 65 Mo. 570; *Clay v. Allen*, 68 Wis. 436; *Waterman v. Buckland*, 1 Mo. App. 45; "Gambling Contracts," 16 Cent. L. J. 225, and many of the authorities cited in note 9, *supra*.

¹¹ *Gregory v. Wendell*, 39 Mich. 337; s. c., 33 Am. Rep. 390; *Thompson v. Cummings*, 68 Ga. 124. Compare *Norton v. Blaine*, 39 Ohio St. 145.

¹² *Cockrell v. Thompson*, 85 Mo. 510; *Hentz v. Jewell*, 4 Woods, 656; s. c., 20 Fed. Rep. 599; *Tomblin v. Callen*, 69 Iowa, 239; "Gambling Contracts," 16 Cent. L. J. 225.

¹³ *Murry v. Oehlirree*, 59 Iowa, 435; s. c., 15 Cent. L. J. 424; *Conner v. Robertson*, 37 La. Ann. 814; s. c., 55 Am. Rep. 521; *Grizewood v. Banc*, 11 C. B. 586; *Pirley v. Boynton*, 79 Ill. 351.

¹⁴ *Kent v. Miltenberger*, 13 Mo. App. 508; s. c., 16 Cent. L. J. 433; *Wall v. Schneider*, 59 Wis. 352; s. c., 48 Am. Rep. 520; *Clark v. Foss*, 7 Biss. 540; *Sawyer v. Taggart*, 14 Bush. (Ky.) 729. Compare *Everingham v. Meighan*, 15 Cent. L. J. 333.

¹⁵ *Hatch v. Douglass*, 48 Conn. 116; *Wall v. Schneider*, 59 Wis. 352; *Whitesides v. Hunt*, 97 Ind. 191.

¹⁶ *Gregory v. Wendell*, 39 Mich. 337; s. c., 33 Am. Rep. 390, 392; *Wall v. Schneider* 59 Wis. 352; s. c. 48 Am. Rep. 520

delivered rendered invalid by an option being given as to the time of delivery.¹⁷

A promissory note or other security given for a debt based either wholly or in part on an illegal transaction cannot be enforced as between the parties.¹⁸ But, in the absence of a statute, a negotiable instrument incapable of enforcement as between the parties, because of such illegality, may, nevertheless, be good in the hands of a *bona fide* indorsee for value, without notice and before maturity.¹⁹ In some of the States, however, there are statutes expressly avoiding negotiable instruments based on such illegal transactions.²⁰ And in nearly all of the States there are general statutes against gaming or wagering. Although these statutes are of the same general tenor and are not unlike in terms, yet there is much conflict in the authorities as to their effect, if any, on negotiable paper in the hands of a *bona fide* holder. In the recent case of *Cunningham v. Nat. Bank*, 17 Cent. L. J. 470; s. c., 71 Ga. 400, it was held that a promissory note given for losses in a speculation in cotton futures was void, under the Georgia statute, even in the hands of an innocent purchaser. That statute provides, however, that all evidences of debt "executed upon a gaming consideration are void in the hands of any person." Similar decisions have been rendered in Alabama and Wisconsin under the general "gaming statutes" of those States.²¹ On the other hand, negotiable instruments growing out of similar transactions have been held valid in the hands of an innocent purchaser under statutes almost if not quite as comprehensive as those just referred to.²² A further consideration of the general subject of contracts based upon acts prohibited by statute will be found in a leading article in 16 Cent. L. J. 302, entitled "Illegal Contracts."

W. F. ELLIOTT.

¹⁷ *Gregory v. Wattowa*, 58 Iowa, 711; *Williams v. Tiedeman*, 6 Mo. App. 269, 273; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438; *Sawyer v. Taggart*, 18 Am. L. Reg. (N. S.) 230, and note. See also *Bigelow v. Benedict*, 70 N. Y. 202; s. c., 26 Am. Rep. 573; *Harris v. Turnbridge*, 83 N. Y. 92; s. c., 38 Am. Rep. 398.

¹⁸ *Seeligson v. Lewis*, 65 Tex. 215; s. c., 57 Am. Rep. 593; *Barnard v. Backhaus*, 52 Wis. 593. See also *Steers v. Lashley*, 6 Term Rep. 61; *Griffiths v. Sears*, 112 Pa. St. 523; *Brown v. Turner*, 7 Term Rep. 630.

¹⁹ See authorities cited to this effect in principal opinion. Also *Crawford v. Spencer*, 92 Mo. 498; s. c., 1 Am. St. Rep. 745; *Shaw v. Clark*, 49 Mich. 384; s. c., 43 Am. Rep. 474; *Greenland v. Dyer*, 2 Man. & R. 422.

²⁰ *Root v. Merriam*, 27 Fed. Rep. 949; *Tenney v. Foote*, 4 Ill. App. 594; s. c., 95 Ill. 99; *Statutes of South Carolina* (1893), 306, § 5.

²¹ *Hawley v. Bibb*, 69 Ala. 52; *Barnard v. Backhaus*, 52 Wis. 593.

²² *Crawford v. Spencer*, 92 Mo. 498; s. c., 1 Am. St. Rep. 745; *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243. See also *Lehman Bros. v. Strassburger*, 3 Cent. L. J. 134, and authorities cited in note 19, *supra*.

RECENT PUBLICATIONS.

THE GREEN BAG, A Useless but Entertaining Magazine for Lawyers. Edited by Horace W. Fuller. Published Monthly. January, 1899. Charles C. Soule, Publisher. Boston, Mass.

We are frank to admit that the first glance at the title page of this new magazine for lawyers, destroyed in some measure, our preconceived and well-settled notion of Boston people, and particularly of Boston publishers. That many valuable articles have

emanated from that city, we are not disposed to deny. But the inhabitant thereof who would not, blindly and aggressively, undertake to prove the negative of that proposition, it is safe to say, could have a permanent engagement in a dime museum, and this magazine, we believe, is the first instance on record where a Boston man has labelled his infant production "useless" and sent it out into the cold world, thus introduced. We are inclined to think that the publisher either knew the stigma was false, or with reasonable diligence could have found it to be so, and that, in thus branding his offspring, he at the same time expected to get credit for an unusual display of modesty on the part of a Boston publisher, and also to make strong his infant in the sympathy at least of the profession. In other words, we are forced to conclude that a Boston publisher is modest "for revenue only." But, independent of its introduction, we take pleasure in saying, after a careful examination of the January number of "The Green Bag," that it is "entertaining," and therefore, useful. We believe that the educated lawyer of to-day wants something in addition to dry reports of cases, and that a magazine which excludes them and, instead, seeks to amuse, entertain and instruct in a literary way, will find many supporters. In this number will be found an article on Chief Justice Fuller with accompanying cut. A very interesting paper on the Harvard Law School, with many illustrations, both of places and prominent professors thereof, will be eagerly read by the many graduates of that historic institution, as well as by others who desire to know something of it. We are informed that each monthly number of this magazine will contain a full page portrait of some eminent judge or lawyer, and during the year a series of articles will be given on the leading law schools of America.

The magazine is prepared in a most attractive way, and contains editorial notices, etc., of current interest.

THE AMERICAN AND ENGLISH RAILROAD CASES. A Collection of all the Railroad Cases in the Courts of Last Resort in America and England. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor, Vol. XXXIV. Northport, Long Island, N. Y.: Edward Thompson Co., Publishers.

This last volume of the railroad cases is fully up to the standard of its predecessors, and that, as a matter of fact, is all that need be said in its favor. For, this series justly stands high in the estimation of the profession, a fact which is partly due to the practical questions involved in the cases reported, but largely to the eminent qualifications of the editor, Mr. James M. Kerr, for the work of arranging and annotating, all of which has been done in the most admirable manner. The work is certainly invaluable to the railroad lawyer and also to that large portion of the legal fraternity who are eager to have it known that they are "agin railroads," for herein may be found railroad law on almost every conceivable subject, from negligence to the establishment of freight rates by the Interstate Commerce Commission. On the subject of negligence there are many interesting cases involving questions of injury to trespassers and licensees and in the crossing of railroad track, and by defective bridges. An important case, very extensively annotated, involving question of liability for passenger's baggage is *Great Western R. Co. v. Bunch*. There are cases on the question of limited ticket, free passes, injuries on Sunday, etc. Some interesting decisions by the Interstate Commerce Commission are to be found here, notably that in reference to the *Kentucky & Indiana Bridge Co.*, in which it is held that the bridge company controlling

the bridge across the Ohio river at Louisville is a common carrier, and, therefore, bound to accept traffic from a railroad company connecting with it. This ruling of the commission has, however, since been overruled on appeal to the United States Circuit Court of Kentucky.

BOOKS RECEIVED.

BLICKENSADERFER'S BLACKSTONE'S ELEMENTS OF LAW, ETC., with Analytical Charts, Tables and Legal Definitions, Arranged and Displayed by a Systematic and Attractive Method. By U. Blickensaderfer, Attorney at Law, Author of "Abridgment of Elementary Law," "Law Student's Review," "Descent of the Crown of England," etc. Chicago, Ill.: Ulric Blickensaderfer, Publisher. 1889.

AMERICAN CONSTITUTIONAL LAW, by J. I. Clark Hare, LL.D. In Two Volumes. Boston: Little, Brown & Company. 1889.

QUERIES AND ANSWERS.

[Subscribers are invited to send short answers to the following.]

QUERY No. 11.

A dies leaving a will in which she bequeaths certain personal property to her children, and in the bequest to each makes him a devise in the following words: "And his share of the farm." The testator owned a farm of 160 acres. One of her children had died several years previous, who had for a consideration quit-claimed to his brother his interest in said 160 acres of land. Can the heirs of the deceased son maintain a partition suit, or have they any interest in the land? The deceased son is not mentioned in the will, but bequests are made to some of his heirs, but no mention is made of any devise to them. W.

QUERY No. 12.

A dies leaving a will by which he gives his real and personal estate to his wife B, for and during her natural life. On and after the death of B he gives to his two daughters C and D the sum of \$2,000 each, payable one-half thereof 1 year after the decease of B and the other half 2 years after such death, and declares said legacies to be a charge upon his real and personal estate. His daughter C died before the testator, leaving two children, E and F, who survived the testator. F died intestate and unmarried, leaving a father G and a sister, said E, surviving, and who also survived the life-tenant B, who died after F. Who is entitled to the \$2,000 devised to C? G claims half of it and E thinks she is entitled to the whole. Which is right? R. S. L.

QUERY No. 13.

A gives a deed of trust to B, a married woman. Upon paying same off A gives a quitclaim deed without her knowledge and joining in same to B. Is it good or should husband join with A. Please cite authorities. The transaction under Missouri law. B. H. B.

QUERIES ANSWERED.

QUERY No. 8.

[To be found in Vol. 28, Cent. L. J., p. 142.]

Whether the title is now in B or in B's wife is a question which various courts decide differently. Devlin on Deeds, §§ 300, 302. In order that A may claim anything from B for use of the land during the time mentioned, admitting the title to have been in A till the second deed was executed, the relation of land-

lord and tenant must have existed between A and B by contract, express or implied. The facts prevent any such assumption, and A has no claim against B therefor. Taylor's Land. & Ten. (8th ed.), §§ 25 and note, 636. R. H.

Another answer.—The query shows plainly that possession was taken under contract of purchase, and that the relation of landlord and tenant never existed. For such reasons rent cannot be collected. 98 Ind. 201; 45 Ind. 576. W. H. B.

QUERY No. 9.

[To be found in Vol. 28, Cent. L. J. p. 167..]

When the magistrate has jurisdiction, and his proceedings are irregular or erroneous, the judgment is voidable only, but not void. Church on Habeas Corpus, § 370. When the judgment is erroneous but not void, it can only be attacked by direct proceedings, and habeas corpus will not lie. Idem., §§ 240, 1410. Such seems to be the general rule. W. T.

QUERY No. 10.

[To be found in Vol. 28, Cent. L. J. p. 168.]

The only reason why A cannot sue in *assumpsit* is, that the matter is *res adjudicata*. The rule is, that he cannot contradict the decision, but in this case he would not contradict the decision, but affirm it. A judgment is an estoppel, when the evidence necessary to sustain a judgment for plaintiff in the present action would have authorized a judgment for him in the former action; otherwise not. Feeman on Judg. § 259. The former judgment is conclusive on the parties as to the matter directly decided. Idem. § 249. If the plaintiff, by mistake, brings the wrong action, he may bring a new action, though judgment went against him. Livermore v. Hershell, 3 Pick. 32. An action for the recovery of a specific \$9,000, alleged to be detained from him, is no bar to an action for \$9,000 of debt generally due him from defendant. Lager v. Blain, 44 N. Y. 445. A can sue in *assumpsit*. A. J. M.

Another answer.—A's action was to recover possession of his property on account of B's fraud, and A's right to recover value of the goods as upon a sale, could not have been adjudicated under such a complaint. It is only when the same question has been determined, or might have been, under the pleadings, that a former judgment is a bar. 2 Ind. 269; 21 Ind. 150.; 12 Ind. 629, and all authorities upon former adjudication. W. H. B.

JETSAM AND FLOTSAM.

"GENTLEMEN of the jury," said counsel in an agricultural case, "there were thirty-six hogs in that lot—thirty-six. I want you to remember that number—thirty-six hogs—just three times the number that there are in the jury box."

THEY have a good one just at present on a well-known Kansas City lawyer, who is noted for his absent-mindedness. He went up his own stairs the other day, and seeing a notice on his door, "Back at two o'clock," sat down to wait for himself.

JUDGE (to jury)—"Have you agreed upon a verdict? Is the prisoner guilty or not guilty of theft, as charged in the indictment?" Foreman—"We have not yet reached a verdict, your honor. I missed my pocket-book in the night, and I would respectfully ask that each juror be searched."

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCOUNTING—Pleading—Partnership.—A petition, in an action upon a contract by which the plaintiff is to receive fixed monthly wages, and the profits of the business are to be divided between the parties, alleging that a special sum is due plaintiff on account of his wages, but not showing that any partnership business was done, or that any partnership account exist, does not state a case for equitable accounting. — *Galliers v. Peppers*, S. C. Iowa, Jan. 18, 1899; 41 N. W. Rep. 205.

2. APPEAL BONDS. — Under Code Md. 1888, art. 5, § 5, providing that appeal bonds shall be executed "with sufficient securities," an appeal bond with only one surety is invalid as a statutory bond. — *Harris v. Register*, Md. Ct. App., Jan. 10, 1899; 16 Atl. Rep. 386.

3. APPEAL — Constitutional Law. — Under Const. Ark. art. 7, § 33, and Dig. Ark. § 1436, the petitioners for an order for the prohibition of the sale of liquor under the "three-mile law," may appeal from an order of the county court denying their petition, though the latter statute makes no provision for an appeal. — *McCullough v. Blackwell*, S. C. Ark., Jan. 12, 1899; 10 S. W. Rep. 269.

4. APPEAL—Pleading.—In an action by an attorney for professional services, an objection that the complaint does not state facts sufficient to constitute a cause of action will not be sustained, where there was no demurrer and no plea of statute of limitations. — *Allen v. Haley*, S. C. Cal., Dec. 26, 1898; 20 Pac. Rep. 90.

5. APPEAL—Review — Bill of Exceptions. — Before the court can consider questions as to the admissibility of evidence, or as to the correctness of instructions, the bill of exceptions or the transcript must contain all the evidence. — *Territory v. Clanton*, S. C. Ara., Jan. 1899; 20 Pac. Rep. 94.

6. APPEAL — From Interlocutory Decree. — In an action to obtain a decree declaring plaintiff to be the equitable owner of an undivided interest in real property, and for a partition, an interlocutory decree was

entered. An appeal was taken from the statutory time: *Held*, that if the decree adjudging the equitable interest of the plaintiff was not to be regarded as a part of the partition suit, it was not appealable at all. — *Watson v. Suiro*, S. C. Cal., Dec. 27, 1898; 20 Pac. Rep. 88.

7. ARBITRATION AND AWARD—Assumpsit—Boundaries. — Entering on the disputed land and erecting thereon a fence several rods from the line between the parties' adjoining lands, designated by arbitrators, to whom the finding and fixing the true line was submitted, do not constitute a breach of the agreement "to abide by and perform the award," for which assumpsit will lie. — *Weeks v. Trask*, S. J. C. Me., Dec. 27, 1898; 16 Atl. Rep. 413.

8. ARBITRATION AND AWARD—Notice. — Where one of three arbitrators, who is absent from his home, receives no notice of, and is not present at, any meeting, an award by the remaining two is void. — *Doherty v. Doherty*, S. J. C. Mass., Jan. 4, 1899; 19 N. E. Rep. 352.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS—Voidable — Assignees. — Where a debtor assigns all his property for the benefit of his creditors by an assignment which is voidable by them, and afterwards is declared insolvent, the assignee in insolvency can recover of the trustee the property assigned, and the proceeds thereof. — *White v. Hul*, S. J. C. Mass., Jan. 5, 1899; 19 N. E. Rep. 407.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS — Assignee. — Under Rev. St. Ind. 1881, § 2674, where an assignee paid out of the trust funds a portion of a mortgage debt before foreclosure proceedings, under an agreement with the mortgagee that if the general creditors should become dissatisfied the money would be repaid: *Held*, that the assignee could recover back the money so paid. — *Wheeler v. Hawkins*, S. C. Ind., Jan. 12, 1899; 19 N. E. Rep. 470.

11. ASSUMPSIT—Demand. — Where one wrongfully receives the money of another, a cause of action to recover it accrues to the latter without any demand. — *Village of Glencoe v. County Commissioners*, S. C. Minn., Jan. 14, 1899; 41 N. W. Rep. 239.

12. ATTACHMENT—Bills of Exceptions. — Affidavits used at the hearing of a motion to dissolve an attachment will not be considered in this court on error, unless preserved by a bill of exceptions. — *Olds Wagon Co. v. Benedict*, S. C. Neb., Jan. 4, 1899; 41 N. W. Rep. 254.

13. ATTACHMENT—Sales—Recording. — Under Rev. St. Me. ch. 76, § 36, a second attaching creditor, purchasing the land at a sale under his attachment, takes his title as against the first attaching creditor, who afterwards purchased at a sale under his attachment, but who fails to record his deed within three months. — *Hayford v. Rust*, S. J. C. Me., Dec. 17, 1898; 16 Atl. Rep. 370.

14. BANKS AND BANKING—Savings Bank. — Where a savings bank is incorporated, for the purpose of receiving deposits to be used to the best advantage, the income to be divided among the depositors, and the officers to receive no compensation, there is no absolute promise to repay to any depositor the full amount of his deposit, and, in case of loss from an investment carefully and lawfully made, it must be borne *pro rata* by the depositors. — *Lewis v. Lynn Inst.*, S. J. C. Mass., Jan. 8, 1899; 19 N. E. Rep. 365.

15. BANKRUPTCY—Discharge — Fraud. — The fraud which, under Rev. St. U. S. § 5117, will prevent a debt from being affected by a discharge in bankruptcy, means actual positive fraud. — *Noble v. Hammond*, U. S. S. C., Jan. 14, 1899; 9 S. C. Rep. 235.

16. BILL OF EXCEPTIONS. — Under Code Iowa, § 2831, the bill of exceptions must be filed during the term unless time is extended by order of court. — *Deering v. Irving*, S. C. Iowa, Jan. 18, 1899; 41 N. W. Rep. 304.

17. BILL OF SALE—Construction. — A bill of sale of "all my stock of goods," and all other personal property, contained in a certain building, or on the lot on which said building is located, is sufficient to carry title to a portion of the stock which had been withdrawn temporarily from the building. — *Towles v. Russell*, S. C. Iowa, Jan. 18, 1899; 41 N. W. Rep. 308.

18. BOND—Supersedeas. — Bond being forfeited by writ of error being dismissed, the obligors in it were responsible not only for all damages and costs and fees which had been awarded, when said writ of error was dismissed, but also for the amount of the judgment which had been superseded by an order of the supreme court of appeals, which was afterwards dismissed. — *State v. Dotts*, S. O. W. Va., Dec. 1, 1888; 8 S. E. Rep. 391.

19. CANCELLATION OF INSTRUMENTS — Judgment. — Where, after a trial before a justice, and a verdict against one defendant, the justice enters judgment against both defendants, and execution issued thereon, equity will set aside such judgment as fraudulently entered against second defendant. — *Dady v. Brown*, S. O. Iowa, Jan. 18, 1889; 41 N. W. Rep. 209.

20. CARRIERS—Discrimination. — Rev. St. Me. ch. 51, § 184, requiring railroads to extend equal facilities and accommodations to all express companies engaged in business within the State, protects foreign express as well as domestic. — *International Express Co. v. Grand Trunk Railway*, S. J. O. Me., Dec. 10, 1888; 16 Atl. Rep. 870.

21. CHATTEL MORTGAGE—Pledge — Assignment. — Held, under the recitals therein the mortgage should be construed as a pledge and not an assignment. — *Sperry v. Clark*, S. O. Iowa, Jan. 17, 1889; 41 N. W. Rep. 208.

22. CHATTEL MORTGAGES—Lien—Priorities. — The lien of a chattel mortgage is not affected by a prior parol agreement between the mortgagors and third persons, the mortgages to be executed by the mortgagors shall have priority over it, when it is actually executed and delivered in violation of such agreement. — *Lazarus v. Hewietta Nat. Bank*, S. O. Tex., Dec. 21, 1888; 10 S. W. Rep. 252.

23. CHATTEL MORTGAGES — Foreclosure — Presumptions. — In an action to foreclose a chattel mortgage against the mortgagor, and one in whose possession the mortgaged goods are, declarations of the mortgagor that he had sold to his co defendant are admitted without objection, evidence sufficient to warrant presumption that the sale to the co-defendant was after the mortgage was executed. — *Chaytor v. Brunswick-Blake-Collender Co.*, S. O. Tex., Oct. 26, 1888; 10 S. W. Rep. 250.

24. CONSTITUTIONAL LAW—Taxation. — Rev. St. Ind. 1881, § 6339, does not violate the provision of the bill of rights that a person shall not be twice punished for same offense. — *Durham v. State*, S. O. Ind., Jan. 5, 1889; 19 N. E. Rep. 327.

25. CONSTITUTIONAL LAW — Corporation as Guardian. — The provisions of Gen. Laws 1883, ch. 107, safe-deposit, and trust companies, granting to such corporations power to act as guardians of the estates of insane persons: Held, valid. — *Minnesota Loan & Trust Co. v. Beebe*, S. O. Minn., Jan. 11, 1889; 41 N. W. Rep. 282.

26. CONSTITUTIONAL LAW—Police Power — Nuisances. — St. Mass. 1887, ch. 348, declaring that any fence unnecessarily exceeding six feet in height, maliciously erected for the purpose of annoying adjoining owners or occupants, is a private nuisance, and that an injured adjoining owner or occupant may have an action, is constitutional. — *Rideout v. Knox*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 890.

27. CONTINUANCE—Absent Witness — Deposition. — An application for a second continuance on the ground of an absent witness will not be granted, where it appears that the deposition of the witness had been taken, and his presence was desired to explain some portions of it. — *East Line, etc. Co. v. Scott*, S. O. Tex., Nov. 9, 1888; 10 S. W. Rep. 298.

28. CONTRACT—Attorney's Fee—Contingency. — Defendant, an attorney, who was to receive as a fee one-sixth of the amount recovered, employed plaintiffs to assist him, agreeing to pay them one-half his fee. On settlement plaintiffs expressed dissatisfaction with the amount, but gave a receipt in full, refusing to wait until defendant could write to his clients to ascertain if they would allow an additional amount: Held, that plaintiffs could not recover one-half of an additional

sum afterwards allowed defendant by his client. — *Cowgys v. Graham*, S. O. Ga., Dec. 10, 1888; 8 S. E. Rep. 521.

29. CONTRACTS—Officers—Taxation. — Where taxes are due on personal property, and the county treasurer is about to enforce the collection by distress and sale of the property, the treasurer cannot accept the promise of one negotiating for a purchase of the property to pay said taxes, and suffer the property to go without distress and sale, and such agreement is not binding on the promisor. — *Cass County v. Beck*, S. O. Iowa, Jan. 17, 1889; 41 N. W. Rep. 200.

30. CONTRACT—Acceptance. — Questions under the evidence as to agreement and acceptance of sale of land by mail and telegram. — *Robinson v. Weller*, S. O. Ga., Dec. 19, 1888; 8 S. E. Rep. 447.

31. CONTRACT—Condition—Parol Evidence. — Where a written agreement was signed and placed in the possession of a custodian, to be held until certain conditions were complied with, the failure of the conditions can be proved by parol testimony. — *Gregory v. Little John*, S. O. Neb., Jan. 8, 1889; 41 N. W. Rep. 253.

32. CONVERSION—Equity—Devise. — A devise of land, to be sold by the executors at such time and in such manner as they may deem best, the proceeds to be paid to a trustee for the benefit of certain persons named, constitutes an equitable conversion of the realty into personalty. — *Carr v. Branch*, Va. Ct. App., Jan. 10, 1889; 8 S. E. Rep. 476.

33. COPYRIGHT—Blank Legal Forms. — A blank form of application for a license to sell liquor at retail, composed of three blanks, — a "petition," a "bond and warrant," and a "justification," — all intended to be filled up and filed by the applicant, is included in the term "book," and is the subject of a valid copyright. — *Brightley v. Littleton*, U. S. C. C. (Penn.), Nov. 24, 1888; 87 Fed. Rep. 108.

34. CORPORATIONS—Purchase of Corporate Debts. — After an assignment by a corporation for the benefit of its creditors, and the sale of its entire assets, one who was its treasurer and a director may purchase debts owing by the corporation, and, having done so, is entitled to participate in the distribution of the fund. — *Appeal of Hammond*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 419.

35. CORPORATIONS — Directors. — Directors of corporations not liable for mismanagement to creditors of the corporations unless made so by some provision of statute. — *Frost Manuf. Co. v. Foster*, S. O. Iowa, Jan. 18, 1889; 41 N. W. Rep. 312.

36. COUNTIES—Costs—Criminal Law. — Under Code Iowa, § 4238, until arrest of the defendant the magistrate has no jurisdiction over him, and cannot bind the county for the mileage and attendance fees of witnesses subpoenaed before such arrest. — *Warnstaff v. Louisa County*, S. O. Iowa, Jan. 22, 1889; 41 N. W. Rep. 195.

37. COURTS — Jurisdiction — Enjoining Judgment of State. — Under Code Va. 1873, ch. 165, § 1, the circuit court of the city of Richmond alone has jurisdiction of any suit to enjoin or affect any judgment or decree in behalf of the commonwealth. — *Commonwealth v. Latham*, Va. Ct. App., Jan. 10, 1889; 8 S. E. Rep. 488.

38. CRIMINAL LAW—Indecent—Assault—Evidence. — In an action for damages for an indecent assault, a verdict may be rendered on the uncorroborated testimony of plaintiff, though a conviction could not be had thereon in a criminal prosecution for rape. — *Rogers v. Witsch*, S. O. Iowa, Jan. 19, 1889; 41 N. W. Rep. 214.

39. CRIMINAL LAW—Homicide — Intent. — Instructions that defendant is guilty of murder if he inflicted the wounds charged "with the intent formed in the mind at the time of the injuries to take deceased life," and that "an unlawful act coupled with malice, and resulting in death, will not of itself constitute murder in the first degree," but "the killing must have been intentional, after deliberation and premeditation," are correct as to the intent. — *Green v. State*, S. O. Ark., Jan. 19 1889; 10 S. W. Rep. 266.

40. CRIMINAL LAW—Offenses Against Postal Laws. —

An indictment under Rev. St. U. S. § 3893, charging that defendant did knowingly deposit for mailing and delivery certain obscene pictures, etc., is not open to the objection that it is not alleged that the defendant knew the character of that which he deposited.—*United States v. Clark*, U. S. C. O. (Minn.), Dec. 14, 1888; 87 Fed. Rep. 106.

41. CRIMINAL LAW—New Trial—Supreme Court.—The supreme court has no jurisdiction, as a court of equity, in an action instituted originally before it, to vacate a judgment and grant a new trial in a criminal prosecution.—*Paulson v. State*, S. O. Neb., Jan. 8, 1889; 41 N. W. Rep. 249.

42. CRIMINAL LAW—Forgery—Indictment—Allegation of Intent.—If the indictment be for falsely making and forging an obligation of the United States, it is sufficient to aver in the general language of the statute an intent to defraud, and the name of any person sought to be defrauded need not be mentioned, nor is any more specific averment necessary, such as might be required if the offense charged were that of passing or attempting to pass, uttering or publishing the forged security.—*United States v. Jolly*, U. S. D. C. (Tenn.), Nov. 15, 1888; 87 Fed. Rep. 108.

43. CRIMINAL LAW—Counterfeiting—Indictment.—It is not essential, in an indictment for counterfeiting United States compound-interest treasury notes, to aver that the alleged counterfeiters are in the likeness and similitude of genuine notes authorized by the act of congress under which they purport to have been issued.—*United States v. Owens*, U. S. C. O. (Tenn.), Dec. 12, 1888; 87 Fed. Rep. 112.

44. CRIMINAL LAW—Homicide—Manslaughter.—Under the facts held that the homicide was not reduced to manslaughter on account of sudden passion under Pen. Code Texas arts. 593, 596.—*Clare v. State*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 242.

45. CRIMINAL LAW—Fornication—Evidence.—A conviction for fornication will not be disturbed, where the female swore positively to the offense, and the defendant did not deny her testimony under oath, but attempted to show an *alibi*, in which he failed.—*Mitchell v. State*, S. O. Ga., Dec. 22, 1888; 8 S. E. Rep. 444.

46. CRIMINAL LAW—Character of Accused.—It is error to instruct the jury that they may consider the character of the accused only in case they are doubtful from the other evidence as to his guilt.—*Shropshire v. State*, S. O. Ga., Dec. 19, 1888; 8 S. E. Rep. 450.

47. CRIMINAL LAW—Instructions.—Where a criminal case is submitted to the jury without any instructions asked, and the jury, after being out four hours, ask for instructions on the question of reasonable doubt, and the court fully and correctly instructs the jury on that point, it is not error to exclude other instructions then offered by defendant, as coming too late.—*Williams v. Commonwealth*, Va. Ct. App., Jan. 10, 1889; 8 S. E. Rep. 470.

48. CRIMINAL LAW—Rape—Resistance.—To a requested instruction that, to constitute rape, force must be used such as may reasonably be supposed adequate to overcome the physical resistance of the woman, it is proper to add that the jury may take into consideration the making of outcries and giving alarm.—*Mingo v. Commonwealth*, S. O. Va., Jan. 17, 1889; 8 S. E. Rep. 474.

49. CRIMINAL LAW—Embezzlement—Evidence.—Where in a trial for embezzlement the defense is properly submitted by the court to the jury, their verdict will not be set aside on appeal, though the proof of defendant's guilt is weak.—*People v. Doane*, S. O. Cal., Dec. 24, 1888; 20 Pac. Rep. 85.

50. CRIMINAL LAW—Arraignment—Petty Larceny.—Defendant indicted for larceny in stealing a cow, of the value of \$15 may be tried without being arraigned.—*State v. Moore*, S. O. S. Car., Jan. 8, 1889; 8 S. E. Rep. 487.

51. CRIMINAL LAW—Murder—Evidence.—Evidence sufficient to show that dead newly born child was defendant's and to sustain conviction for its murder.—*Echols v. State*, S. O. Ga., Dec. 22, 8 S. E. Rep. 443.

52. CRIMINAL LAW—Homicide—Intent.—A charge that it constitutes murder if the accused conceived a design to assault deceased, and in consequence of such assault he died, whether deceased intended to kill him or not, is proper.—*State v. Alexander*, S. O. S. Car., Jan. 8, 1889; 8 S. E. Rep. 440.

53. CRIMINAL LAW—Homicide—Self-defense.—If defendant has received serious bodily injury, and believing that the danger of receiving additional bodily injury is threatening, shoots, the killing would be justifiable, in self-defense, under Pen. Code Tex. art. 570.—*Hugh v. State*, Tex. Ct. App., Dec. 8, 1888; 10 S. W. Rep. 238.

54. CRIMINAL LAW—Appeal—Record.—Where the record on appeal does not show any action taken on a demurrer to defendant's plea of former jeopardy, defendant will be held to have waived the plea.—*Johnson v. State*, Tex. Ct. App., Dec. 19, 1888; 10 S. W. Rep. 235.

55. CRIMINAL LAW—Arguments of Counsel.—In a prosecution for illicit cohabitation, statements by the prosecuting attorney, on the argument, that defendant's wife is heart-broken over his conduct, that he heard the evidence before the grand jury, and knows what people think about the case, are cause for reversal.—*Jackson v. State*, S. C. Ind., Jan. 5, 1889; 19 N. E. Rep. 330.

56. CRIMINAL LAW—Rape—Assault.—Under an indictment for rape, a conviction may be had of assault with intent to commit rape, under Mansf. Dig. Ark. § 2298.—*Pratt v. State*, S. O. Ark., Jan. 12, 1889; 10 S. W. Rep. 233.

57. CRIMINAL LAW—Forgery—Indictment.—An indictment charging the forgery of an indorsement upon a forged promissory note, which consisted in indorsing the name of the apparent maker upon a note payable to the maker's own order, charges an indictable offense.—*Commonwealth v. Welch*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 357.

58. CUSTOMS—Duties—Province of Jury.—The question whether a particular importation, on which a duty has been imposed, is properly included in a particular name of a substance as employed in the tariff laws, is for the jury, and not the court.—*Wellbacher v. Merritt*, U. S. C. O. (N. Y.), Oct. 29, 1888; 87 Fed. Rep. 85.

59. DAMAGES—Evidence.—The plaintiff in this case testified that she was a widow and had six children: *Held*, this testimony was immaterial and irrelevant to the issue, but, inasmuch as the damages are not in excess of what was fully warranted, it is not a reversible error.—*Moore v. City of Huntington*, W. Va. Ct. App., Dec. 15, 1888; 8 S. E. Rep. 512.

60. DEDICATION—Public Use.—Sufficiency of evidence showing dedication of land for public use.—*Atty. Gen. v. Tarr*, S. J. C. Mass., Jan. 3, 1889; 19 N. E. Rep. 358.

61. DEEDS—Description—Parol Evidence.—It may be shown by parol, in an action at law, that by "Mercy A. Andrews," described as grantee in a deed, was meant "Melissa A. Andrews," the person producing the deed, and to whom it was delivered on its execution.—*Andrews v. Dyer*, S. J. C. Me., Dec. 22, 1888; 16 Atl. Rep. 405.

62. DEED—Construction.—A purchaser of a life-estate at execution sale agreed with the debtor's wife to hold the same in trust for her and her children, and to convey to her and her children on reimbursement of expenses. After payment he conveyed by deed to the debtor and his wife, but the children were not named as parties in the deed: *Held*, that the wife held a life-estate in the life-estate of her husband, with remainder to her children.—*Merrivether v. Merrivether*, S. C. Ky., Dec. 18, 1888; 10 S. W. Rep. 272.

63. DEED—Sufficiency of Description.—A sheriff's deed, though in itself too definite in its description of land conveyed, but which refers for more specific description to a recorded deed to the same land, when supplemented by the testimony of a surveyor, is sufficient.—*Whight v. Lassiter*, S. O. Tex., Nov. 2, 1888; 10 S. W. Rep. 295.

64. **DEMURRER**—Appeal—Record.—When a demurrer to an answer is overruled, and plaintiff elects to stand on the ruling, he must so state, and have the fact shown of record.—*Seippel v. Blake*, S. C. Iowa, Jan. 17, 1889; 41 N. W. Rep. 199.

65. **DESCENT AND DISTRIBUTION**—Advancements.—Where certain heirs had received slaves as an advancement in the years 1859, and 1861, it was proper in December, in 1864, in allowing slaves, to an heir who had received none to allot them as of the value of 1861.—*West v. Jones*, Va. Ct. App., Jan. 10, 1889; 8 S. E. Rep. 468.

66. **DIVORCE**—Adultery.—*Held*, not in itself a cause for divorce for the wife to charge the husband with adultery.—*McAllister v. McAllister*, S. C. Tex., Nov. 9, 1888; 10 S. W. Rep. 294.

67. **EJECTMENT**—Foreclosure—Cumulative Remedy.—Plaintiff who has obtained a valid title to land by foreclosure, and is in possession of a portion of it, can bring ejectment for the balance, and is not compelled to rely on a writ of assistance.—*Trops v. Kerns*, S. C. Cal., Dec. 24, 1888; 20 Pac. Rep. 82.

68. **ELECTORS AND VOTERS**—Contest—Burden of Proof.—The burden of proof is on the plaintiff, when he seeks to introduce the ballots to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that they are the genuine ballots cast by the voters.—*Fenton v. Scott*, S. C. Oreg., Dec. 20, 1888; 20 Pac. Rep. 95.

69. **ELECTIONS AND VOTERS**—Contests.—Laws 16th Gen. Assem. Iowa, ch. 136, § 1, making women eligible to any school office in the State, is a repeal by implication of so much of Code Iowa, § 697, as requires, in election contests, the technical statement that the contestant is an elector.—*Brown v. Collum*, S. C. Iowa, Jan. 16, 1889; 41 N. W. Rep. 197.

70. **EMINENT DOMAIN**—Compensation—Evidence.—When, in proceedings to assess the damages for land taken for a public park, the city assessor testified as to the value of the land, the court, in cross-examination, properly excludes a question as to the price at which he had assessed neighboring lots at about the time the lot in controversy was taken.—*Thompson v. City of Boston*, S. J. C. Mass., Jan. 5, 1889; 19 N. E. Rep. 406.

71. **EMINENT DOMAIN**—Public Use.—Whether the use to which property sought to be taken under the exercise of eminent domain is public or private is a judicial question, subject to review by the appellate court.—*Pittsburg, etc. Co. v. Bemwood Iron-works*, W. Va. Ct. App., Dec. 15, 1888; 8 S. E. Rep. 458.

72. **EQUITY**—Disinheriting Only Child.—Where the legal capacity of a grantor to make a deed is shown, and there is no fraud or undue influence established, he has the legal right to make an unjust, unnatural, or unreasonable conveyance of his property.—*Hale v. Cole*, W. Va. Ct. App., Nov. 24, 1888; 8 S. E. Rep. 516.

73. **EQUITY**—Practice.—When a party's time to take testimony has expired without its being taken, the court may, on cause shown, grant relief by allowing it to be taken *nunc pro tunc*.—*Coon v. Abbott*, U. S. C. O. (N. Y.), Nov. 28, 1888; 87 Fed. Rep. 98.

74. **EQUITY**—Jurisdiction.—The jurisdiction of an equity court is not entirely ousted by the happening of an event, subsequent to the commencement of an action, which precludes the exercise of the power to grant an injunction.—*Hohorst v. Howard*, U. S. C. O. (N. Y.), Dec. 1, 1888; 87 Fed. Rep. 97.

75. **EQUITY**—Jurisdiction—Establishment of Wills.—Courts of equity in New York have no inherent jurisdiction of an action by a devisee in possession against the heir to establish the alleged will.—*Anderson v. Anderson*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 427.

76. **EQUITY**—Mistake—Deed.—Where aged and infirm parents, unable to read or write, and not understanding the English language, convey all their interest in the estate of a deceased son to two of his brothers, not understanding what they are doing, and not intending so to do, the conveyance will be set aside.—*Weller v. Weller*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 428.

77. **EQUITY**—Pleading—Amendment.—Under Comp. Laws N. M. § 1911, a complainant in a bill to set aside a deed, alleging it to have been made with intent to defraud creditors, should be allowed to file an amended bill charging that the deed was, though absolute in form, a mortgage in fact.—*Perera v. Callegos*, S. O. N. Mex., Jan. 1889; 20 Pac. Rep. 105.

78. **ERROR**—Writ of—Judgment—Supersedeas Bond.—Where, on a writ of error from the superior court to review a cause brought on a writ of error from a city court, the act authorizing writs of error from the city court to the superior court is held unconstitutional, it is not error for the city court to refuse to enter judgment on the supersedeas bond.—*Memmler v. Roberts*, S. C. Ga., Dec. 12, 1888; 8 S. E. Rep. 525.

79. **EVIDENCE AS TO VALUE**.—On the question of value of personal property, evidence that it has no market value, where it does not appear that such property was ever offered for sale, is immaterial.—*Doran v. Eaton*, S. O. Minn., Jan. 14, 1889; 41 N. W. Rep. 244.

80. **EXECUTION**—Sale—Mistake.—A mistake of a sheriff by which he sells land for more than the execution debt, interest, and costs, is waived by the execution debtor refusing to receive the excess, and directing its repayment to the purchaser.—*Thomas' Adm'r v. Thomas' Adm'r*, Ky. Ct. App., June 14, 1888; 10 S. W. Rep. 283.

81. **EXECUTION**—Chattel Mortgage—Equity.—Under Acts 21st Gen. Assem. Iowa, ch. 117, the creditor cannot so subject the property to his execution where the mortgage note is not due, although the mortgage authorizes the mortgagee to take possession of the property whenever he deems himself insecure.—*Deering v. Wheeler*; *Dotson v. Same*, S. C. Iowa, Jan. 17, 1889; 41 N. W. Rep. 198.

82. **EXECUTION**—Sale—Fraud.—Facts sufficient to raise presumption of unfairness and fraud on execution sale and burden is on purchaser to show that debtor had notice of sale.—*Wright v. Dick*, S. C. Ind., Jan. 3, 1889; 19 N. E. Rep. 806.

83. **FALSE IMPRISONMENT**—Evidence—Burden of Proof.—Under Pen. Code Cal. § 236, defining "false imprisonment" the imprisonment being proven, the law presumes it unlawful, and it is for the defendant to show that it was lawful.—*People v. McGrew*, S. C. Cal., Dec. 26, 1888; 20 Pac. Rep. 92.

84. **FEDERAL COURTS**—Corporations—Citizenship.—Act. U. S. March 3, 1867, authorizes an action against a railroad corporation only in the State by whose laws it was created.—*Fulk v. Delaware, L. & W. R. Co.*, U. S. C. O. (N. Y.), Nov. 28, 1888; 87 Fed. Rep. 65.

85. **FORCIBLE ENTRY AND DETAINER**—Evidence.—Where, in an action under Rev. St. Ind. § 5237, evidence shows that plaintiffs voluntarily gave defendant possession of the building, and that when possession was demanded he refused to surrender the premises, and peaceably retained possession, a verdict for defendant may be directed, as the essential element of force in retaining the possession is wholly wanting.—*Gipe v. Cummins*, S. C. Ind., Jan. 11, 1889; 19 N. E. Rep. 4.

86. **FRAUDS**—Statute of—Agreement—In Open Court.—An agreement made in open court, and acted on by the court, is not void under the statute of frauds, because not in writing.—*Savage v. Blanchard*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 396.

87. **FRAUDULENT CONVEYANCES**—Equity.—A creditor cannot sue in equity to set aside as fraudulent a conveyance by his debtor, or one made by a third party at his instance, of property belonging to the debtor, until after judgment against the debtor, and a return of *nulla bona*, or after a proceeding against the property by attachment.—*Kyle v. O'Neil*, Ky. Ct. App., Jan. 15, 1889; 10 S. W. Rep. 275.

88. **FRAUDULENT CONVEYANCES**.—Pub. St. Mass. ch. 151, § 8, does not alter the rule that property fraudulently conveyed by a person who has since deceased, and whose estate is being administered, can be reached

only by proceedings instituted by the executor or administrator, and that, if he refuses, he may be removed, and another appointed. — *Putney v. Fletcher*, S. J. O. Mass., Jan. 2, 1889; 19 N. E. Rep. 870.

89. GARNISHMENT—Foreign Corporation. — § 8145, How. Stat. Mich., providing for the commencement of suits against foreign corporations, does not apply to a garnishment suit. — *Milwaukee Bridge & Iron Works v. Brevoort*, S. C. Mich., Jan. 8, 1889; 41 N. W. Rep. 215.

90. GARNISHMENT—Judgment. — There is no law for serving a copy of the summons of garnishment, making a return of service on the original, filing it in the office of the clerk of the superior court, and having that court render judgment against the garnishee for failing to answer. — *West v. Harvey*, S. C. Ga., Dec. 22, 1888; 8 S. Rep. 450.

91. GARNISHMENT—Duty of Garnishee to Defend. — Where plaintiff had knowledge of the pendency of a suit against him in another State, in which defendant was garnished as his debtor, and defendant's attorneys appeared for him and filed his affidavit of exemption, it was not defendant's duty to defend the suit. — *Chicago, etc. E. Co. v. Meyer*, S. C. Ind., Jan. 5, 1889; 19 N. E. Rep. 520.

92. GRAND JURY—Selection. — Irregularities in selection of grand jury: *Held*, not sufficient cause for quashing indictment found by them. — *Crawford v. State*, S. C. Ga., Dec. 22, 1888; 8 S. E. Rep. 445.

93. HOMESTEAD—Abandonment—Evidence. — Testimony that a homestead was rented for a year, on account of the ill-health of the wife, that there was no intention to leave the State, but always an intention to return to the homestead at the expiration of the lease, is sufficient, though contradicted as to intention, to sustain a finding that there was no abandonment. — *Carver Lumber Co. v. Clay*, S. C. Tex., Nov. 9, 1888; 10 S. W. Rep. 298.

94. HUSBAND AND WIFE—Antenuptial Debts of Wife. — Under Gen. Stat. Ky. ch. 52, art. 2, § 4, a husband is liable for his wife's antenuptial debts to the extent of property received by him from her, though such property before and after the marriage was exempt from seizure. — *Clark v. Miller*, Ky. Ct. App., Jan. 10, 1889; 10 S. W. Rep. 277.

95. HUSBAND AND WIFE—Antenuptial Agreement—Construction. — An antenuptial agreement in writing between parties owning real and personal property, the wife having a life estate in land, reciting the contemplated marriage, and stipulating that the survivor should take no interest in the estate of the deceased consort by descent or otherwise, but the estate should "descend to the heirs the same as it would if they had not married," bars the widow from claiming any interest in her deceased husband's estate, though under the law of Indiana the wife is the heir, in a limited sense, of her husband dying without issue. — *McNutt v. McNutt*, S. C. Ind., Dec. 11, 1888; 19 N. E. Rep. 115.

96. INJUNCTION—Contract—Adequate Remedy at Law. — The breach of a contract by which defendant agreed to have her whole crop of a gar for two years refined at plaintiff's refinery may be adequately compensated by damages at law, and equity will not enjoin a violation of the agreement. — *Burdon, etc. Co. v. Leberich*, U. S. O. O. (La.), Nov. 15, 1888; 37 Fed. Rep. 67.

97. INJURY—Liability of State—Dedication. — Where there was no legal dedication of a highway, and use of same was only by sufferance, the State cannot be held liable for injury to a person thereon who had knowledge of its dangers. — *Donohue v. State*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 419.

98. INSURANCE—Assessment Life Insurance Companies—Deposit of Bonds. — Under act Va., May 18, 1887, only such assessment insurance companies are contemplated as raise the money to pay a loss caused by the death of a member by an assessment made after the death of such member upon those who survive him. — *Mutual Ben. Life Co. v. Mayre*, S. O. App. Va., Jan. 17, 1888; 8 S. E. Rep. 481.

99. INSURANCE—Mutual Companies—Policy Holder. — When a person takes a policy in a mutual insurance company, he becomes a member, with the right to vote for directors; and though the directors are extravagant, incompetent, or careless of their trust, they are none the less his representatives. — *Koehler v. Beeber*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 854.

100. INTEREST—Unconscionable Rate—Enforcement. — Under Pub. Stat. Mass., ch. 77, § 3, enforcement of a note made before the passage of Stat. 1888, ch. 388, will not be refused because the stipulated interest is unconscionable, there being no fraud. — *Lamprey v. Mason*, S. J. O. Mass., Jan. 3, 1889; 19 N. E. Rep. 850.

101. INTOXICATING LIQUORS—Nuisance. — Indictment, under Rev. Stat. Me., ch. 17, § 12, need not allege that the respondent knew the place to be a common nuisance. — *State v. Ryan*, S. J. O. Me., Dec. 23, 1888; 16 Atl. Rep. 406.

102. INTOXICATING LIQUORS—Illegal Sales. — An instruction that the fact that officials allowed defendant to carry on the business of a liquor seller and collected money from him for the privilege was no justification, is not erroneous under the evidence previously adduced. — *Hendon v. State*, S. C. Ark., Jan. 19, 1889; 10 S. W. Rep. 265.

103. INTOXICATING LIQUORS—Illegal Sale—Servant. — Where a master intrusts to a servant the management and control of his business of selling liquor, and he carries it on in the absence of his employer, both may be convicted of keeping and maintaining the tenement. — *Commonwealth v. Merriam*, S. J. O. Mass., Jan. 10, 1889; 19 N. E. Rep. 405.

104. INTOXICATING LIQUORS—Illegal Sale—Indictment. — On an indictment for selling liquor to William Langford, Jr., a minor, the variance is not fatal, though the evidence shows that the sale was to William H. Langford. — *Ross v. State*, S. C. Ind., Jan. 10, 1889; 19 N. E. Rep. 451.

105. INTOXICATING LIQUORS—Illegal Sales—License. — Under Acts Ark. 1883, p. 193, providing that one who sells liquor in territory where sales are prohibited may be convicted for a violation of the license law or of the local option law, the penalties of the license act are in force in prohibition districts. — *Massie v. State*, S. O. Ark., Jan. 19, 1889; 10 S. W. Rep. 257.

106. INTOXICATING LIQUORS—Illegal Sales—Lien. — The lien created by § 18, ch. 35, Comp. Laws 1886, in favor of the State for the amount of fines and costs adjudged against a person for selling intoxicating liquor contrary to law, on premises leased to the convicted person, attaches to the leased premises, and operates upon them from the date of the conviction of the tenant. — *Snyder v. State*, S. O. Kan., Jan. 5, 1889; 20 Pac. Rep. 122.

107. INTOXICATING LIQUORS—Evidence. — Merchant without license selling brandy fruit was properly convicted of selling liquor without license. — *Musick v. State*, S. C. Ark., Jan. 12, 1889; 10 S. W. Rep. 235.

108. JUDGE—Special Judge—Appointment. — An appointment without writing, as required by law, of an attorney to try a case on the incompetency of the judge, confers no authority, when seasonably objected to. — *Greenwood v. State*, S. O. Ind., Jan. 8, 1889; 19 N. E. Rep. 538.

109. JUDGMENT—Default—Vacation. — Facts considered and held not to justify an order opening a judgment (reversed on default) and allowing an answer on the ground that the judgment was recovered through defendant's mistake, inadvertence, or excusable neglect. — *Weymouth v. Gregg*, S. O. Minn., Jan. 14, 1889; 41 N. W. Rep. 243.

110. JUDGMENT—Assignment for Benefit of Creditors. — The appellant recovered judgment against the insolvent, Dec. 9, 1887. Feb. 16, 1888, the insolvent made an assignment: *Held*, that the assignment did not affect the judgment, nor its lien on real estate. — *In re Church Mfg. Co.*, S. O. Minn., Jan. 14, 1889; 41 N. W. Rep. 241.

111. JUDGMENT—Foreclosure—Parties. — An equity of redemption owned by an assignee in bankruptcy, as such, is not barred by a foreclosure in which he is made

a party, and is served and appears in his individual name only, and in which his official character is in no-wise mentioned.—*London v. Townsend*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 424.

112. JUDGMENT—Lien.—Under Rev. Stat. Ind., § 608, the lien of the judgment, a transcript of which is filed in another county, is in force for 10 years after its rendition, and not 10 years from the time of filing the transcript.—*Brown v. Wuskoff et al.*, S. C. Ind., Jan. 10, 1889; 19 N. E. Rep. 463.

113. JUDGMENT—Review.—An action to review a judgment must be brought in the court in which the original action was brought, and prosecuted to judgment.—*Jones v. Ahrens*, S. C. Ind., Jan. 9, 1889; 19 N. E. Rep. 334.

114. JUDICIAL SALES—Land Mortgaged by Husband—Abandoned Wife.—The husband of plaintiff's ancestor gave a mortgage in which she did not join, and the land was sold to defendant under a foreclosure suit to which she was not a party. The husband deserted her, and was living in adultery at her death: *Held*, under Rev. Stat. Ind., §§ 2497, 2508, that plaintiff could recover her interest in the land.—*Bradley v. Thixton*, S. C. Ind., Jan. 9, 1889; 19 N. E. Rep. 335.

115. JURY—Oath.—Mere statements in the record are not to be regarded as attempts to give the form of the oath administered, and do not show that the jury were sworn "to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and the evidence."—*Baldwin v. State of Kansas*, U. S. S. C., Jan. 14, 1889; 9 S. C. Rep. 193.

116. LIMITATION OF ACTIONS—Taxation.—Where title to the land is in dispute the statute of limitation did not begin to run until date of decree quieting title.—*Wood v. Curran*, S. C. Iowa, Jan. 21, 1889; 41 N. W. Rep. 214.

117. LIMITATION OF ACTIONS—Mortgage.—As to the running of statute of limitations in favor of a mortgagee guilty of fraud.—*Jacobs v. Snyder*, S. C. Iowa, Jan. 18, 1889; 41 N. W. Rep. 207.

118. LIMITATION OF ACTIONS—Judgment Liens—Exceptions.—To avoid the bar of the statute of limitations in respect to the right to enforce the lien of a judgment, the creditor must bring his case within one of the exceptions declared in the statute, and he cannot, by parol evidence or otherwise, avoid such bar upon any ground not embraced in the statute.—*Relley v. Clark, W. Va.*, Ct. App., Nov. 24, 1888; 8 S. E. Rep. 509.

119. MANDAMUS—Abatement.—Expiration of term of office of county clerk and election of successor does not abate application for mandamus requiring him to certify certain collection of fees.—*State v. Cole*, S. C. Neb., Jan. 3, 1889; 41 N. W. Rep. 245.

120. MASTER AND SERVANT—Negligence.—Where plaintiff lawfully on construction train was injured by car starting with a jerk: *Held*, proper to charge that defendant was liable if the injury was caused by the negligence of its servants, although there may have been negligence on the part of plaintiff, unless she could, by the exercise of ordinary care, have avoided the consequences of defendant's negligence.—*Brown v. Sullivan*, S. C. Tex., Jan. 7, 1889; 10 S. W. Rep. 286.

121. MASTER AND SERVANT—Negligence.—Question of contributory negligence of servant injured by machinery with which he was fully acquainted.—*Belte v. Detroit Leather Co.*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 216.

122. MASTER AND SERVANT—Negligence.—Where plaintiff, has worked six months on a machine similar to one upon which he was injured, defendant was not negligent in not instructing plaintiff of the danger.—*Crowley v. Pacific Mills*, S. J. C. Mass., Jan. 2, 1889; 19 Pac. Rep. 344.

123. MECHANIC'S LIEN—Notice—Description.—Sufficiency of description of property in notice required by the mechanic's lien act Mass. ch. 191, §§ 6, 8.—*Cleaverly v. Mosely*, S. C. Mass., Jan. 3, 1889; 19 N. E. Rep. 394.

124. MECHANIC'S LIEN—Obligation of Contract.—Pub. Acts Mich. 1887, No. 229, does not give a lien to laborers for work done, after its passage, on shingles sawed under a contract, made before its passage.—*Bourgette v. Williams*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 229.

125. MINES AND MINING—Patents—Fraudulent Representations.—The United States may maintain a bill to cancel a patent for mining lands obtained by fraudulent representations as to the character of the land and the performance of the required work.—*United States v. Iron Silver Min. Co.*, U. S. S. C., Dec. 17, 1888; 9 S. C. Rep. 196.

126. MINES AND MINING—Location—Recording.—A location notice of a mining claim, when recorded, is *prima facie* evidence of the necessary facts set forth.—*Jantzen v. Arizona Cooper Co.*, S. C. Ara., Jan. 19, 1889; 20 Pac. Rep. 93.

127. MORTGAGE—Foreclosure—Decree.—A decree in proceeding for the sale of land under a mortgage, ordering the sale of certain real and leasehold estate, is not void because it also orders the sale of personal property.—*Bernstein v. Hobelman*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 374.

128. MUNICIPAL CORPORATIONS—Powers.—That part of the ordinance of the city of Minneapolis, which imposes a penalty upon "any person who commits any act of lewdness or indecency within the limits of said city," is void, because it is in excess of the power vested in the city council by the city charter.—*State v. Hammond*, S. C. Minn., Jan. 14, 1889; 41 N. W. Rep. 243.

129. MUNICIPAL CORPORATIONS—Public Work.—Construction of validity of ordinance under laws N. Y. 1878, § 91, providing for expenditures in public work in New York city.—*Phelps v. City of New York*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 408.

130. MUNICIPAL CORPORATIONS—Defective Sewers.—Though a municipal corporation cannot be compelled to exercise the powers conferred by its charter to grade streets and construct sewers, if it undertakes to make such improvements it is liable for any negligence or unskillfulness in the construction of the work.—*Town of Frostburg v. Hitchins*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 360.

131. MUNICIPAL CORPORATIONS—Constitutional Law.—Act. Pa. May 24, 1887, dividing the cities of the State into seven classes, for the purposes of government, and conferring substantially the same powers on the fourth to the seventh classes, is not founded on any manifest peculiarities in the latter classes, requiring legislation for each that would be useless or detrimental to the others; and is therefore in violation of Const. Pa. art. 3, § 7.—*Appeal of Ayars*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 366.

132. MUNICIPAL CORPORATIONS—Municipal Liens.—Act. Pa. May 24, 1887, dividing the cities of the State into seven classes, etc., having been declared unconstitutional (*Appeal of Ayars*), a municipal lien entered and filed solely in accordance therewith is void.—*Berghaus v. City of Harrisburg*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 365.

133. MUNICIPAL CORPORATIONS—*Certiorari* will lie to review the action of the district court in confirming special assessment by the board of public works of Duluth to defray expenses of local improvement.—*Sherwood v. Judge*, S. C. Minn., Jan. 11, 1889; 41 N. W. Rep. 234.

134. MUNICIPAL CORPORATIONS—Street Assessments.—Where the board of public works of the city of St. Paul makes an assessment of benefits and damages to property resulting from a change of grade of a street, finding the benefits greater than the damages, and the property owner voluntarily pays the balance or difference collectible from him, he thereby acquiesces in the assessment.—*State v. District Court*, S. C. Minn., Jan. 11, 1889; 41 N. W. Rep. 235.

135. MUNICIPAL CORPORATIONS—Police Officers—Removal.—Under a city charter, providing that the

mayor and aldermen shall have power to appoint police officers, and to remove them at pleasure, the power of removal is not confined to officers nominated by the mayor exercising it, but extends to officers nominated by his predecessors. — *Williams v. City of Gloucester*, S. J. O. Mass., Jan. 8, 1889; 19 N. E. Rep. 848.

135. NEGLIGENCE—Province of Jury. — In an action for injuries received from a board thrown back from a circular saw operated by one of defendants, it is error to submit the case to the jury where plaintiff does not show how it happened that the board was thrown back. — *Fraser v. Lloyd*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 418.

137. NEGLIGENCE—Railroad Company. — Question of negligence where party was killed at crossing where smoke over the track clouded the sight and where evidence was conflicting whether signal was sounded by defendant. — *Heaney v. Long Island, Ry. Co.*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 422.

138. NEGLIGENCE — Snow from Roofs. — One who constructs a building so near to a street that ice or snow will fall from it in the ordinary course of things, endangering travelers who are rightfully in the highway, is liable for injuries so received, although the building is of no unusual construction. — *Smethurst v. Proprietors Ind. Cong. Church*, S. J. O. Mass., Jan. 3, 1889; 19 N. E. Rep. 387.

139. NEGLIGENCE — Joint Tortfeasors. — Where mail carriers unnecessarily obstruct the platform of a railway station causing injury to one who recovers therefor, in action against the railway company the latter is not a joint wrong-doer so far as to prevent recovery from the mail carrier of the amount paid. — *Old Colony Railway v. Stevens*, S. J. O. Mass., Jan. 4, 1889; 19 N. E. Rep. 372.

140. NEGLIGENCE—Evidence. — Where the evidence is conflicting as to whether the train stopped sufficiently long to enable plaintiff, an old woman, to alight, and whether she used proper diligence in alighting, an order refusing a new trial will not be reversed. — *Atlanta & W. P. R. Co. v. Smith*, S. O. Ga., Dec. 22, 1888; 8 S. E. Rep. 446.

141. NEGLIGENCE—Passenger—Injury. — Question of negligence where passenger was killed in going from car to car. — *State v. Me. Cent. Ry.*, S. J. O. Me., Dec. 10, 1888; 16 Atl. Rep. 368.

142. NEGLIGENCE — Passenger. — A passenger who gets off on the track side, instead of getting off on the side where passengers usually alight, is properly non-suited, in an action for injuries received by a passing train. — *Morgan v. Camden & A. R. Co.*, S. C. Penn., Jan. 21, 1889; 16 Atl. Rep. 353.

143. NEGLIGENCE—Injury. — Evidence not sufficient to show negligence on part of defendant railroad company. — *Ogden v. Penn. R. Co.*, S. C. Penn., Jan. 21, 1889; 16 Atl. Rep. 353.

144. NEGLIGENCE — Driving at Immoderate Speed — Evidence. — In an action to recover damages for injuries inflicted by the defendant in negligently riding his horse upon plaintiff, evidence that there was more travel upon that street than upon any other street in the city was competent. — *Stringer v. Frost*, S. C. Ind., Jan. 8, 1889; 19 N. E. Rep. 331.

145. NEGOTIABLE INSTRUMENT—Conversion. — Payee of note not liable on his indorsement of same where he left it with plaintiff who wanted to look up the solvency of the maker and converted same to his own use. — *Haas v. Sackett*, S. C. Minn., Jan. 18, 1889; 41 N. W. Rep. 237.

146. NEGOTIABLE INSTRUMENTS—Payment — Renewal. — Where a joint note is executed for a debt, and at its maturity a partial payment is made, and a new note given for the balance, which is invalid as to one of the makers on account of a material alteration, a recovery can be had against the latter on the original cause of action, the old note being produced at the trial. — *Owen v. Hall*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 376.

147. NEGOTIABLE INSTRUMENT—Indorsement—Notice.

— Sufficiency of notice of non-payment of promissory note to bind indorser. — *Wachusett Nat. Bank v. Fairbrother*, S. J. O. Mass., Jan. 2, 1889; 19 N. E. Rep. 345.

148. NOVATION — Contract. — Question under the facts whether plaintiff's contract was with board of education or carpenter employed by them, through whom plaintiff was required to draw his pay. — *Denn v. Board of Education*, S. O. Mich., Jan. 11, 1889; 41 N. W. Rep. 218.

149. NUISANCE—Action for Damages—Parties. — It is not necessary to the right of action given by St. Mass. 1887, ch. 248, for maliciously erecting a fence more than six feet high for the purpose of annoyance, that the owner should be in actual occupation. — *Smith v. Morse*, S. J. O. Mass., Jan. 5, 1889; 19 N. E. Rep. 838.

150. PARTNERSHIP—Minor Partner — Dissolution. — A copartnership of which a minor is a member, and to the capital of which he has contributed, may, after its dissolution, upon the petition of the adult member be declared insolvent, and a warrant may be issued against the firm's property. — *Pelletier v. Couture*, S. J. O. Mass., Jan. 3, 1889; 19 N. E. Rep. 400.

151. PARTNERSHIP—Contracts. — If a written contract, not required to be under seal, within the scope of the partnership business, be executed under seal by one partner in behalf of the firm, the seal may be rejected as surplusage, and the instrument treated as the parol contract. — *Sterling v. Bock*, S. O. Minn., Jan. 11, 1889; 41 N. W. Rep. 238.

152. PENAL ACTIONS — Fraudulent Tax-list. — One who gives to the assessor a false and fraudulent tax-list is liable to the penalty prescribed by Rev. St. Ind. 1881, § 6839, and must be prosecuted in a penal action, in the mode prescribed therein, and not by indictment. — *Durham v. State*, S. O. Ind., Jan. 10, 1889; 19 N. E. Rep. 329.

153. PLEADING—Purchase — Public Lands. — Sufficiency of averment under Pol. Code Cal. § 3498, in action to determine the right to purchase land from the State. — *Riddell v. Mullen*, S. O. Cal., Dec. 26, 1888; 20 Pac. Rep. 91.

154. PLEADING—Complaint. — Held, that bill alleging execution of contract for postponement of the completion of contract showed no such postponement when plaintiff's name was not signed to the writing though it bore the word accepted and where there was no averment of acceptance. — *Wiley v. San Pedro, etc. Co.*, S. C. N. Mex., Jan. 1888; 20 Pac. Rep. 115.

155. POOR DEBTORS — Examination. — Under Rev. St. Me. ch. 118, § 28, a justice who has heard and adjudicated upon one application is not disqualified to hear a second application, under the same execution. — *McGivern v. Staples*, S. J. O. Me., Dec. 22, 1888; 16 Atl. Rep. 404.

156. POWER OF ATTORNEY — Construction. — Held, that the wording of power of attorney was not ambiguous so as to permit introduction of parol evidence. — *Redd v. Commonwealth*, S. C. Va., Jan. 17, 1889; 8 S. E. Rep. 490.

157. PRACTICE IN CIVIL CASES—Summons. — Under the statute of Oregon: Held, that the service was invalid, and the decree of sale thereon null and void, because the return did not show that the service of the summons was made at the defendant's usual place of abode in the State, in whatever county it might be, but only at his usual place of abode in Linn county. — *Swift v. Meyers*, U. S. C. O. (Oreg.), Dec. 24, 1888; 37 Fed. Rep. 37.

158. PRACTICE IN CIVIL CASES—Findings—Appeal. — Under Code Iowa, § 2743, findings of fact and law must be made prior to or contemporaneous with the judgment, and it is irregular for the court to enter judgment and file his findings at a subsequent day of the term. — *Hodges v. Gochyman*, S. O. Iowa, Jan. 16, 1889; 41 N. W. Rep. 195.

159. PRINCIPAL AND SURETY — Indemnity. — The sureties on a bond for the delivery of property levied on cannot be required to surrender to the judgment creditor the proceeds of property placed in their hands

to indemnify them, until it is shown that they have been relieved from liability. — *Cheatham v. Seawright*, S. O. S. Car., Jan. 8, 1899; 8 S. E. Rep. 526.

160. PUBLIC LANDS—Land Grants—Reservations.—On bill to set aside the patent to even-numbered sections of land granted to defendant railway company, the objection that the sections were not the subject of grant because of the New York Indian reservation under the treaty of 1838 (7 St. U. S. 550) will not be considered. — *United States v. Missouri, K. & T. Ry. Co.*, U. S. C. O. (Kan.), Oct. 31, 1898; 87 Fed. Rep. 68.

161. RAILROAD COMPANIES—Consolidation—Taxation.—Act. Ky. Feb. 22, 1871, incorporating the K. O. R. Co., and investing it with "all the powers, privileges, rights, immunities, and franchises" of the O & L. R. Co., whose road it had bought at judicial sale, did not grant it the commutation of taxation conferred by act on the O & L. R. Co., nor was that right transferred by the judicial sale. — *Kentucky Cent. R. Co. v. Commonwealth*, Ky. Ct. App., Dec. 18, 1898; 10 S. W. Rep. 268.

162. RAILROAD COMPANIES—Grade Crossings—Compensation.—Under Rev. St. Ind. 1881, granting to a railroad company power "to cross, intersect, join, and unite its railroad with any other railroad before constructed," and providing that, "if the two corporations cannot agree upon the amount of compensation, or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners," etc., the petition must allege that an effort has been made to agree upon the amount of compensation, the points, and the manner of crossing. — *Lake Shore, etc. Co. v. Cincinnati, etc. Ry. Co.*, S. O. Ind. Dec. 19, 1898; 19 N. E. Rep. 440.

163. RAILROAD COMPANIES—Transfer of Franchise.—Under Act Cong. March 3, 1871, the T. & P. Ry., has no authority to transfer its franchise to another company and retain merely an easement over the right of way. — *South Pac. Ry. Co. v. Esquivel*, S. O. N. Mex., Jan. 1899; 20 Pac. Rep. 119.

164. RAILROAD COMPANIES—Bonds—Liabilities to Company Creditors.—The undertaking of mortgage bondholders of a corporation who subscribe to its debenture bonds, agreeing to pay specified portions of their subscription as called for, is in effect an agreement to loan the corporation money, and receive the bonds as security, and is not analogous to an unpaid subscription to capital stock. — *Pettibone v. Toledo, etc. Co.*, S. J. O. Mass., Jan. 2, 1899; 19 N. E. Rep. 357.

165. RAILROAD COMPANIES—Recital in Bond.—A recital in a county bond, "authorized by an act entitled 'An act to incorporate the Mo. & Miss. R. R. Company, approved Feb. 20, 1865,'" does not estop the bondholder from showing that the bond was in fact issued under a general law. — *Ninth Nat. Bank v. Knox County*, U. S. C. O. (Mo.), Sept. 11, 1898; 87 Fed. Rep. 76.

166. REAL ESTATE AGENTS—Pleading.—In an action by a real estate agent, for his commission on a sale, a denial, in the answer, of the agreement authorizing him to sell, will not admit proof that while making the sale he was also acting as agent for the buyer in making the purchase. — *MacFee v. Horan*, S. O. Minn., Jan. 14, 1899; 41 N. W. Rep. 239.

167. RESCISSION OF CONTRACT—False Representations—Value.—Though relied upon, false representations as to value of land is no ground for rescission, in the absence of actual fraud or deceit. — *Lucas v. Crippen*, S. O. Iowa, Jan. 17, 1899; 41 N. W. Rep. 205.

168. REFERENCE—Practice.—Where a referee fails to give notice to the opposing parties of the time and place of announcing his findings of fact and law, as required by How. St. Mich. § 782, the court may on report being made, refer the case back for the purpose of separately stating the conclusions of law and fact, and of giving an opportunity to settle a bill of exceptions. — *Russell v. Mofat*, S. O. Mich., Jan. 11, 1899; 41 N. W. Rep. 224.

169. RELIGIOUS SOCIETIES—Lease—Trusts.—Contributions were taken up and land was bought, and a

meeting-house built, a church formed, and the proprietors formed a corporation under St. Mass., 1840, ch. 63 and the committee holding the land conveyed to the corporation by a simple deed, expressing no trust: Held, that a bill would not lie by persons suing in behalf of the church, to set aside a lease by the corporation of the meeting-house, no trust arising in favor of the church against the corporation. — *Warner v. Bowdoin Square Baptist Soc.*, S. J. O. Mass., Jan. 5, 1899; 19 N. E. Rep. 406.

170. REFLEVIN—Possessory Warrant.—Under Code Ga. § 4082, one who lends a chattel without any fraudulent misrepresentation by the borrower, is not entitled to a possessory warrant for its recovery. — *Odum v. Trantham*, S. O. Ga., Dec. 22, 1898; 8 S. E. Rep. 442.

171. RES ADJUDICATA—Adverse Possession.—Where, in an action to recover possession of real property, the complaint tenders an issue on the title of the plaintiff, basing his right to the possession upon such title, a judgment in his favor upon the merits is conclusive upon the question of title at that time between the parties and their privies. — *Eastle v. Murray*, S. O. Minn., Jan. 18, 1899; 41 N. W. Rep. 238.

172. SALES—Action for Price—Payment by Void Note.—Defendant purchased goods of plaintiffs in the name of a corporation, which in fact had no existence, giving therefore what purported to be the note of the corporation: Held, that on discovery of the non-existence of the supposed corporation, plaintiffs could treat the note as a nullity, and sue defendant for goods sold. — *Montgomery v. Forbes*, S. J. O. Mass., Jan. 2, 1899; 19 N. E. Rep. 342.

173. SET-OFF—Counties—States.—On an application for a *mandamus* to compel payment by a county of the amount due the State, a claim by it against the State, which has not been submitted to the State's auditing officers, cannot be set-off. — *Apkin v. Board of Supervisors*, S. O. Mich., Jan. 11, 1899; 41 N. W. Rep. 323.

174. SPECIFIC PERFORMANCE—Evidence.—Specific performance of an oral agreement to convey lands cannot be decreed on a finding of fact that the trial court is unable to determine from the evidence what the terms of the agreement are. — *Burke v. Ray*, S. O. Minn., Jan. 14, 1899; 41 N. W. Rep. 240.

175. SPECIFIC PERFORMANCE.—It is no defense to a bill for the specific performance of defendant's agreement to give a quitclaim deed for a strip of land that the public are using it as a highway, where it appears that the record title is in defendant, and that no deed or written dedication of the same has been made. — *Canham v. Mooney*, S. O. Mich., Jan. 11, 1899; 41 N. W. Rep. 223.

176. STATUTES—Validity—Removal of Causes.—The act passed March 19, 1887 (84 Laws, 139), amending § 550, Rev. St., was duly adopted by the general assembly, and is a valid law. — *State v. Rabbitts*, S. C. Ohio, Jan. 8, 1899; 19 N. E. Rep. 437.

177. STREET RAILROADS—Franchises—Taxation.—The acts N. Y., 1860, ch. 512, and act 1866, ch. 893, create different franchises, and defendant, to avail itself of them, must pay the license fee prescribed by the first act, and also the percentage called for by the second. — *Mayor, etc. Co. v. Dry-Dock, etc. Co.*, N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 420.

178. SWAMP LANDS—Contracts—Consideration.—Acts 5th Gen. Assem. Iowa, ch. 110, § 1, does not render invalid a contract made by a county with attorneys, by which, in return for services rendered by the latter in securing and perfecting the title to swamp lands, it was stipulated that a portion of the lands should be conveyed to them when the title to the whole should be acquired. — *Emmet County v. Allen*, S. O. Iowa, Jan. 17, 1899; 41 N. W. Rep. 201.

179. TAXATION—State Lands—Payment.—Land set apart by the State for the contractor, as payment for the construction of the new capitol of Texas, to be conveyed to him from time to time when earned in the progress of the work, is not subject to taxation unde-

Rev. St. Tex. art. 4601. — *Taylor v. Robinson*, S. O. Tex., Dec. 31, 1888; 10 S. W. Rep. 245.

180. TOWNS—Debts—Taxation. — Construction of Rev. St. Ind. 1881, §§ 6006, 6007, restricting the incurring of debts by trustees of township.—*Jefferson School Tp. v. Litton*, S. O. Ind., Jan. 5, 1889; 19 N. E. Rep. 323.

181. TRESPASS—Removal of Crops by Tenant. — Where, by contract between landlord and cropper, each was to have one-half of the crop, but the whole was to be the property of the former, and under his control, until he received both his half and pay for all his advances, it was not a criminal trespass by the cropper, while the cotton was in his possession and before the expiration of the year, to remove some of it from the premises and sell it.—*Padgett v. State*, S. O. Ga., Dec. 22, 1888; 8 S. E. Rep. 445.

182. TRESPASS. — Entry though peaceable and for the purpose of seizure under chattel mortgage but followed by some damage is no justification for trespass on real estate.—*Concanon v. Boynton*, S. O. Iowa, Jan. 19, 1889; 41 N. W. Rep. 213.

183. TRESPASS TO TRY TITLE—Evidence. — Upon trial of an action for land patented by virtue of a certificate issued to one S K, the theory of the defense being that the plaintiffs are heirs of an S K other than the one to whom the certificate was in fact granted, it is error to refuse to charge that the legal title to the land was vested in the person to whom the certificate was in fact granted; that, if the jury believe from the evidence that there were two men of that name, they should determine to which one the certificate was granted. — *Groening v. Keel*, S. O. Tex., Dec. 4, 1888; 10 S. W. Rep. 255.

§ 184. TRESPASS TO TRY TITLE—Pleading. — Plaintiff in trespass to try title can only recover on his superior title existing at the institution of the action. — *Collins v. Ballow*, S. O. Tex., Dec. 18, 1888; 10 S. W. Rep. 248.

185. TROVER AND CONVERSION—Damages—Evidence. — The value of four bales of cotton at Rome, Ga., cannot be inferred from the value of six bales (including these four) at Cincinnati, Ohio, nor from the value of the other two bales at Rome; it not appearing that these two were of like weight and quality as the four in question.—*Stimpson v. Cincinnati, N. O. & T. P. Ry. Co.*, S. O. Ga., Dec. 19, 1888; 8 S. E. Rep. 524.

186. TROVER AND CONVERSION—Removal of Goods. — Where one hires a room in a house, and puts goods therein, leaving the room unfastened, a job teamster is not liable for conversion, who in good faith removes the goods under the direction of the owner of the house, and delivers them to the latter.—*Gurley v. Armistead*, S. J. O. Mass., Jan. 3, 1889; 19 N. E. Rep. 389.

187. TROVER AND CONVERSION—Lost Goods. — Liability of finder of lost goods, deposited in the earth for safe keeping, for trover and conversion. — *Sovern v. Yoran*, S. O. Oreg., May 7, 1888; 20 Pac. Rep. 100.

188. TROVER AND CONVERSION—Note—Broker. — Broker who refuses to return note sent him for sale or pay draft for it, is liable for conversion. — *Security Bank v. Fogg*, S. J. O. Mass., Jan. 3, 1889; 19 N. E. Rep. 378.

189. TRUST—Enforcement at Law. — An action at law can be brought to recover money held under a parol trust, when the trust has so far been performed that nothing remains to be done by the trustee but to distribute the money. — *Chase v. Perley*, S. J. O. Mass., Jan. 3, 1889; 19 N. E. Rep. 398.

190. TRUSTS—Deeds—Construction. — Property was conveyed in trust for the separate use of a married woman during her life, and after her death for the support of her husband, remainder over on his death: *Held*, that the trust was personal, and was extinguished by a sale of the husband's interest in insolvency proceedings after the wife's death. — *Thompson v. Ballard*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 378.

191. USURY. — *Held*, under the evidence that the contract had none of the element of usury. — *Myers v. Rolter*, S. O. Va., Jan. 10, 1889; 8 S. S. E. Rep. 483.

192. USURY—Burden of Proof. — Where one enters into a contract, in consideration of a loan, to deliver

certain cotton, to be sold on commission, which contract is usurious if the borrower has no reasonable expectation that he can comply with the terms, the burden is on him to show that in making the contract, he had no such expectation.—*Smith v. Lehman*, S. O. Ala., Dec. 19, 1888; 5 South. Rep. 204.

193. USURY—Advances—Commission Merchants. — A commission merchant advanced to a planter money, taking his note therefor due in the next cotton season, with interest from date, with an additional agreement that for every \$10 loaned, the planter would deliver to the merchant one bale of cotton for storage and sale on commission: *Held*, that where there was a reasonable expectation that the planter could deliver the cotton, the contract was not usurious.—*Harmon v. Lehman*, S. O. Ala., Dec. 18, 1888; 5 South. Rep. 197.

194. VENDOR AND VENDEE—Deed. — Where property is sold title subject to approval of A and the latter disapproved it and vendee refused to accept deed: *Held*, that vendor could thereupon treat the contract as at an end.—*Dean v. Hitchings*, S. O. Minn., Jan. 14, 1889; 41 N. W. Rep. 240.

195. WATER-COURSE—Diversion. — *Held*, under the facts that defendant had not the right to extend his tile drain so as to divert water from complainant's land.—*Hilliker v. Coleman*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 220.

196. WILLS—Construction—Trusts. — Testatrix left all her estate to a trustee, to pay the income to her sister during her life, and on the death of her sister the property to a charity, and to pay the net income of the real estate to her brother during his life, and on his death to divide the real estate among his children, or failing any, to transfer it to the same charity: *Held*, that the will created two separate trusts. — *Carruth v. Carruth*; *Reed v. Same*, S. J. O. Mass., Jan. 7, 1889; 19 N. E. Rep. 869.

197. WILLS—Construction. — At a common law a devise of real estate, in order to convey the fee, must contain words of inheritance or perpetuity; but under the statutes of this State such words are not necessary to convey the fee, and every devise of land is to be construed to convey all of the estate of the deviser therein, unless it shall clearly appear by the will that the deviser intended to convey a less estate. — *Little v. Giles*, S. O. Neb., Jan. 3, 1889; 41 N. W. Rep. 186.

198. WILLS—Undue Influence — Declarations of Testator. — The declarations of a testator, made within a reasonable time before and after the execution of a will, are admissible to show the condition of testator's mind on an issue raised upon the exercise of fraud and undue influence, although such declarations have no force to establish the fact of undue influence. — *Herster v. Herster*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 342.

199. WILLS—Construction—Trusts. — A will gave testator's wife all his property, and named her executrix, and proceeded: "If she find it always convenient to pay my sister C B the sum of \$300 a year, I wish it to be done:" *Held*, that a trust was created, contingent only on the widow's "convenience," and not dependent on her volition. — *Phillips v. Phillips*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 411.

200. WILLS—Construction. — A devise to A for life, at her death to pass to B, if living, and, if not, to his widow for life or widowhood, and then to the heirs of B if any be living, and, if not, remainder over, vests a remainder in B at testator's death, though the enjoyment is postponed until the termination of the particular estate.—*Hoover v. Hoover*, S. O. Ind., Jan. 11, 1889; 19 N. E. Rep. 468.

201. WILL—Construction. — A devise in trust to the use of A for life, then to the use of B for life, and then to transfer and convey the property to B's children and their heirs, creates an equitable life estate in A, and in B if he survives A, with a remainder which vests in the children at the testator's death.—*Loring v. Carnes*, S. J. O. Mass., Jan. 2, 1889; 19 N. E. Rep. 343.

The Central Law Journal.

ST. LOUIS, MARCH 8, 1889.

CURRENT EVENTS.

THE editor of the *American Law Review* is apparently moved to tears, at the sight of an advertisement, claiming that the CENTRAL LAW JOURNAL has the largest circulation of any law journal in the world, and commenting upon this discovery, says, in the January-February number of the *Review*, that "no doubt it has and deserves to have a large circulation; but it may be doubted whether its publisher has such information concerning the circulation of all the law journals in the world, as warrants him in making this statement." We can readily understand the eagerness with which our esteemed contemporary endeavors, by implication, to refute the statement or at least cast discredit upon it. But there may be some things extant, which even the learned editor of the *Review* does not know, and there may possibly exist information, which we have, entirely by accident to be sure, stumbled upon, but which his sagacity has failed to discover. We are not disposed to question his superior ability and intelligence, as an abstract proposition, and do not wish to be understood, as seeking a contention on that issue, but on the other hand, does the *American Law Review* seek to enter the lists against us, as a competitor for the honors, in the matter of circulation? We feel justified in asserting boldly, that, on such an issue, we have the fullest information, and of a kind which the learned editor himself would not doubt.

In the same article, an effort is observable, to say something pleasant of us, but the attempt is evidently so laborious, that before the subject is fairly entered upon, the learned editor gets tired, cross and critical, cruelly speaks of our "so-called", "Notes of Recent Decisions," says he doesn't like our plan of omitting head-lines to editorial notes, and is especially grieved at the circulation of the CENTRAL LAW JOURNAL, as announced by us, all of which we very much regret, as we are

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publishing this JOURNAL for his special edification and pleasure, and it is not an agreeable sight to see our esteemed friend in such sore distress.

To THOSE of our readers who may, on first thought, share the opinion of the *Review* as to the furnishing of head-lines to editorial notes, we will say, that we discontinued this old and established custom, after much cogitation on the subject, and for good reasons. In the first place, we think it presents a better appearance. And by their omission, we save considerable space. However, to compensate for their loss and to save one the necessity of reading "twenty lines in order to ascertain whether we want to read the paragraph at all or not," as the *Review* puts it, we have adopted the system of stating the substance or subject of the note, in its first two or three lines, and, in addition to this, our readers will find on one of the front advertising pages of each number of the JOURNAL, a statement of its contents, in which the substance of each editorial note is given. We believe that a large majority of our readers, with this explanation, will indorse us in the change. If not entirely clear and satisfactory to the editor of the *Review*, we will undertake to furnish him a diagram with accompanying cuts and illustrations.

THE national bankruptcy convention held in St. Louis February 28, as announced in a late issue of this JOURNAL, resulted in nothing but resolutions. The declared purpose in calling together delegates from the various commercial associations and business houses, was to formulate an equitable bankrupt act. But the representation was not nearly as large as was expected, and the fact was revealed, through answers received from all portions of the United States, that much opposition exists against the passage of a general national bankrupt law. It was further demonstrated that much diversity of opinion prevails as to the essential features of such an act. It has been said, with how much reason we do not undertake to say, that the Eastern States want a law framed for the creditor, the Western and Southern States for the debtor—in other words that the for-

mer seek an enactment whose provisions force a man to pay what he can—and the latter, one whose provisions enable an insolvent to go through and pay what he likes.

It was natural that this convention should find it impossible within the period of twenty-four hours to frame a satisfactory bill, when in fact the judiciary committee of the United States senate were unable to arrive at a definite conclusion after six or eight months' labor. So, the convention did the best thing possible, adopted resolutions in favor of a uniform system of bankruptcy, recommended the Lowell bill, as best embodying the views of all, urged congress to make it the basis of the desired legislation, and finally adjourned to meet in Minneapolis next September. The Lowell measure has been before the country for many years, and is strongly favored, especially in the Eastern States.

A RECENT decision of Judge Brewer, of the United States circuit court, on the Iowa railroad commissioners' case, involving judicial control of railway charges, has created some consternation among the railroads, and is likely to have considerable influence in other directions. The case before the court, was the application of certain of the railroad companies for an injunction, restraining the commissioners from enforcing a schedule of charges for local traffic which they had formulated. The allegation was, that rates had been fixed without due consideration of the circumstances, and that the charges so placed required the companies to do business at a loss, and that under them the companies could not pay operating costs and fixed charges. The court dissolved the injunction and leaves the commissioners free to enforce their tariff. The ground of the decision is extremely simple. After finding that the commissioners have an undoubted right to make rates for intrastate traffic, Judge Brewer concludes that the reasonableness of the rate is something which cannot be proved by anything but actual experience. If the rates are unremunerative, the companies can then take action against the commissioners. It is apparently not so much the expected loss on the local traffic within the State which is the cause of dismay. The real gist of the matter

is the possibility that similar action to that adopted by the Iowa commissioners may be taken in other States, and that legislators, in obedience to the popular outcry against railroads, may go a great deal further than the Iowa commissioners have done. The test of reasonableness has yet to be applied to the proposed rates, but the court puts the burden of proof upon the railroads and not on the commissioners.

NOTES OF RECENT DECISIONS.

In *Inman v. South Carolina R. Co.*, 9 S. C. Rep. 249, the Supreme Court of the United States considered the relation between carriers and owners of insured goods, under subrogation clauses now common to bills of lading. This was a suit against a carrier, based on defendant's breach of duty, in failing to safely carry and deliver. The defense was that the bill of lading stipulated, in effect, that in case of loss, the carrier shall have the benefit of any insurance on the goods. It was held that such stipulation does not entitle the carrier to receive such benefit, or to a tender therefor before an action can be brought against it for the loss. Neither can a failure to give the carrier the benefit of such insurance avail as a counterclaim unless it be proved that the shipper had actually received the insurance money and refused to allow the carrier the benefit of it. The court says:

If this bill of lading had contained a provision that the railroad company would not be liable unless the owners should insure for its benefits, such provision could not be sustained, for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with indemnity against the consequences of failure in such discharge. Refusal by the owners to enter into a contract so worded would furnish no defense to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances, and not binding. But the clause in question bears no such construction, and obviously cannot be relied on as in itself absolving the company from liability, for by its terms the benefit of insurance was only to be had when a legal liability had been incurred, and in favor of "the company incurring such liability." Since the right to the benefit of insurance at all depended upon the maintenance of plaintiffs' cause of action, the fact of not receiving such benefit could not be put forward in denial of the truth or validity of their complaint. If, on the other hand, the contention of the defendant may be regarded as in the

nature of a counterclaim by way of recoupment or set-off, then the question arises as to the extent of the stipulation, assuming it to be otherwise valid, and what would amount to breach of it. By its terms the plaintiffs were not compelled to insure for the benefit of the railroad company; but if they had insurance at time of the loss, which they could make available to the carrier, or which, before bringing suit against the company, they had collected, without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counterclaim might be sustained, but otherwise not. The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier. Nor have the insurance companies paid the owners. It is true that, after the loss had been incurred, the companies signed certain *memoranda*, by which the face of the insurance was reinstated, proofs of loss waived, and provision made for postponing the question of indemnity until the owners, if the carrier refused to pay, had used effort to collect, without prejudice to the owners' claims against the insurance companies. But this falls far short of the equivalent of payment, and, indeed, under the terms of the policies, payment itself would have been subject to such conditions as the companies chose to impose. Although, in the order of ultimate liability, that of the carrier is in legal effect primary, and that of the insurer secondary, yet the insured can, in the absence of provisions otherwise controlling the subject, insist upon the proceeding, under his contract, first, against the party secondarily liable, and when he does so is bound in conscience to give to the latter the benefit of the remedy against the party principal; but these insurers could, under their contracts, require the owners to pursue the carrier in the first instance, and decline to indemnify them until the question and the measure of the latter's liability were determined. This they did, and to their action in that regard the defendant is not so situated as to be entitled to object.

An interesting feature in the decision of Louisville, etc. Ry. v. Buck, 19 N. E. Rep. 453, by the Supreme Court of Indiana, involving a question of master and servant, was the fact that the injury which resulted in the death of the servant was received on Sunday while he was engaged in his regular employment as brakeman. The court held that this did not relieve the company from liability. Though it is admitted that the decisions in some of the States are not all consistent with that conclusion, still it has the support of the weight of authority. The court says:

We had occasion to consider this question in Railway Co. v. Frawley, 110 Ind. 18, where it was presented in substantially the same manner as in the present case. Our conclusion there was that a person injured by the negligent omission of another to perform a legal duty would not be denied a recovery, even though it appeared that the injured person was, at the time of

receiving the injury, acting in disobedience of his collateral obligation to the State, which required of him the observance of the Sunday law. If the railway company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employee who was required to use the appliances, in ignorance of their defective condition, was the same on one day as on another. That they were being used on Sunday rather than on Monday neither contributed to, nor was it the efficient cause of, the injury which gave rise to this action, nor can the railroad company now interfere and become the champion of the Sunday law as an excuse for its wrong, or to defeat a recovery. *Sutton v. Wauwatosa*, 29 Wis. 28. It is quite true that a plaintiff will in no case be permitted to recover when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law. *Holt v. Green*, 73 Pa. St. 198; *Coppell v. Hall*, 7 Wall. 558; *Steele v. Burkhardt*, 104 Mass. 59; *McGrath v. Merwin*, 112 Mass. 467. But where he can prove his cause of action without proving that he was violating the law, even though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless. *Cooley, Torts* (2d ed.), 178, 179. Whoever travels about from place to place for the purpose of gaming with cards or otherwise acts in violation of a criminal statute. It would hardly be claimed that a recovery against a common carrier would be denied if it appeared incidentally in evidence that a passenger injured through the carrier's negligence was traveling in violation of the statute against gaming. Why should a brakeman who is required to work in violation of the Sunday law be denied a recovery? The gist of the action in the present case is the negligent failure of the railway company to furnish safe and suitable appliances, whereby the death of the plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment and the time when the injury occurred were mere incidents to, and were in no respect the foundation of, the action. *Railway Co. v. Frawley*, *supra*; *Frost v. Plumb*, 18 Am. Law Reg. 587.

THE question as to the right to proceed by *mandamus* against the State superintendent of insurance, was exhaustively considered by the Supreme Court of Kansas, in the case of Dwelling House Ins. Co. v. Wilder. The plaintiff had been authorized to do, and was doing business in the State, and applied to the superintendent of insurance for a renewal of authority and license to continue business, but the application was refused. Thereupon proceedings were instituted to compel the superintendent to issue a license. It is admitted that the company is solvent and that they have complied with every statutory regulation and rule of the insurance department, and the only question arising here is as to whether the courts can compel this perform-

ance by *mandamus*. It is held, after a consideration of the statutes governing the insurance department, and that the determination of the superintendent in granting, refusing or revoking licenses involves the exercise of official judgment and discretion, which cannot be controlled or directed by *mandamus*. The court says:

One of the principal objects of the act creating the insurance department and the office of superintendent is the protection of the insured, by excluding from the State such companies as are unsound and irresponsible. To accomplish this, large powers and considerable discretion must necessarily be lodged with some one. The legislature has placed the execution of the insurance law and the conduct of the department in the control of the superintendent. From the provisions referred to it will be seen that he is to determine the character and responsibility of an applying company, or of one already admitted, if there is reason to suspect that it is in an unsound condition. To do this, rigid examinations are authorized, and other safeguards provided. The legislature has prescribed the standards by which an insurance company is to be admitted or allowed to continue business after admission; but whether the companies come up to those standards or requirements is to be determined by the superintendent. He is intrusted with the exclusive control of the department. It is he who values their assets and investigates their condition. He examines the evidence of fair dealing or fraud on their part; and it is he alone who must be satisfied before a license is granted. On evidence satisfactory to him a license may be revoked; and indeed every one of these steps in granting, refusing, or revoking the authority of the insurers involves the exercise of discretion and judgment, which is vested in the superintendent alone. No appeal from his determination is given, nor any power of review in any other officer or tribunal recognized in the law. When we find from the examination of the statutes that official discretion and judgment are involved in the determination of the superintendent of insurance, and that he has acted upon the application made, the end of the inquiry is reached, so far as the present proceedings are concerned. It is well settled that *mandamus* will not lie to compel an officer to perform an act or duty which necessarily calls for the exercise of judgment and discretion. *Martin v. Ingham*, 38 Kan. 651, High, Extr. Rem. § 24. The case of *Insurance Co. v. Welch*, 29 Kan. 676, is referred to as sustaining the right of the plaintiffs to the remedy of *mandamus*. The court was there considering the validity of a law the operation of which depended upon a contingency. An action was brought to recover from the insurance company certain fees prescribed by what is known as the "retaliatory statute." It was argued that the law was incomplete when it came from the hands of the legislature; that its operation depended upon the action of a foreign State and the superintendent of insurance, and was therefore invalid. The court, in meeting the objection, held that the rule regulating the fees to be collected was fixed by the legislature in the act challenged, and not by the superintendent. It was stated in the opinion that "it is not left to the State superintendent to determine what the rule shall be. His duty is simply to ascertain the facts, and apply the rule. He may not arbitrarily determine upon what conditions the plaintiff may enter this State. He can only enforce the con-

dition which the legislature has imposed." The question whether the determination of the superintendent involved official discretion was not in the mind of the court when that language was used; but only whether the superintendent of insurance had been delegated or was exercising power by prescribing the conditions under which insurance companies might enter the State.

A VERY important case, involving the statutory right of taxation of shares of stock held by citizens of Ohio in a foreign corporation, was decided by the supreme court of that State, in *Lee v. Sturges*, 19 N. E. Rep. 560. The opinion of the court is exhaustive of the subject. The questions arising upon the record are: 1. Whether shares of stock in a foreign corporation held by citizens of Ohio, which has in this State substantial property upon which it pays taxes, are taxable here. 2. Whether shares so held are taxable here where the company is formed by consolidation of an Ohio company with companies of other States and has substantial property in the State on which it pays taxes—the larger portion of its property being without the State. The claim against their taxability is substantially that there is no law for it, that holders of such stock are authorized to omit them from tax returns, and that the levying of such taxes would impose unequal burdens and result in double taxation. The court says as to the last point:

Nor is it apparent that double taxation would follow. The shares of stock are distinct from the capital or property of the company. That may be largely real estate. The shares are in the nature of personality. They can have no locality, and must therefore, of necessity, follow the person of the owner, unless other provision is made by statute. The corporation is the legal owner of all the property of the company, real and personal, and, within the powers conferred upon it by its charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. The interest of the shareholder entitles him to participate in the net profits in proportion to the number of his shares; to have a voice in the selection of officers to manage the business of the company in like proportion; and, upon its dissolution, the right to his proportion of the property that may remain of the corporation after payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him; is under his sole control, so that he may sell or hypothecate it. He is entitled, from net earnings of the corporation, to dividends upon his stock, and the value of the stock depends largely upon its capacity for earning dividends. The shares of stock may be worth much more than the property of the corporation; that is, the franchise may be very valuable, while the visible capital may be of but little value, and dividends may be greatly out of proportion to the

tangible property, as frequently occurs in regard to street railroads, gas companies, electric light companies, etc. *People v. Commissioners*, 4 Wall. 244; *Bank v. State*, 9 Yerg. 490; *Cook v. Burlington*, 59 Iowa. It follows from this that, although the shareholder may be affected as regards the extent of his dividends by a taxation of the property of the corporation, yet a tax on the shares is not a tax on the capital of the company, and, *converso*, a tax on the capital is not a tax on the shares held by the stockholders. Taxation of the capital and property of the corporation may be accepted by the State as an equivalent for, but it is not the same as, a tax on the shares. We have many subjects of taxation which approach more nearly to double taxation than that of taxing capital stock and individual shares of stock in addition. Take the familiar instance of the taxation of mortgages. The owner of real estate—a farm, for instance—mortgages it for money to invest in cattle to stock it. He pays taxes on the land without deduction, and on the live stock, and the lender of the money pays taxes on the mortgage. By reason of this latter fact the lender demands more interest, which the farmer pays. He thus pays taxes on his farm, on his stock, the result of the borrowed money, and, indirectly, the whole or a considerable portion of the tax on the mortgage; and yet, reduced to its last analysis, this is not regarded as double taxation, because value is taxed each time. At all events, it is unquestionably the legal rule in Ohio. It is not impossible that a large portion of the stock of this corporation may be held by residents of this State. In such case, if the claim of the defendant should prevail, large amounts within the State, represented by these shares, would escape taxation, while the shares of stock held by our citizens in foreign corporations which happen not to have property within the State would bear their full burden. Such a rule would not tend to uniformity or equality of taxation; and, inasmuch as the tax on the property of the corporation within the State is not a tax on the shares, and does not, in this case, afford an equivalent, and inasmuch as the manifest purpose of the legislature was to reach all "investments in stocks" in some form, we think a rational construction of the statute can lead to no other conclusion than that the telegraph stock cannot come within the purview of the exemption clauses.

THE rights of creditors as against a voluntary conveyance, made with fraudulent intent, is discussed in an interesting manner by the Maryland Court of Appeals, in *Diggs v. McCullough*, 16 Atl. Rep. 453. It has long been a question with some courts as to the effect of such conveyance upon subsequent creditors, the doctrine being fully established that as to existing creditors such a conveyance is void. It is here held that a voluntary conveyance, if made with the fraudulent intent or design of hindering or delaying subsequent creditors, is void. Though the court divide on the question as to whether the facts in this case show such fraudulent intent against subsequent creditors, the decision is unanimous so far as the doctrine of law is concerned. It is further held that convey-

ances which can be attacked by subsequent creditors can be attacked by the trustee in insolvency representing them, and that the former cannot be debarred from attacking a deed made in pursuance of a scheme to defraud them merely because it has been recorded. *Stone, J.*, citing *Williams v. Banks*, 11 Md. 251; *Mather v. Heather*, 57 Md. 484; *Moore v. Blindheim*, 19 Md. 165, says:

These cases hold that a voluntarily deed, which is fraudulent in law, is void as against pre-existing creditors, and also that a voluntary deed which is made with the design to defraud subsequent creditors may be impeached by those so defrauded. But they also hold that where a voluntary deed is made without design to defraud subsequent creditors, and is recorded, it is valid against all subsequent creditors." It seems to me that this is a succinct statement of the law on that subject as it exists in this State to-day. A deed may be fraudulent in fact—that is to say, made with the design to hinder, delay, and defraud existing creditors—yet, unless it was made, with the intention and design to defraud subsequent creditors, these latter have no right to impeach it. They deal with the party with knowledge, either actual or constructive, of the existence of the deed. It is very apparent from these cases that, in order to entitle a subsequent creditor to relief against a duly recorded deed, he must show something more than that deed was fraudulent in fact as against existing creditors. He must show the intent and design to defraud those who might thereafter become his creditors. This fraudulent design must be shown by some declaration or acts of the party seeking to defraud. But, as fraudulent conveyances do not generally disclose their designs, we generally have to rely upon a scrutiny of their acts. Unless, therefore, the grantor has done something, or said something, from which we can reasonably infer that at the time he executed the deed it was with the intent to defraud the subsequent creditors, the deed as to them must stand.

A question of damage by obstruction of water-course came before the Supreme Court of Nebraska, in the case of *McCleneghan v. O. & R. V. Ry. Co.*, 41 N. W. Rep. 350. There, defendant a railroad company was authorized by law to construct its road across a stream. Damage was done to adjacent lands, by the construction of the bridge which caused the water and ice to gorge and overflow such land. It was contended by defendant, that the highest obligation resting upon it in the construction of the bridge, was that of its safety and use in the general requirements of railroad traffic. This was substantially the view taken by the lower court as expressed in its instructions. The court, in reversing the case, hold that defendant is liable for the damage done, although authorized by law to build the bridge and that in the selection of the character of bridge to be built, due regard must be had to the rights of the adjacent land owners, as well as to the safety of the public who may travel over its road.

RIGHT OF THE TEACHER TO INFLECT CORPORAL PUNISHMENT UPON THE PUPIL.

1. Right to Inflict Corporal Punishment.
2. Relation of Teacher and Pupil.
3. Objects of Punishment.
4. When Punishment may be Inflicted.
5. Offenses Committed Away from School.
6. Severity of Punishment.

1. *Right to Inflict Corporal Punishment.*—Under proper circumstances, the law confers upon the teacher authority to inflict reasonable and moderate corporal punishment upon the pupil.¹ This right of the teacher is also recognized by statute.² While the law sanctions corporal punishment, it is evident that it should be reserved for the baser faults. It is a coarse remedy and should be employed upon the coarse sins of our animal nature. In an early Indiana case, strong ground is taken against this mode of correction.³ "The public seems to cling to a despotism in the government of schools which has been discarded everywhere else," the court asserts. In that case, the question is suggested "whether such training be congenial to our institutions and favorable to the full development of the future man, is worthy of serious consideration." The court proceeds: "In one respect the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess. Where one or two stripes only were at first intended, several usually follow, each increasing in vigor as the act of striking inflames the passions. This is a matter of daily observation and experience. Hence the spirit of the law is, and

¹ 3 Greenl. Ev., § 63; *State v. Mizner*, 45 Iowa, 248; S. C., 24 Am. Rep. 769; 2 Kent's Com., 169, 170; *Vanvactor v. State* (Ind.), 15 N. W. Rep. 341; *Commonwealth v. Randall*, 4 Gray (Mass.), 36; *Lander v. Seaver*, 82 Vt. 114; *Balding v. State* (Ct. App. Tex.), 24 Reporter, 314; *Stanfield v. State*, 43 Tex. 167; *Dowlen v. State*, 14 Tex. App. 61; *Patterson v. Mitter*, 78 Me. 509; *Cooley's Const. Lim.* (5th ed.), 417; *Encyclopedia of Education*, 189, by Kiddle and Schem. See note to *Fitzgerald v. Northcote*, 4 F. & F. 663, for collection of English authorities; *Cooley on Torts*, 171, 172, 268.

² Texas Penal Code, art. 490, par. 1; *Balding v. State*, 23 Tex. App. 172; *Hutton v. State*, 23 Tex. App. 386; *Stanfield v. State*, 43 Tex. 167; *Dowlen v. State*, 14 Tex. App. 61.

³ *Cooper v. McJunkin*, 4 Ind. 290, 291.

the leaning of the court should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly. The tender age of the sufferer forbids that its slightest abuses should be tolerated. * * * The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element. They are above him. His true position will readily suggest itself. It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government only the resources of his intellect and heart. Such is the only policy worthy of the State and of her otherwise enlightened and liberal institutions. It is the policy of progress. The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school boy, 'with his shining morning face,' should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained."⁴

2. *Relation of Teacher and Pupil.*—In England, in the time of Edward IV, the relation of the teacher to the pupil appeared to be that of a temporary guardian.⁵ Hawkins places parent and child, master and servant, and schoolmaster and pupil on the same footing,⁶ which seems to be borne out by many cases.⁷ A teacher has been likened to a public officer,⁸ but on the other hand it is

⁴ According to the old Roman law, the father was privileged, under certain circumstances, to kill or abandon his newborn child: 2 Whart. Crim. Law, § 1563, p. 403; 2 Kent's Com., 203 *et. seq.*; 1 Bl. Com., 458. Anciently a husband might give his wife moderate correction: 1 Bl. Com., 444. In North Carolina, this doctrine was seemingly favored: *State v. Black*, Winst. (N. C.) 266; *State v. Rhodes*, Phil. (N. C.) 453; *Shoulder's Dom. Bel.* (3d ed.) § 244, p. 336.

⁵ Yearbook 7, Edw. IV.

⁶ Haw. Pl. Cro., 150.

⁷ *Amberly v. James*, Vent. 70; *Newman v. Bennett*, 2 Ch. Rep. 195; *Penn v. Ward*, 2 C. M. R. 338; *Lamb v. Burnett*, 1 Cro. & J. 291.

⁸ *Reeves on Dom. Rel.*, 288.

argued that in no proper sense can he be deemed a public officer, exercising by virtue of his office discretionary and *quasi* judicial powers.⁹ Many authorities hold that the teacher stands with reference to the pupil in *loco parentis*,¹⁰ and the books commonly assume that the teacher has the same right to chastise the pupil as the parent the child.¹¹ While the relations are analogous, and the teacher is, to a limited degree, invested with discretionary power, yet the teacher's right in this respect will seldom quite equal that of the parent.¹² No schoolmaster should feel himself at liberty to administer chastisement co-extensive with the parent.¹³

3. *Objects of Punishment.*—The legal objects and purposes of punishment in schools are like the objects and purposes of the State in punishing the citizen. They are threefold: First, the reformation of the highest good of the pupil; second, the enforcement and maintenance of correct discipline in the school; and third, as an example to like evil doers.¹⁴ It is the duty of the teacher to train and qualify the pupils for becoming useful and virtuous members of society. To this end it is indispensable that he be clothed with power to govern them, to quicken the slothful, to spur the indolent, to restrain the impetuous, to control the stubborn and to reform bad habits. In the school as in the family, there exists upon the part of the pupils the obligations and obedience to lawful command, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it whether it has or has not been re-enacted by the district

board in the form of written rules and regulations.¹⁵

4. *When Punishment may be Inflicted.*—Ordinarily, lawful punishment is limited to cases of misconduct and cannot be administered, unless where education is by law compulsory, to compel pursuance of any particular line of study,¹⁶ and certainly not for the gratification of passion or rage;¹⁷ and it has been adjudged that it cannot be inflicted for refusal to do something which the parent has requested that the pupil be excused from doing. The remedy in such case is not corporal punishment but expulsion.¹⁸ Unquestionably, corporal punishment may be administered for disobedience to lawful and reasonable command.¹⁹ Acts done to deface or injure the school room, to destroy the books of scholars, or the books or apparatus for instruction, or the instruments of punishment; language used to other scholars to stir up disorder and insubordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom of our schools, the school master has always been deemed to have the right to punish such offenses. Such power is essential to the preservation of order, decency, decorum and good government in schools.²⁰ So, punishment may be inflicted for a violation of reasonable rules,²¹ as a rule against swearing and quarrelling,²² or fight-

⁹ Lander v. Seaver, 32 Vt. 122.

¹⁰ Danenhoffer v. State, 69 Ind. 295, 299; s. c., 35 Am. Rep. 216; Com. v. Seed, 5 Pa. L. J. Rep. 78; State v. Pendergrass, 2 Dev. & Bat. (N. C.) 365; s. c., 31 Am. Rep. 416; Fitzgerald v. Northcote, 4 Post. & Fin. 656; State v. Burton, 45 Wis. 150; s. c., 30 Am. Rep. 706; s. c., 18 Am. L. Reg. (N. S.) 238; note 238; Heritage v. Dodge (N. H.), 9 Atl. Rep. 722; Reeves Dom. Rel., 288.

¹¹ Bishop on Crim. Law (7th ed.), § 886; 1 Hawk. P. C. (6th ed.), ch. 60, § 23.

¹² Bishop on Crim. Law (7th ed.), § 886; Vanvactor v. State, 113 Ind. 276; s. c., 15 N. W. Rep. 341.

¹³ Lander v. Seaver, 32 Vt. 123.

¹⁴ State v. Mizner, 50 Iowa, 145, 149

¹⁵ State v. Burton, 45 Wis. 150; Danenhoffer v. State, 69 Ind. 295, 299; State v. Pendergrass, 2 Dev. & Bat. (N. C.) 365.

¹⁶ Whart. Crim. Law (9th ed.), 632; Rullson v. Post, 79 Ill. 567; Morrow v. Wood, 35 Wis. 59; s. c., 13 Am. L. Reg. (N. S.) 692.

¹⁷ Regina v. Hopley, 2 Post. & Fin. 206.

¹⁸ The parent requested that the pupil be excused from studying algebra, and also from school in the afternoon, because of ill-health: State v. Mizner, 50 Iowa, 145, 152. See Morrow v. Wood, 35 Wis. 59.

¹⁹ Danenhoffer v. State, 69 Ind. 295; s. c., 35 Am. Rep. 216.

²⁰ Lander v. Seaver, 32 Vt. 114, 121.

²¹ Sheehan v. Sturges, 53 Conn. 481; s. c., 22 Reporter, 455.

²² Deskins v. Gose, 85 Mo. 483; s. c., 55 Am. Rep. 387.

ing,²³ or truancy.²⁴ Likewise, for a refusal to solve examples in arithmetic,²⁵ or to render an excuse of absence from school without leave.²⁶ But chastisement cannot be administered for the violation of a rule requiring pupils to "pay for the wanton and careless destruction of school property," for the reason that such rule is unreasonable, since in simple carelessness there is no purpose or intent to do wrong or violate rules; moreover, no rule is reasonable which requires of the pupils what they cannot do.²⁷ So, disturbing the school by making a noise resembling a cough is an act of contempt and defiance of the teacher's authority, for which reasonable chastisement may be administered.²⁸ It is indispensable to justify the punishment that it be administered for some specific offense, and that the pupil is given to understand why it is so administered. Punishment inflicted when the reason of it is unknown to the punished is subversive and not promotive of its true objects and cannot be justified. The pupil must know the reason for the chastisement, else reformation cannot be expected therefrom. Just the contrary might be looked for. In conformity to this rule, the teacher is not required to state to the pupil in clear and distinct terms the offense for which he or she is punished. It only requires that the pupil, as a reasonable being, should understand from what occurred why the punishment is inflicted.²⁹ Where a pupil has been habitually refractory and disobedient the teaching in punishing him for a particular offense may take this into consideration, and it is not necessary that he should inform the pupil at the time that the punishment is given for his past as well as his present misconduct.³⁰ Corporal punishment may be inflicted, although the pupil is of legal age,³¹ and although the parents forbids it.³²

5. Offenses Committed Away from School.

²³ Hutton v. State (Tex. Ct. App.), 5 S. W. Rep. 122.

²⁴ King v. Jefferson City, etc., 71 Mo. 628; s. c., 39 Am. Rep. 499; Burdick v. Babcock, 31 Iowa, 562.

²⁵ Balding v. State (Tex. Ct. App.), 4 S. W. Rep. 579; s. c., 24 Reporter, 314.

²⁶ Danenhoffer v. State, 69 Ind. 295; s. c., 35 Am. Rep. 216.

²⁷ State v. Vanderblit (Ind.), 8 N. W. Rep. 266.

²⁸ Heritage v. Dodge (N. H.), 9 Atl. Rep. 722.

²⁹ State v. Mizner, 50 Iowa, 145, 149.

³⁰ Sheehan v. Struges, 53 Conn. 481, 484.

³¹ State v. Mizner, 45 Iowa, 248; s. c., 24 Am. Rep. 769; Stevens v. Fassett, 37 Me. 266.

³² State v. Von Stranz (Tenn.), 3 Leg. Rep. 19.

—There seems to be no reasonable doubt that the supervision and control of the school master over the scholar extends from the time he leaves home to go to school until he returns home from school. Hence, where the offense has a direct and immediate tendency to injure the school and bring the teacher's authority into contempt, although committed an hour and a half after the school had been dismissed, when done in presence of other pupils and of the teacher, and with a design to insult him, he may inflict punishment for such act, upon return of the pupil to school again.³³ Respecting this question, the Supreme Court of Missouri, in a recent case, very succinctly states the rule: "If the effect of acts done out of the school room while the pupils are returning from their homes, and before parental control is resumed, *reach within the school room*, and are detrimental to good order and the best interest of the school, no good reason is perceived why such acts may not be forbidden, and punishment inflicted on those who commit them." In conformity with this view, a violation of the rule against the use of profane language by pupils and quarrelling and fighting among them, on going to or returning home from school may be punished.³⁴ And in Texas it has been adjudged that a teacher's authority extends to the prescribing and enforcement of reasonable rules and requirements, even while the pupils are at their homes. Hence, in harmony with this rule, it has been held in that State that the pupil may be required to prepare lessons while at home.³⁵

6. *Severity of Punishment.*—There seems to be a tendency to restrict rather than to enlarge the authority of the teacher as to corporal punishment. Public sentiment and a general tone of the decisions do not now tolerate such severe corporal punishment of

³³ The pupil called the teacher "Old Jack Seavers!" Lander v. Seaver, 32 Vt. 114, 120.

³⁴ Deskins v. Gose, 85 Mo. 436; s. c., 55 Am. Rep. 387. The Missouri statute provides (Rev. Stat. 1879, § 7045), that the school board shall have power to make all needful rules and regulations for the government of the school. If the board fail to do so, the right of the teacher employed to conduct the school, to adopt reasonable rules, to promote good order and discipline, arises out of the very nature of the employment: *Ib.*

³⁵ Balding v. State (Tex. Ct. App.), 24 Reporter, 314; s. c., 4 S. W. Rep. 579. Fighting away from school: Hutton v. State (Tex. Ct. App.), 5 S. W. Rep. 122.

pupils as was formerly thought permissible and even necessary,³⁶ and it is evident that it will eventually disappear from the schools as it has already disappeared from the list of punishment of crime.

The law has not undertaken to prescribe stated punishment for particular offenses—but has contented itself with a general grant of power of reasonable and moderate correction, and has confided the gradation of punishment within the limits of this grant, in a large degree, to the discretion of the teacher. The line which separates moderate correction from immoderate punishment can only be ascertained by reference to general principles. While all of the decisions sanction moderate corporal punishment,³⁷ yet it is very difficult to determine with exact precision when the teacher has exceeded the bounds of moderation. That correction which will be considered by some as unreasonable will be viewed by others as perfectly reasonable. What may be considered by some a venial folly, to which none, or very little, correction ought to be applied, by others will be considered as an offense that requires very severe treatment. Perhaps the solution of this question is the most embarrassing and difficult of any respecting the subject under consideration. The pupil being helpless and in the power of the teacher, that power should be restrained and not allowed to be wantonly abused with impunity. It has been well said that the government of a school should be patriarchal, rather than despotic. If it be a monarchy it should be a limited one and not absolute.³⁸ The character and interest of the teacher, combined with the refinement which education gives to the human mind in softening the heart, like parental love, is generally found a sufficient protection for the children. But if these fail the law affords ample protection against cruelty, and oppression, while it is a shield to those who have done their duty.³⁹ The punishment should not be excessive or cruel. It should be administered with "kind-

ness, prudence and propriety,"⁴⁰ "apportioned to the gravity of the offense and within the bounds of moderation."⁴¹ It must not be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb.⁴² Whether the punishment is moderate or excessive is a question of fact for the jury,⁴³ and the proper, and doubtless the only test, is the general judgment of reasonable men.⁴⁴ This will largely depend upon the nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, the age, sex, condition and strength of the pupil and the character of the instrument with which the punishment is inflicted.⁴⁵ The teacher's calm and honest judgment should have great weight.⁴⁶ Where no improper weapon is employed the presumption, until the contrary appears in the proofs, will be that what was done was done rightly,⁴⁷ and where a reasonable doubt that the punishment was excessive exists, the teacher should have the benefit of it.⁴⁸ A father cannot authorize excessive punishment; not having possessed that right himself, he cannot delegate it,⁴⁹ but he may delegate his authority over his child to the school master,⁵⁰ yet the latter cannot delegate his authority to punish.⁵¹ Where the correc-

³⁶ Per Cooley, J., in note 15 to his edition of Blackstone, p. 453.

³⁷ *State v. Pendergrass*, 2 Dev. & Bat. (N. C.) 365; *Texas Penal Code*, art. 490, par. 1; *Balding v. State*, 23 Tex. App. 172; *Hutton v. State*, 23 Tex. App. 386; *Stanfield v. State*, 43 Tex. 167; *Dowlen v. State*, 14 Tex. App. 61.

³⁸ *Anderson v. State*, 3 Head (Tenn.), 455, 457.

³⁹ *Commonwealth v. Seed*, 5 Pa. L. J. Rep. 78, 82.

⁴⁰ *Danenhoffer v. State*, 69 Ind. 295; s. c., 35 Am. Rep. 216; 1 Bishop Crim. Law (7th ed.), § 886; *State v. Vanderbilt*, 18 N. W. Rep. 266.

⁴¹ *Vanvactor v. State*, 113 Ind. 276; s. c., 15 N. W. Rep. 34; *Anderson v. State*, 3 Head (Tenn.), 455, 457.

⁴² *Regina v. Hopley*, 2 *Fost. & Fin.* 206.

⁴³ 1 Whart. Crim. Law (9th ed.), § 632; *Sheehan v. Sturges*, 53 Conn. 481; s. c., 22 Reporter, 455.

⁴⁴ *Patterson v. Mitter*, 78 Me. 509; s. c., 57 Am. Rep. 818; s. c., 7 Atl. Rep. 273; *Lander v. Seaver*, 32 Vt. 114; s. c., 76 Am. Dec. 156.

⁴⁵ *Dowlen v. State*, 14 Tex. App. 61; *Stanfield v. State*, 43 Tex. 167; *Lander v. Seaver*, 32 Vt. 123; *Sheehan v. Sturges*, 53 Conn. 481; *Com. v. Randall*, 4 Gray, 36; *Anderson v. State*, 3 Head (Tenn.), 455; *Cooper v. McJunkin*, 4 Ind. 90.

⁴⁶ 1 Bishop Crim. Law (7th ed.), § 886; *Vanvactor v. State* (Ind.), 15 N. W. Rep. 34; *State v. Pendergrass*, 2 Dev. & Bat. (N. C.) 365; 1 Whart. Crim. Law (9th ed.), § 632.

⁴⁷ *Id.*; *Anderson v. State*, 3 Head (Tenn.), 455, 457; *Dowlen v. State*, 14 Tex. App. 61, 65; *Cooley's Const. Lim.* (5th ed.), 417; *Cooley on Torts*, 171, 172.

⁴⁸ *Lander v. Seaver*, 32 Vt. 114, 124.

⁴⁹ *Regina v. Hopley*, 2 *Fost. & Fin.* 202.

⁵⁰ 2 Kent's Com., 169, 170; *Stevens v. Fassett*, 27 Me. 266, 280; *State v. Pendergrass*, 2 Dev. & Bat. (N. C.) 365.

⁵¹ *Reeves Dom. Rel.* (3d ed.) 375.

tion administered is not in itself immoderate, and therefore beyond the authority of the teacher, its legality or illegality must depend entirely upon the *quo animo* with which it is administered. Within the sphere of his authority, the master is the judge when correction is required, and of the degree of correction necessary, and like all others intrusted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose.⁵² "He is a judge with limited authority, not an autocrat."⁵³ But where excessive violence is shown, as where it produces death, the teacher's motive is immaterial.⁵⁴ A few illustrations will be given. Where a pupil becomes rebellious, exhibiting a violent temper by screaming and jumping, a flogging with a small, smooth rattan is moderate punishment.⁵⁵ So, nine licks inflicted with a switch of reasonable size, leaving no severe bruises, abrasions or other serious injury, is not unreasonable.⁵⁶ Punishment with a rod which leaves marks or welts on the person of the pupil for two months afterwards, or much less time, is immoderate and excessive,⁵⁷ but the fact of leaving temporary marks alone is not sufficient to so characterize the punishment.⁵⁸ Whether a raw hide is a proper instrument of punishment is a question for the jury. Evidence that it was used in other schools in the vicinity is admissible to rebut the charge of malice.⁵⁹ Beating a boy 13 or 14 years of age, although with the assent of his father, secretly and in the night-time, for two and one-half hours, with a thick stick, until he dies, is unquestionably cruel, excessive, and brutal, clearly subjecting the teacher to a charge of manslaughter.

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⁵² *Com. v. Seed*, 5 Pa. L. J. Rep. 78, 80; *State v. Pendergrass*, 2 Dev. & Bat. (N. C.) 365; *Cooley's Const. Lim.* (5th ed.) 417; *Cooley on Torts*, 171, 172, 288; *Reeves on Dom. Rel.* (3d ed.) 420.

⁵³ *Cooley on Torts*, 288.

⁵⁴ *Regina v. Hopley*, 2 Fost. & Fin. 202; *Whart. on Hom.* (2d ed.) § 165; *Lander v. Seaver*, 32 Vt. 114, 124. See *Heritage v. Dodge* (N. H.), 9 Atl. Rep. 722.

⁵⁵ *Com. v. Seed*, 5 Pa. L. J. Rep. 78, 81.

⁵⁶ *Hutton v. State* (Ct. App. Tex.), 5 S. W. Rep. 122.

⁵⁷ *State v. Mizner*, 50 Iowa, 145.

⁵⁸ *State v. Pendergrass*, 2 Dev. & Bat. (N. C.) 365, 367; *State v. Alforst*, 68 N. C. 322.

⁵⁹ *Lander v. Seaver*, 32 Vt. 114, 125.

⁶⁰ *Regina v. Hopley*, 2 Fost. & Fin. 202; *Whart. on Hom.* (2d ed.) § 165.

EXTRADITION—TRIAL FOR CRIME NOT MENTIONED IN REQUISITION—RIGHT TO DEPART.

STATE V. HALL.

Supreme Court Kansas, December 8, 1888.

1. A defendant extradited from another State charged with a specific crime, cannot be tried for a crime not mentioned in the requisition.

2. Upon failure to prove the defendant guilty of such specific crime, he must be allowed reasonable time in which to depart.

VALENTINE, J., delivered the opinion of the court:

The judgment of the court below must be affirmed. The question presented is this: Where a fugitive from justice from the State of Kansas to another State has lawfully been extradited from such other State back to Kansas, for the purpose that he may be required to answer to a criminal charge contained in a certain indictment, can he, at once, be put upon trial to answer to another and different criminal charge, contained in another and different indictment, but a charge of an offense for which he could have been, but was not, extradited? In other words, can a person be extradited for one offense, and immediately tried for a wholly different offense? We would think not. It is a general maxim of law that judicial process shall not be abused. But to try a person for an offense other than the one for which he was extradited would be an abuse of judicial process. Within this broad and general maxim above referred to is included the following more definite rule of law, to-wit: Where the presence of a person has been changed from a place outside of the territorial jurisdiction of a court of justice to a place within such jurisdiction, and this change has been procured through the instrumentality of another person, and upon a pretext of thereby accomplishing some particular purpose, such first mentioned person cannot, after his presence has been thus obtained within the territorial jurisdiction of the court, and before he has had an opportunity to return, be prosecuted in such court by the person who has thus been instrumental in procuring his presence for the purpose of accomplishing some wholly different purpose. This rule of law has often been applied by the courts in civil cases. *Van Horn v. Manufacturing Co.*, 37 Kan. 523, 526, 15 Pac. Rep. 562, and cases their cited; *Spear, Extrad.* 526, and cases their cited; *Compton v. Wilder*, 40 Ohio St. 130. This rule of law is applied in cases of separate jurisdictions, whether the separate jurisdictions are cities, counties, districts, States or foreign countries. It is often the case, however, that the jurisdiction of a court extends to every portion of the State; but a court cannot have jurisdiction beyond the boundaries of its own State, nor can it send its process into other States or countries. It cannot compel a fugitive from justice or any other person beyond the boundaries of its own

State, to attend its sessions. A fugitive from justice can be obtained from another State or country only with the consent of the executive authorities of such other State or country; and for a State to procure a fugitive from justice from some other State or country to be tried for some particular offense, by the consent of such other State or country, and then to try him for another and a different offense before he has had an opportunity to return would be such an unwarranted abuse of judicial process, such a fraud upon justice, such an act of perfidy, that no court in any country should for a moment tolerate the same. The foregoing rule of law applies in criminal cases where the fugitive from justice has been extradited from a foreign country. *United States v. Rauscher*, 119 U. S. 407, 7 S. C. Rep. 234; *United States v. Watts*, 8 Sawy. 370, 14 Fed. Rep. 120; *Ex parte Hibbs*, 26 Fed. Rep. 421, 431; *Ex parte Coy*, 32 Fed. Rep. 911, and note; *Com. v. Hawes*, 13 Bush, 697; *State v. Vanderpool*, 39 Ohio St. 273; *Blandford v. State*, 10 Tex. App. 627. In the cases above cited the fugitives from justice were extradited under treaties, but in these treaties there was no provision that the fugitive from justice should be tried only for the offense for which he was extradited; hence the foregoing decisions are perfectly applicable to this case. The foregoing rule of law also applies in criminal cases between States. *State v. Simmons*, 39 Kan. 262; *In re Cannon*, 47 Mich. 481, 11 N. W. Rep. 280, and it applies as strongly between States as it does between foreign countries. In *Lagrange's Case*, 14 Abb. Pr. (N. S.) 344, 346, Judge Daniels uses the following language: "In principle, there can be no practical difference between the case of fugitive brought from a neighboring State under the constitution and laws of the United States, and one brought from a foreign country under the provisions of its treaties. In each, the right of freedom to return is precisely the same, and the implied guaranty of that right under the laws is no greater in one case than it is in the other."

The foregoing rule of law, stated broadly, as it is, is upheld and sustained by the great preponderance of authority in this country. When applied to civil cases it is sustained by nearly the entire, if not the universal, current of authority. When applied to criminal cases, where the extradition is from a foreign country, it is sustained by almost all authority. When applied, however, to criminal cases where the extradition is from a sister State, a majority of the cases is against the rule, and, as we think, without any good reason. The State should not be allowed to obtain jurisdiction of a fugitive from justice for one purpose, and then to take advantage of that jurisdiction thus obtained and use it for another and different purpose. A State has no more right to act fraudulently or unfairly than an individual person has, and what the State does by its officers or agents it does itself. Mr. Samuel T. Spear, author of the work on the Law of Extradition, and also Judge Cooley, have carefully considered this entire

question and have come to the same conclusion that we have. See Spear, *Extrad.* ch. 12. Among the things which Mr. Spear has said upon this subject, we would quote the following: "No sufficient reason can be assigned why these principles of law should not be applied in extradition cases, so as to guard the process, against abuse or diversion from the purpose intended by the constitution. The use of the process for any other purpose is an abuse. On this point, Judge Cooley uses the following strong and emphatic language: 'To obtain the surrender of a man on one charge, and then put him upon trial on another, is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule that where, by compulsion of law, a man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraints for another purpose. The legal privileges from arrest, when one is in the performance of a legal duty away from his home, rest upon this rule, and they are merely the expressions of reasonable exemption from unfair advantages. The reason of the rule applies to these cases; and it should be held, as it recently has been in Kentucky, that the fugitive surrendered on one charge is exempt from prosecution on any other. He is within the State by compulsion of law upon a single accusation. He has a right to have that disposed of, and then to depart in peace.' *Princeton Review*, Jan., 1879, p. 176. Courts, as will appear in the sequel, have not always adopted this view; and yet it is the only just and proper view in the premises, and the only view that is consistent with the letter and intent of the constitutional provision relating to extradition." Spear, *Extrad.* 527, 528. "Now, to use the constitution and the law for the purpose of forcibly removing a person, on the charge of a specific crime, from one State to another, in order that he may in the latter State be tried for that crime, and then to use the custody thus secured for a different purpose, is to make a case different from the one contained in the constitution and the law, different from the one that appeared in the extradition proceedings, different from the avowed purpose of the demanding State at the time of making the demand, and different from the case that was before the delivering State, and on which it passed judgment as to the obligation of delivery. The State that takes this course after obtaining possession of the fugitive gives the lie to its own official declaration; and if, at the time of seeking the possession, it meant to do so, then it meant to perpetrate a fraud upon the surrendering State. Such a course would plainly carry the jurisdiction exercised over the surrendered party beyond the point and beyond the purpose contemplated in the constitution and the law. That purpose, as expressly stated, is that the party demanded and charged with a specific crime by one State, and arrested and delivered up by another State, may be removed to the State having juris-

diction of the crime' charged, and that he may be there put on trial for that crime. It is no part of this purpose that the party being delivered up in the manner specified should, at the pleasure of the State receiving him, be held and tried for other crimes, or that he should be arrested and held to bail in civil actions by creditors, whether these creditors procured his extradition are not. Either proceeding would be foreign to, and in excess of, the one purpose for which, under the constitution and the law, the demand was made by one State, and the arrest and delivery were ordered by the executive authority of another State. The constitution furnishes the extradition remedy for the case which it describes, and for no other case; and the arrest of the extradited party in a civil action, or his trial for an offense different from the one specified in the proceedings, is a use of the custody thus secured that is not in that case. It must be put there, if at all, by judicial construction; and such construction we are compelled to regard as an abuse of the remedy. It is due to good faith between the States, to the sovereignty of the States as distinct political communities, to the terms of their intercourse with each other in demanding and surrendering fugitives from justice, and to the plain intent of the constitution in providing the extradition remedy, that when one State in this way obtain the custody of a person, it should limit the use of that custody to the purpose for which it was obtained, and which was distinctly avowed by it when obtaining the same; and hence, when this purpose has been gained, the State demanding and receiving the fugitive should interpose no legal hinderance to his freedom or departure and return to the State from which he was thus removed. The matter for which he was brought into the State having been legally disposed of, then, in the language of Judge Cooley, he has a right 'to depart in peace.' Any other course, if originally intended, would be a fraud on the part of the demanding State, and if not so intended, would be an act of bad faith. Extradition is not an act between the extradited party and the person or persons, who may have procured the extradition, but between two sovereign States, for the purpose of public justice in the case specified. These States are bound to act in good faith towards each other, no matter what may have been the motives of private parties in seeking the extradition. One of these States set forth its case, and if the other responds affirmatively by compliance with its demands, as it will be bound to do if the case comes within the provisions of the constitution and the law, then the former State will be equally bound in honor to confine the exercise of its jurisdiction to the case presented." Spear, Extrad. 548-550. "The constitution and the law make it the duty of the asylum State to give the necessary consent and put forth the necessary action when, and only when, the prescribed conditions are present; and one of these conditions is a specific and definite charge

of a particular crime as the ground of the removal, and also a declaration of the purpose for which the removal is sought. The obvious implication arising from this condition is that the State receiving the fugitive, under the constitution and the law, like a nation receiving a fugitive under a treaty, should use the custody only for the purpose professed when acquiring it, and which was had in view by the delivering authority when making the arrest and surrender. This implication naturally arises from the constitution and the law; and, if so, then it is binding on State courts as it would be if it had been stated in express words. What the constitution or the law, by a just and fair construction, implies, is a part of that constitution or that law." Spear, Extrad. 552.

The provision of the United States constitution upon which interstate extradition is founded reads as follows: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Const. U. S. art. 4, § 2. This provision does not expressly say that the extradited fugitive shall not be prosecuted in the State to which he was extradited for any offense other than the one for which he was extradited, nor does it say that he shall not be subject to other prosecutions of a civil character. But neither do treaties between the United States and foreign nations, so far as they have been construed, say any such thing; but the strong implications of both the constitutional provision and the treaties are to that effect, at least so long as the extradited fugitive is involuntarily kept within the State to which he has been extradited, and the State to which he has been extradited cannot fairly and honorably permit him to be subject to any such prosecutions. As between sister States, or as between a State and a foreign country, whatever the State permits to be done by or through its officers, agents, or courts of justice, it does itself, and is responsible therefor. As between sister States, there is more reason for applying the doctrine that an extradited fugitive can be prosecuted only for the offense for which he was extradited than there is between a State and a foreign country; for the reason that the State from which the fugitive was extradited has no effective remedy, while a foreign country can protect itself by having a provision inserted in its treaties with our country preventing the extradited fugitive from being prosecuted for anything except the offense for which he was extradited, or by withdrawing all intercourse between it and our country. On the other hand, sister States cannot make treaties, nor can they avoid intercourse. It is the constitutional duty of a sister State, in every case, to extradite a fugitive from justice upon a legal requisition from another sister State; and it cannot ask any questions upon the subject, nor impose any terms.

The judgment of the court below will be affirmed; all the justices concurring.

NOTE.—Until within the last two years, no case involving the question, whether a person extradited for one offense could be tried for another offense without being given an opportunity to return to the country from which he was taken, had come before the Supreme Court of the United States. The point had arisen numerous times in the lower courts, both State and federal however, but the cases were in conflict.

1. In *Adrian v. Lagrave*,¹ a case often referred to in the books, it was held that the defendant, though extradited from France on a criminal charge, was subject, before he could return, to arrest on a civil process.

In *United States v. Caldwell*,² the defendant was extradited from Canada on the charge of forgery, but was indicted, tried, convicted and punished for bribery. It was held in another case, that a fugitive criminal, extradited under the treaty of 1842 between the United States and Great Britain, might be held on his prior conviction and sentence for a nonextraditable offense after the charges for which he was delivered had been ignored.³ And in a Texas case, that such prosecution would be proper, where a citizen of one State was extradited therefrom to another.⁴ And in a New York case, that where a defendant is extradited from another State on an indictment for grand larceny, and is tried and acquitted, he may be arrested at the suit of the party who procured the indictment and extradition in a civil action, where it does not appear that there was any bad faith in causing the extradition, but that it was done solely for criminal punishment.⁵ And in Washington Territory, that a man may be tried for a slightly different offense from the one for which he was extradited, there being nothing to suggest fraud.⁶ And in Indiana, that where a prisoner was brought into the State upon a requisition, stating that he was charged with embezzling money, he might be tried upon an indictment charging in one count the embezzlement of money and in another count the embezzlement of property, the same property being involved in each case.⁷ On the other hand, however, in the case of *Blandford v. The State*,⁸ it was held that a person extradited for embezzlement of public moneys (one of the crimes named in the extradition treaty with Mexico), could not be tried for embezzlement of the funds of a private corporation. And in *Commonwealth v. Hawes*,⁹ the defendant was demanded from and surrendered by the Canadian authorities to be tried on three separate and distinct charges of forgery, which were mentioned in the demand and warrant of extradition. One of these charges was abandoned by the Commonwealth. He was tried on the remaining two and found not guilty by the jury in each case, and stood acquitted of the crimes for which he was extradited. He was then held by the officers of the law in custody, and it was de-

manded that he should be compelled to plead to an indictment for embezzlement, there being several indictments against him for embezzlement and uttering forged paper, and thereupon, on the application and motion of the prisoner, the court made an order that * * * "the said Hawes be not held in custody until the further order of this court." And furthermore, that after trial the defendant could not be proceeded against for other offenses, but should have been allowed to return to Canada. The same doctrine was laid down in the Ohio case, *State v. Vanderpool*.¹⁰

In *Ex parte Hibbs*,¹¹ it was held that where a warrant of extradition recited that a party was accused of the crime of forgery, and had been committed for extradition thereon, without saying what forgery, resort might be had to the proceedings before the committing magistrate, and his report, on which the warrant was issued, to ascertain what and how many forgeries the extradition was intended to apply to, or include. It has furthermore been held in Michigan, that a person extradited on the charge of seduction cannot be held under bastardy proceedings.¹²

In a Pennsylvania case, where "W," a citizen of that State, was extradited upon a requisition issued by the governor of Ohio, upon the application of C. A. & Co., in a criminal prosecution, it was held that the service of a summons and an order of arrest, issued in a civil action brought by the said C. A. & Co. against the defendant, and made upon him directly after he had entered into a recognizance to appear before the court of common pleas at its next term, and before conviction and before he had an opportunity to return to his home, was rightfully set aside.¹³ This brings us to the case of *U. S. v. Rauscher*,¹⁴ recently decided by the Supreme Court of the United States. The defendant, being charged with murder on board an American vessel on the high seas, fled to England, and was demanded of the government of that country and surrendered on this charge. The Circuit Court of the United States for the Southern District of New York, in which he was tried, did not proceed against him for murder, but for a minor offense, not included in the extradition treaty between the two countries, and the judges of the said court certified to the supreme court for its judgment, the question whether this could be done; and it was held by the latter:

1. That a treaty to which the United States is a party is a law of the land, of which all courts, State and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement.

2. That, on a sound construction of the treaty under which the defendant was delivered to this country, and under the proceedings by which this was done, and acts of congress on that subject, Rev. Stat. §§ 5272, 5275, he could not be tried for any other offense than murder.

3. That the treaty, the acts of congress and the proceedings by which he was extradited, clothed him with the right to exemption from trial for any other offense, until he had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender; the national honor requiring that good faith should be kept with the country which surrendered him.

¹⁰ 39 Ohio St. 273; s. c., 48 Am. Rep. 431; 17 Cent. L. J. 287.

¹¹ 26 Fed. Rep. 421.

¹² Cannon's Case, 47 Mich. 681.

¹³ Compton v. Wilder, 40 Ohio St. 130. And see, in this connection, *Ex parte Coy*, 32 Fed. Rep. 911.

¹⁴ 119 U. S. 407.

¹ 59 N. Y. 110.

² 8 Blatchf. 131. And see *United States v. Lawrence*, 13 Blatchf. 236.

³ *In re Miller*, 6 Crim. L. Mag. 511.

⁴ *Ham v. State*, 4 Tex. App. 645.

⁵ *Browning v. Abrams*, 51 How. Fr. 172. And see *Williams v. Bacon*, 10 Wend. 636.

⁶ *Harland v. Territory*, 13 Pac. Rep. 453.

⁷ *Waterman v. State*, 18 N. E. Rep. 63. In line with the above, see *State v. Stewart*, 60 Wis. 587.

⁸ 10 Tex. App. 637.

⁹ 13 Bush (Ky.), 697. See *Ker v. People*, 110 Ill. 627; *U. S. v. Watts*, 14 Fed. Rep. 421; *U. S. v. Rauscher*, 119 U. S. 407.

4. That the circumstance that the party was convicted of inflicting cruel and unusual punishment on the same evidence which was produced before the committing magistrate in England, in the extradition proceedings for murder, did not change the principle.

II. The authorities are not agreed as to whether the rule thus established applies to cases of interstate extradition. It was laid down in a Texas case, that the doctrine of international extradition in this respect, whether based on comity or on treaty stipulations, has no application to extradition cases arising between the different States of the American Union under their common constitution.¹⁵ And in Wisconsin.¹⁶ But, as in the principal case, the contrary view has been taken in Michigan.¹⁷

III. It will not avail one charged with crime that the means and force by which he was brought within the jurisdiction of the court were illegal.¹⁸

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¹⁵ *Ham v. The State*, 4 Tex. App. 645.

¹⁶ *State v. Stewart*, 60 Wis. 587.

¹⁷ *Cannon's Case*, 47 Mich. 481.

¹⁸ *State v. Brewster*, 7 Vt. 118, 121. It was said in this case, "If the foreign nation complain of a violation of its sovereignty, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court." *Matter of Brown*, 19 Ohl. Leg. News, 50. The judge said in this case, the defendant having been persuaded to cross the Canadian frontier through fraud, that the acts done morally deserved reprobation, but that they were acts between private individuals, which could not prevent the State performing its public duty to another State. And see *Ker v. People*, 114 Ill. 627; *State v. Smith*, 12 S. C. 430; *Ex parte Coupland*, 26 Tex. 328; *Kelley v. State*, 18 Tex. App. 158; *State v. Ross*, 21 Iowa, 467; *U. S. v. Caldwell*, 8 Blatchf. 181; *Adrian v. Lagrave*, 59 N. Y. 110; *U. S. v. Lawrence*, 18 Blatchf. 306; *Irre Miller*, 23 Fed. Rep. 32; *Van Horne v. G. W. Mfg. Co.*, 37 Kan. 523; *State v. Simmons*, 39 Kan. 262; *Dow's Case*, 18 Pa. St. 37. See generally "The Winslow Extradition Case," 3 Cent. L. J. 249, 264, 300, 310, 346, 362; 5 *Id.* 457. "Retention of extradited prisoners for other crimes." 19 *Id.* 22. "Extradition," 22 *Id.* 467; "Treaties of Extradition," 23 *Id.* 247.

RECENT PUBLICATIONS.

THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, Compiled under the Editorial Supervision of John Houston Merrill, Late Editor of the American and English Railroad Cases, and the American and English Corporation Cases, Vols. 1, 2, 3, 4, 5 and 6. Northport, Long Island, N. Y.: Edward Thompson, Law Publisher. 1887, 1888.

An encyclopædia of the law is as useful to the lawyer as a general encyclopædia is to the literary man, in fact more so. For while the latter consults his encyclopædia, simply as a matter of interest or general information, the lawyer may use the encyclopædia of law as a large part of the tools of his trade, and make it of practical every day value. We can see wherein the attorney far removed from a complete library may find practically all that he needs in a well prepared, comprehensive encyclopædia. For what is it, in fact, but a series of condensed treatises on the various topics of the law. And even the lawyer who has access to a well stocked library, such a series is invaluable. Chief Justice Sharswood is said to have remarked, and the phrase has become an axiom, that

"the difficulty in our profession, is not so much to know the law, as to know where to find it," and we are every day reminded of this in our blind groping after authorities, where the very abundance of matter is confusing. The great increase from year to year in the number and volumes of reports makes an encyclopædia almost invaluable. So much for encyclopædias in general. The set before us, and of which but six volumes have so far appeared, is the first attempt in that direction in this country, and the first in England since the publication of "Bacon's Abridgment" many years ago.

The projectors of the present series state their purpose "to supply in convenient form the whole body of modern law," and to furnish a practical law library of accepted principles of law, supported by the citation of many, if not of all the cases on the various subjects. The literary work is done under the editorial supervision of John H. Merrill, Esq., whose ability in that direction is unquestioned. Most of the writers engaged in the preparation of the material (and there are necessarily many) and a list of whom appear in each volume, are well and favorably known, and some of them have taken high rank as authorities upon particular branches of the law. We note among them one of our staunch friends and a valuable contributor to this JOURNAL, Mr. James M. Kerr. A thorough and satisfactory review of these volumes, embracing as they do every conceivable legal topic, from "A" to "Estate" would not be possible within the limits of this article. But we deem it sufficient to say that every subject seems to be treated in an exhaustive manner and at a length commensurate with its importance. For instance, the subject of "bills and notes" occupies space of over one hundred pages of text and notes, most of which is in small type. "Building associations," a topic of new interest, has fifty pages. "Carriers" has two hundred and fifty pages, equal to a text-book. "Criminal law and procedure" has almost three hundred pages, and so on throughout the work. It is claimed by the publishers that in comparison with text-books, the several subjects treated in the encyclopædia contain each more citations of cases than a text-book on corresponding subject. For instance, on the subject of "executors and administrators," the encyclopædia cites 12,918 cases. Schouler on the same subject cites 5,530 and Willard, 1,063. On "criminal law" the encyclopædia cites 14,027 cases. Bishop's Criminal Law cites 4,420 and Wharton, 5,508.

From such data as these, coupled with the reputation and standing of those who have prepared the material, may be understood the value of these books to the practitioner. We have, ourselves, used them to great advantage, and are using them constantly, and so feel justified in commending them to the profession.

QUERIES AND ANSWERS.

[Subscribers are invited to send short answers to the following.]

QUERY NO. 14.

A died in Missouri, leaving a wife and one child. The widow elected to take a homestead. Afterwards she sold same and gave a quitclaim deed. Does her deed convey any title, the widow and minor child having moved off the place?

B. H.

QUERIES ANSWERED.

QUERY NO. 10.

[To be found in Vol. 28, Cent. L. J. p. 168.]

In the replevin case A has elected his remedy. He denies or disaffirms the contract. He does so deliberately. He has not mistaken his remedy; he has elected it with his eyes open. He is estopped afterwards to sue in *assumpsit*. He cannot approbate and reprobate. He cannot both deny the contract and affirm it. He must abide his election of remedies. It is not a question of mistaken remedy. A had a right to elect; two remedies were open to him. Having deliberately elected one, he is estopped from using the other. See *Burnett v. Smith*, 4 Gray (Mass.), 50, 52. The question is a novel one, and is open to much controversy.

JETSAM AND FLOTSAM.

MRS. LARDINE (of Chicago). "Really, Mr. Bigfee, I think that five hundred dollars for so simple a matter as a divorce is quite exorbitant!"

MR. BIGFEE (firmly, but respectfully). "Those are my usual terms, madam."

MRS. LARDINE (with *hauteur*). "Very well, sir, you may write a receipt; but I have never paid so much before, and I never will again."

THIS is not bad. Two judges at General Term having given opposing opinions on a matter of slight importance, the question was settled by Judge ——'s quietly stating, "I agree with my brother A, for the reasons given by my brother B."

"I HAVE a number of authorities bearing directly upon this point if your honor would like to hear them," said a young attorney recently, in one of our Massachusetts courts. With a weary smile the judge replied: "I cannot truthfully say that I should like to hear them, but I suppose it is my duty to listen to them."

"REMEMBER, Uncle Rastus," cautioned the magistrate, "that you are not compelled to disclose anything which may criminate yourself." "Den, I reckon, I'll keep my mouf shet, judge, was the wise reply."

MAGISTRATE (to new policeman)—Did you notice no suspicious characters about the neighborhood?" New Policeman—Shure, yer honor, I saw but one mon, an' I asked him wot he was doin' there at that time o' night. Sez he: "I have no business here just now, but I expect to open a jewelry shtore in the vicinity later on." At that I sez: "I wish you success, sor." Magistrate (after a pause)—Yes, he did open a jewelry store in that vicinity, and stole seventeen watches. New Policeman (after a pause)—Begorra, yer honor, the man may have been a thafe, but he was no loiar.

PRISON VISITOR—"What brought you to this place, my friend?" Convict—"Sneezing." Visitor—"Sneezing?" "Yis, sir; it woke the gentleman up, an' he nabbed me!"

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACTION—Separate Claims—Jurisdiction.— A landlord may sue separately for each year's crops grown on the demised premises, and sold to defendant by the tenant, who holds under a separate contract for each year, and falls to pay the rent, and a justice of the peace has jurisdiction, where the amount involved in each suit is within it, though the whole claim exceeds his jurisdiction.—*McLendon v. Pass*, S. C. Miss., Jan. 14, 1888; 5 South. Rep. 234.

2. ADMIRALTY—Jurisdiction—Suits Between Non-residents. — Admiralty courts have a discretion as to entertaining suits between foreigners; and a transaction taking place in Florida, where all the officers of defendant corporation resided, and the libellant being an English corporation: *Held*, that no comity or reasons of justice demanded relief in this district.—*Neptune Steam Nav. Co. v. Sullivan Timber Co.*, U. S. D. C. (N. Y.), Nov. 26, 1888; 37 Fed. Rep. 169.

3. APPEAL—Notice—Estoppel.— Respondents held estopped to deny due service of notice of appeal, where service was admitted by attorney on day after death of defendant but he left plaintiff in ignorance of this until after expiration of time. — *Moyle v. Landers*, S. C. Cal., Jan. 11, 1889; 20 Pac. Rep. 243.

4. APPEAL—Practice — Assignment of Error. — An assignment of error to the overruling of a plea in abatement, which does not set out the form of the plea, nor show upon what ground it was overruled, cannot be considered. — *Morris v. Beall*, S. C. Ala., Jan. 7, 1889; 5 South. Rep. 252.

5. APPEAL — Review. — Error cannot be assigned upon a ruling or action of the district court made or taken with the consent of the complaining party. — *Chamberlain v. Brown*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 284.

6. **APPEAL—Review—Weight of Evidence.**—Where, in an action by administrators against the receiver of an insolvent bank to recover money deposited by them, the defense is that, though a certificate was issued by the cashier, no deposit was in fact made, the oral evidence being contradictory, and the certificate of deposit showing that the money was paid in, a verdict for plaintiffs will not be set aside as against the weight of the evidence. — *Bingham v. Marine Nat. Bank*, N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 416.

7. **APPEAL—Review—Rulings in Evidence.**—Where incompetent testimony is admitted though the court withdraws such incompetent evidence from the jury, and directs them not to consider the same: *Held*, where such incompetent evidence is not of a character likely to create sympathy for the party offering the same, such error is immaterial. — *City of Kansas v. Morse*, S. C. Kan., Jan. 5, 1899; 20 Pac. Rep. 217.

8. **APPEAL—Review—Weight of Evidence.**—Where the evidence is conflicting, the findings of the trial court will not be disturbed, although the preponderance of the evidence may seem to the appellate court to be the other way. — *Walker v. Terry*, S. C. Tex., Nov. 2, 1898; 10 S. W. Rep. 329.

9. **APPEAL—Record.**—The evidence taken down by a short-hand reporter does not become a part of the record, until his notes, together with a translation thereof, are deposited with the clerk, and the evidence thus presented is duly certified by the judge. — *Harrison v. Snahr*, S. C. Iowa, Jan. 19, 1899; 41 N. W. Rep. 315.

10. **APPEAL—Notice.**—Notice of appeal held insufficient when served upon "B, attorney for plaintiff," there being two plaintiffs. — *Goodwin v. Hilliard*, S. C. Iowa, Jan. 19, 1899; 41 N. W. Rep. 312.

11. **APPEAL—Foreclosure of Mortgage—Judgment.**—Under Code Iowa, §§ 3180-3182, a recital in an appellant's notice of appeal that the case will be for hearing at a term following one which is more than thirty days from the service of such notice is mere surplusage, and does not affect the appeal, nor the time for hearing it. — *Mickley v. Tomlinson*, S. C. Iowa, Jan. 19, 1899; 41 N. W. Rep. 311.

12. **APPEAL—Eminent Domain—Damages.**—Where evidence is introduced without objection to prove certain facts, a party cannot predicate error thereon; and the same rule will apply if a party excepts to the introduction of certain evidence, and afterwards introduces the evidence objected to, or that of a like character. — *Chicago, etc. Co. v. Wtebe*, S. C. Neb., Jan. 4, 1899; 41 N. W. Rep. 297.

13. **APPEAL—New Trial.**—It is immaterial that the trial court came to an erroneous conclusion on the only point discussed by it on granting a new trial, where it appears that the order can be justified on other grounds on which the motion was based, and on which the court expressed no opinion. — *Harnett v. Cent. Pac. R. Co.*, S. C. Cal., Dec. 29, 1898; 20 Pac. Rep. 154.

14. **APPEAL—Notice.**—The supreme court is without jurisdiction of a cause submitted on an abstract reciting that defendant "filed notice and acceptance, by plaintiff's attorney, of appeal," but not reciting service of the notice on the clerk, as required by Code Iowa, § 8178. — *M'Manus v. Swift*, S. C. Iowa, Jan. 21, 1899; 41 N. W. Rep. 364.

15. **APPEAL—Errors not on Record.**—Where the paper books of counsel do not contain the facts necessary to a determination of the questions raised by the assignments of error, and the evidence is not brought up, and the statements of the history of the case in the paper books differ, the judgment will be affirmed, without passing upon the alleged errors. — *Crawford v. City of Allegheny*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 476.

16. **ARBITRATION AND AWARD—Misconduct.**—Where a motion to set aside award for misconduct of arbitrators conflicting affidavits are filed, the decision of the court below will not be disturbed. — *DeFord v. DeFord*, S. C. Ind., Jan. 12, 1899; 19 N. E. Rep. 530.

17. **ASSUMPSIT—Goods Sold and Delivered.**—B and

S traded buggies, and it was agreed that S should take B's new buggy at \$250, \$100 of which to be paid by S to B in S's old buggy. S took possession of and held the new buggy, but never delivered or offered to deliver the old buggy to B, nor did S pay or offer to pay B for the new buggy: *Held*, that B, the plaintiff, could recover the value of the new buggy on the count of the declaration for goods sold and delivered. — *Sullivan v. Boley*, S. C. Fla., Dec. 14, 1898; 5 South. Rep. 244.

18. **ATTACHMENT—Bond—Attorney's Fees.**—In an action on an attachment bond, reasonable attorney's fees, paid in defending the attachment suit, may be recovered as a part of the damages. — *Territory v. Rindcoff*, S. C. N. Mex., Jan. 1899; 20 Pac. Rep. 180.

19. **ATTACHMENT—Subsisting Indebtedness.**—On the dissolution of a firm, the partner who was to continue the business took the assets, and assumed all indebtedness of the firm, and gave his notes to the retiring partner to secure him against the firm creditors: *Held*, that the notes were evidence of such a subsisting indebtedness as would authorize a writ of attachment. — *Brown v. Wyatt*, S. C. Tex., Nov. 20, 1898; 10 S. W. Rep. 321.

20. **ATTACHMENT—Fraud—Intent.**—It is not evidence of a debtor's intent to defraud his creditors that he refuses to give him security for his debt, and gives mortgages on his property to secure other *bona fide* creditors, and to secure a sum borrowed after said creditor had threatened suit, which sum is used in the payment of other debts. — *Ray v. Gore*, S. C. Mich., Jan. 18, 1899; 41 N. W. Rep. 329.

21. **ATTACHMENT—Fraud—Non-resident.**—Under Code Civil Proc. Cal. § 537, where the property of a non-resident, who was not served with summons, was attached in an action founded upon his fraud and collusion with plaintiff's debtor, whereby the latter's property was put out of the reach of his creditors, the attachment was absolutely void. — *Mudge v. Steinhart*, S. C. Cal., Dec. 29, 1898; 20 Pac. Rep. 147.

22. **ATTACHMENT—Appeal.**—Code Iowa, § 3019, is not limited to a dissolution of the attachment on motion of the defendant, but applies to an order of discharge obtained by one intervening under § 3016, claiming title to the property. — *Ryan v. Keenan*, S. C. Iowa, Jan. 22, 1899; 41 N. W. Rep. 367.

23. **ATTORNEY AND CLIENT—Lien—Compromise.**—Where plaintiff, with defendant's knowledge, agrees with his attorneys to pay them a reasonable compensation, from the proceeds of the judgment which should be obtained, and the parties settle without the knowledge or consent of the attorneys, it is improper for the court to vacate the judgment and dismiss the suit without securing the rights of the attorneys under their agreement. — *Weeks v. Wayne Circuit Judges*, S. C. Mich., Jan. 14, 1899; 41 N. W. Rep. 269.

24. **ATTORNEY AND CLIENT—Admission to Practice.**—Act Pa. May 7, 1886, as amended by act May 19, 1887, providing for admission to the bar, does not authorize admission upon the certificate of the judge of a county other than that in which the attorney has last actually lived and practiced. — *In re Splane*, S. C. Penn., Jan. 21, 1899; 16 Atl. Rep. 481.

25. **BAIL—Right of Sheriff to Take.**—Where a *capias* issued to a sheriff is returnable forthwith, during the term of court at which the same is awarded, it is not proper for the sheriff to take bond for the appearance of the accused, after he has arrested him. — *Bourdeaux v. Warren County*, S. C. Miss., Nov. 26, 1898; 5 South. Rep. 227.

26. **BANKS AND BANKING—Liquidation.**—Under act Cong. July 12, 1893, extending for the purpose of liquidation the franchise of such national banking associations as do not extend the periods of their charters, and making applicable to them the statutes relating to liquidation of banking associations, such an association may continue to elect officers and directors for the purpose of effecting the liquidation. — *Richards v. Attleborough Nat. Bank*, S. J. C. Mass., Jan. 2, 1899; 19 N. Rep. 353.

27. **BANKS AND BANKING—Liability of Stockholders—Married Women.**—A bill to enforce against the separate estate of a married woman an assessment upon shares of national bank stock, is not open to the objection that it does not allege that she had capacity to become a stockholder, whether she became such before or after marriage, where it alleges matter sufficient under the statute Dig. St. Ark. 1874, § 4194. — *Bundy v. Cocks*, Nov. 12, 1888; 9 S. C. Rep. 242.

28. **BONDS—Appeal.**—Where the contractor for the erection of a building gave a bond, and the contract proved that he was "to furnish all the material:" *Held*, that a failure to pay for such materials, whereby a mechanic's lien was filed on the building and lot, was a breach of the condition of the bond. — *Klewis v. Carter*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 286.

29. **BONDS—Interest Coupons—Guaranty.**—One who guarantees the punctual payment of principal and interest of a bond with coupons attached, "when and as the same shall respectively fall due," is liable for the interest or overdue coupons detached at maturity. — *Philadelphia & R. R. Co. v. Knight*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 492.

30. **BOUNDARIES—Adjoining Owner—Agreement.**—Possession and assertion of ownership under a contract to purchase are sufficient to constitute the occupant an adjoining owner for the purposes of agreed boundary lines, and to enable him to make a valid agreement for such lines. — *Silvaver v. Hansen*, S. C. Cal., Dec. 26, 1888; 20 Pac. Rep. 186.

31. **CANCELLATION—Deed—Gift.**—Evidence sufficient to justify court in cancelling deed, the grantor being weak-minded and it not being his intention to convey absolutely. — *Crips v. Towles*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 852.

32. **CARRIERS OF PASSENGERS—Rights of Passengers.**—Where defendant's train stops before crossing the track of another road, where there was no depot, but where defendant allowed passengers to take trains, one who enters the train there becomes a passenger after entering the car; and his rights and duties are the same as other passengers. — *Devire v. Boston & M. R. Co.*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 523.

33. **CARRIERS—Passengers—Damages.**—Steamer held liable for amount of passage money paid when she had advertised to make journey direct to Bordeaux but afterwards deviated from the route. — *DeColavy v. The Chateau Margaux*, U. S. D. C. (N. Y.), Dec. 18, 1888; 87 Fed. Rep. 157.

34. **CHARITIES—Bequests—Construction.**—Equity will enjoin the trustees of an academy from using any portion of a fund for the purchase of land for the use of the academy, where, by the terms of the will bequeathing the property from which the fund is derived, the income only is to be used for purposes of education. — *Peter v. Carter*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 450.

35. **CHATTEL MORTGAGE—Absolute Bill of Sale.**—A deed or bill of sale, absolute on its face, may in equity be adjudged a mortgage; and such adjudication may rest on parol evidence. — *Cake v. Shull*, N. J. Ct. Err. & App., Jan. 23, 1889; 16 Atl. Rep. 434.

36. **CHATTEL MORTGAGE.**—As to the effect of insertion of assumed and fictitious name of mortgagor in chattel mortgage. — *Alexander v. Groves*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 230.

37. **CHATTEL MORTGAGE—Description.**—A description in a chattel mortgage, "one sorrel horse, three years old," is not sufficiently definite to impart constructive notice to third parties, though the mortgage also recites the mortgagor's place of residence, and provides for the place of sale in case of foreclosure. — *Barret v. Fisch*, S. C. Iowa, Jan. 19, 1889; 41 N. W. Rep. 810.

38. **COLLISION.**—Evidence reviewed on question of responsibility for collision and failure to comply with signal. — *The William H. Vanderbilt*, U. S. C. C. (N. Y.), Oct. 15, 1888; 37 Fed. Rep. 116.

39. **COLLISION.**—Evidence reviewed with reference

to responsibility for collision and failure to exhibit signal light. — *The Saratoga*, U. S. D. C. (N. Y.), Dec. 15, 1888; 37 Fed. Rep. 119.

40. **COLLISION—Extent of Liability.**—The liability of the owners of a vessel for damages resulting from a collision in which she was at fault, is limited to the amount of their risk in the voyage, which is (1) the value of the ship; (2) the expenses of the voyage, including ship stores, loading charges, and pay of crew; and (3) the actual gain of the voyage, estimated by deducting from the freight earned the amount of the voyage expenses and such additional expense as is incurred in earning the freight after the collision. — *The Jose E. More*, U. S. C. C. (N. Y.), Dec. 1, 1888; 37 Fed. Rep. 123.

41. **COLLISION—Review of evidence as to responsibility for collision where one of the vessels was obstructing the channel.**—*The Wargaret J. Sanford*, U. S. C. C. (N. Y.), Dec. 1, 1888; 37 Fed. Rep. 143.

42. **CONSTITUTIONAL LAW—Titles to Laws.**—Act. Md. 1888, ch. 362, does not violate a constitutional provision that the subject of every law shall be described in its title. — *State v. Norris*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 445.

43. **CONSTITUTIONAL LAW—Appeal.**—Where a statute contains invalid or unconstitutional provisions, if the valid and invalid are capable of separation, only the latter are to be disregarded. — *Muldoon v. Levi*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 280.

44. **CONSTITUTIONAL LAW—Title of Act.**—Under Const. Tenn. art. 2, § 17, the title of an amendatory act need only recite the title to the act amended, if the amendment is germane to and embraced within the title of the original act. — *State v. Algood*, S. C. Tenn., Dec. 31, 1888; 10 S. W. Rep. 310.

45. **CONTRACTS—Indemnity—Bond.**—Question whether indemnity bond in this case is invalid on account of vagueness. — *Booske v. Gulf Ice Co.*, S. C. Fla., Dec. 18, 1888; 5 South. Rep. 247.

46. **CONTRACTS—Rescission—Fraudulent Representations.**—If plaintiffs induced the sale by misrepresentation of any material fact upon which defendants had the right to and did rely, defendants may rescind, but such right must be exercised within a reasonable time after discovery of the fraud. — *Young v. Arntz*, S. C. Ala., Jan. 8, 1889; 5 South. Rep. 253.

47. **CONTRACTS—Construction—Tender.**—A and B were partners engaged in milling, and, being unable to meet their liabilities, A agreed to convey the mill property to B in consideration that the latter would pay on the partnership debts, if necessary to discharge them, a stipulated sum. B went into possession of the property: *Held*, that he could not refuse to perform his part of the agreement because the deed of the mill property was not actually delivered. — *Buford v. Ashcroft*, S. C. Tex., Nov. 28, 1888; 10 S. W. Rep. 846.

48. **CONTRACT—Construction.**—A paper signed by an architect, after he has performed the services which he agreed to perform, acknowledging receipt of part payment therefor, and stating that a certain balance remains due, which the other party to the paper agrees to pay in installments, at times named, "which shall be in full for all services for plans of exterior and floor plans on the building," is not a contract to do the work necessary for the plans of the exterior and floor plans. — *Pfeiffer v. Campbell*, N. Y. Ct. App., Jan. 16, 1889; 19 N. E. Rep. 496.

49. **CONTRACT—State—Warranty.**—*Held*, under the facts where contractor built wings to the capital under plans of architect that the State warranted the same and was liable to the plaintiffs for the expense of restoring a portion which fell owing to the defect in the plans. — *Bentley v. State*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 838.

50. **CORPORATIONS—Stockholders—Profits.**—A stockholder cannot sue the corporation to recover his share of the accumulated profits until a dividend has been declared, a matter within the discretion of the direc-

tors, and which the courts will not control. — *Beveridge v. New York El. R. Co.*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 498.

51. CORPORATIONS—Stockholder.—Evidence under which court held stockholders of a company liable as joint contractors to a material man furnishing supplies on the order of subcontractor.—*McFall v. McKeesport Ice Co.*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 478.

52. COSTS—Taxation—Revival of Judgment.—Necessary costs incurred in order to have a judgment reviewed in the appellate court cannot be recovered on the reversal of the judgment, in the absence of a statute or rule of court authorizing the taxation of such costs. — *Price v. Garland*, S. C. N. Mex., Jan. 1889; 20 Pac. Rep. 182.

53. COSTS—Suits by County.—The game laws of the State proceed upon the assumption that the county is interested in their enforcement, and in the reservation of game, within its limits; and an action brought by the district attorney for a penalty, under the game laws, is "to recover money or property, or to establish a right or claim, for the benefit of a county," within the meaning of Code Civil Proc. N. Y. § 3248.—*People v. Alden*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 516.

54. COSTS—Federal Court—Attorney's Fee.—Under § 823, Rev. St. U. S., the prevailing party is entitled to collect for his attorney a fee of \$2.50 for the deposition of each witness "taken and admitted in evidence," to be taxed as costs.—*Broyles v. Buck*, U. S. C. C. (Ga.), Dec. 29, 1888; 37 Fed. Rep. 137.

55. COURTS—Jurisdiction—Surrogate.—Question of jurisdiction of surrogates count in matter of equitable set-off.—*Alexander v. Durkee*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 513.

56. COVENANTS — Res Adjudicata. — In an action against a railroad company for damages for failure to maintain a fence and crossing, as provided in a deed, it was competent for defendant to introduce in evidence the files and decree in a former case, brought by plaintiff against the former owner, for the cancellation of said deed, for failure to construct the fence and crossing.—*Hunter v. Burlington, C. R. & N. Ry. Co.*, S. C. Iowa, Jan. 16, 1889; 41 N. W. Rep. 305.

57. CRIMINAL LAW—Confessions—Insanity.—Where a party accused of crime, voluntarily and without inducement of any kind, makes a confession that he committed the offense, and details the facts and circumstances such confession is admissible in evidence against him, although at the time of making the same he was held in custody. — *Anderson v. State*, S. C. Neb., Jan. 9, 1889; 41 N. W. Rep. 357.

58. CRIMINAL LAW—Appeal — Application for Rehearing. — Where, in a criminal case, the counsel for the accused, on appeal, ably present all the rulings of the trial court, and after decision thereon other counsel, on an application for rehearing, present new points, purely technical, they will not be considered.—*People v. Northey*, S. C. Cal., Jan. 25, 1889; 20 Pac. Rep. 129.

59. CRIMINAL LAW — Larceny — Intent. — Simple larceny is the felonious taking and carrying away of the personal goods of another, with intent to deprive the owner permanently of his property. If A should take the property of B, believing that it was with B's consent, and that the property belonged to A, there could be no larceny. — *Mead v. State*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 278.

60. CRIMINAL LAW—Embezzlement—Indictment.—Sufficiency of allegation as to articles stolen in indictment under Rev. St. U. S. § 5467, for embezzlement from the mails. — *United States v. Fuller*, S. C. N. Mex., Jan. 1889; 20 Pac. Rep. 175.

61. CRIMINAL LAW—Embezzlement—Indictment.—Sufficiency of allegation in indictment under Comp. Laws N. M. 1884, § 750, providing for embezzlement by carrier.—*Territory v. Heacock*, S. C. N. Mex., Jan. 1889; 20 Pac. Rep. 171.

62. CRIMINAL LAW—Compounding Felony—Evidence.—In a prosecution for taking money, upon an agree-

ment to withhold evidence of a crime, under § 112, of the Penal Code, it is not necessary that the testimony of the person who makes the agreement with and pays the money to the accused should be corroborated. — *State v. Quinlan*, S. C. Minn., Jan. 21, 1889; 41 N. W. Rep. 239.

63. CRIMINAL LAW — Homicide — Sufficiency of Evidence. — Deceased was found lying as if in sleep, with his skull crushed in by a blow from some blunt instrument, lying by his side, and there was no evidence of a struggle: Held, that the evidence was sufficient to prove murder in the first degree.—*Killer v. Commonwealth*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 495.

64. DAMAGES—Wharves—Concealed Obstruction.—A wharf owner is liable for damages caused to a vessel by a concealed obstruction which might have been ascertained with reasonable diligence.—*Manhattan Transp. Co. v. Mayor*, U. S. D. C. (N. Y.), Dec. 11, 1888; 37 Fed. Rep. 160.

65. DEED—Construction.—Where a conveyance in consideration of love and affection was made to one for life, remainder to his children, and, in the event of his dying without children, remainder to the donor's grandchildren, and the life tenant had a child, but survived it, and the mother of the child survived the life-tenant, the remainder vested in the child at its birth.—*Amos v. Amos*, S. C. Ind., Jan. 23, 1889; 19 N. E. Rep. 543.

66. DEED—Construction—Vested Interests.—Under a conveyance to one for life, and at his death to his children begotten by him in wedlock, and in the event of his "dying without children begotten in wedlock, then the fee-simple" to others, the remainder vests as soon as a child is born by the life tenant in wedlock.—*Amos v. Amos*, S. C. Ind., Jan. 23, 1889; 19 N. E. Rep. 539.

67. DEED—Bona Fide Purchaser — Notice. — As to how far possession of land is notice of the occupant's rights. — *McCleerey v. Wakefield*, S. C. Iowa, Jan. 18, 1889; 41 N. W. Rep. 210.

68. DESCENT AND DISTRIBUTION. — Under Laws Mich. 1883, act 169, and How. St. Mich. § 5776a, the nelves of an intestate dying without nearer relatives, take all her personality to the exclusion of grand-nieces and grand-nephews. — *Van Cleve v. Van Fossen*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 258.

69. DIVORCE—Division of Property. — Where a wife wrongfully procures the title to the homestead and other property to be transferred directly from the husband to herself, and then drives him from the premises, and he afterwards obtains a divorce because of her wrongs, the property should be divided equitably between the parties, and he should have a fair share of the same. — *Snodgrass v. Snodgrass*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 208.

70. DIVORCE—Abandonment. — Facts upon which court held that there was no legal abandonment as charged by wife in divorce suit. — *Bruner v. Bruner*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 335.

72. EDUCATIONAL INSTITUTION—Taxation. — As to what institutions are taxable under Const. Tenn. art. 2, § 28, and acts Tenn. 1883, ch. 105, §§ 1, 2. — *State v. Fisk University*, S. C. Tenn., Jan. 22, 1889; 10 S. W. Rep. 284.

72. EMINENT DOMAIN—Questions for Jury. — In proceedings to condemn land for railroad purposes under the Michigan statute, the jury have only to determine the necessity of taking the property and the damages. — *Manistee, etc. Co. Fowler*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 261.

73. EMINENT DOMAIN — Damages — Evidence. — A witness, called to testify to the damages to certain private property from the location and construction of a public improvement near it, may state what the property was worth immediately before the location and construction of the improvement, and immediately afterwards.—*City of Omaha v. Kramer*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 295.

74. EQUITY — Reformation of Deeds. — A court of equity has power to correct the misdescription of the land in the mortgage, the decree of foreclosure and the

deed from the master, so as to make the same conform to the true intention of the parties to the mortgage, or to give equivalent relief by injunction. — *Greeley v. De Cottes*, S. C. Fla., Dec. 18, 1888; 5 South. Rep. 239.

75. EQUITY—Rescission — Fraud. — Evidence sufficient to justify court in setting aside lease for fraud. — *Wilson v. Moriarty*, S. C. Cal., Dec. 26, 1888; 20 Pac. Rep. 134.

76. EQUITY—Jurisdiction — Negotiable Instruments. — A bill in equity will not lie on a note transferred without indorsement by the payee's legatee, since suit can be brought at law in the name of the payee's executor or administrator, and, if there be none, one may be appointed. — *Nash v. Hogan*, N. J. Ct. Chan., Jan. 18, 1889; 15 Atl. Rep. 433.

77. ESTOPPEL—Homestead. — Wife estopped under the facts to claim homestead in the land where plaintiff advanced money in faith of the statement that the land was not a homestead. — *Equitable West Co. v. Martin*, S. C. Tex., Nov. 9, 1888; 10 S. W. Rep. 301.

78. EVIDENCE—Recorded Chattel Mortgage. — Under 2 Bayles, Rev. St. Tex. art. 3190b, § 3: Held, that a copy was not admissible to show the execution of a chattel mortgage, where the absence of the original instrument was not accounted for. — *Boydston v. Morris*, S. C. Tex., Nov. 9, 1888; 10 S. W. Rep. 331.

79. EVIDENCE—Tenant by Courtesy. — Question of sufficiency of evidence in action by children of R's first wife to recover from the children of his second wife certain land which they allege are held as tenant by the courtesy in the right of his first wife. — *Woolfolk v. Richardson*, Ky. Ct. app., Jan. 10, 1889; 10 S. W. Rep. 320.

80. EVIDENCE—Admission—Letters Between Partners. — Testimony as to the contents of a letter written by one member of a firm to another, showing the purpose for which a pretended purchase from a failing debtor was made, is, in a contest between the firm and other creditors as to the validity of such purchase, competent as an admission, though at the time of giving the testimony the witness, to whom the letter was written, has ceased to be a member of the firm. — *Wills Point Bank v. Bates*, S. C. Tex., Nov. 27, 1888; 10 S. W. Rep. 348.

81. EVIDENCE — Medical Expert — Weight and Sufficiency. — When a medical expert is asked give his professional opinion to a jury, upon an hypothetical case founded upon the testimony of witnesses previously examined, the questions to him must be so shaped as to give him no occasion to mentally draw his conclusion, and from these conclusions, express his opinion, and his answers must be such as not to involve any such conclusion. — *Kerr v. Lunsford*, S. C. W. Va., Dec. 8, 1888; 8 S. E. Rep. 493.

82. EVIDENCE—Res Gestæ—Indecent Assault. — In a civil action for damages by a female plaintiff, for an assault upon her with intent to have carnal intercourse with her: Held, that statements made by the defendant of and concerning the plaintiff derogatory to her character, before and after the alleged assault, and too remote therefrom to be deemed a part of the *res gestæ*, were inadmissible in evidence. — *Atkins v. Gladwich*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 347.

83. EXECUTION—Sale. — An execution sale of shares in the stock of a building association, made after 9 o'clock at night, in the hall of the association, when but few of the members are there, is void. — *McNaughton, McLean*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 267.

84. EXECUTION—Sales — Confirmation. — Upon the return of an order of sale of real estate, where the proceedings are found to be regular, it is the duty of the court to confirm the sale. — *Adams v. De Valley*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 239.

85. EXECUTORS AND ADMINISTRATORS—Mortgage. — Construction of acts Pa. March 29, 1832, and Feb. 24, 1834, providing for jurisdiction of orphans in the matter of allowing administrators to raise money on realty to pay debts. — *Spencer v. Jennings*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 426.

86. EXECUTORS AND ADMINISTRATORS—Actions — Defenses. — It is no defense to an action by executors on a due bill to testator that the will provides that any debt outstanding from defendant to testator shall be deducted from the shares given to defendant's children. — *Morgan v. Morgan*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 489.

87. EXECUTORS AND ADMINISTRATORS — Allowance to Widow. — Construction of Code Civil Proc. Cal. § 1465, providing that the probate court may set apart, for the use of the widow, the property of decedent exempt from execution; and § 1466, authorizing such reasonable allowance for the support of the family as may be necessary, according to their circumstances, during the settlement of the estate. — *In re Walkerly's Estate*, S. C. Cal., Dec. 29, 1888; 20 Pac. Rep. 150.

88. EXECUTORS AND ADMINISTRATORS — Actions — Pleading. — Under Code Md. art. 75, § 22, subsec. 96, a declaration showing that plaintiff sues "for money payable by the defendant's testator to the plaintiff, for goods sold by the plaintiff to the defendants' testator," is sufficient. — *Stoner v. Derubins*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 440.

89. FRAUD—Damages—Exchange of Lands. — Claim for damages suffered by reason of false representations in exchange of land is a tort, and not a contract. — *Parley v. Wike*, S. C. Ind., Jan. 22, 1889; 19 N. E. Rep. 478.

90. FRAUDS—Statute of. — A receipt signed by defendant, showing the payment of a sum of money on account of the price of "a lot of ground fronting about 190 feet on the P. E. R., in the 21st ward," P does not sufficiently identify the land to comply with the statute of frauds. — *Mellon v. Davison*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 431.

91. FRAUDS—Statute of—Specific Performance. — It was held that an oral acceptance of the option of purchase contained in a lease was sufficient, under the statute of frauds, the lease being signed by the party. — *Smith v. Gibson*, S. C. Neb., Jan. 8, 1889; 41 N. W. Rep. 360.

92. FRAUDULENT CONVEYANCE. — A creditor can secure preference of his claim against an insolvent debtor in payment of *bona fide* debt, provided he acts in good faith. — *Stewart v. Mills, etc. Bank*, S. C. Iowa, Jan. 21, 1889; 41 N. W. Rep. 818.

93. HIGHWAYS—Dedication — Acquiescence. — The fact that a road had been open to public travel, worked and used as a public road for a period of eighteen months, does not show a dedication, unless the land owner knew and acquiesced in the user, nor a case within Pol. Code Cal. § 2619, providing that "all roads used as such for a period of five years are highways." — *Hope v. Barnett*, S. C. Cal., Dec. 29, 1888; 20 Pac. Rep. 245.

94. HUSBAND AND WIFE — Judgment. — Evidence held not sufficient to sustain bill in equity to annul sale of land by husband to wife on ground that the wife obtained no absolute interest in the land. — *Craig v. Monitor Plow Works*, S. C. Iowa, Jan. 21, 1889; 41 N. W. Rep. 864.

95. INDIANS — Homicide — Statutes. — Under act Cong. March 3, 1885, on indictment of Indian for the killing of another Indian, in obedience to tribal resolutions, it was no defense that defendants never had notice of the statute. — *United States v. Whaley*, U. S. O. C. (Cal.), Dec. 15, 1888; 37 Fed. Rep. 145.

96. INDIANS—Rights of Heirs—Conveyance—Patent. — Under act Cong. Aug. 4, 1886, § 2, providing the procedure on the death of an allottee of land under the treaty with the Kickapoo Indians, the United States holds the legal title in fee-simple in trust for the heirs of the allottee, and the latter are estopped by their warranty deed conveying the land before obtaining a patent from asserting title against the grantee. — *Briggs v. Wash-luk qua*, U. S. O. C. (Kan.), Dec. 26, 1888; 37 Fed. Rep. 135.

97. INJUNCTION—Obstruction. — Where the bill alleges that defendant threatens to construct a wharf in front of complainant's wharf, thereby entirely preventing the latter from having access to their wharf, and

the answer and affidavits in support thereof deny that such access will be cut off by the proposed construction, an injunction will not be ordered.—*Hatch v. Kaighns, et. Co.*, N. J. Ct. Chan., Jan. 24, 1889; 16 Atl. Rep. 432.

98. INJUNCTION—Laches.—A turnpike company, a part of whose road bed had been condemned for railroad purposes on condition that the railroad company should build a certain described fence between its track and the turnpike, cannot, after allowing the railroad to be built and operated for six years, without requiring the railroad company to build the fence, obtain an injunction restraining the operation of the road over the condemned land.—*Spencer v. Falls Turnpike Road Co.*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 451.

99. INSANITY—Guardian.—Under How. Stat. Mich. § 6314, providing for appointment of guardian for person mentally incompetent, no jurisdiction is conferred upon the court to make such appointment unless the petition discloses who the heirs presumptive and next of kin are, all of whom must have notice of the hearing.—*In re Myers*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 334.

100. INSURANCE—Mutual Benefit Companies—Amount of Recovery.—In an action on a mutual life insurance certificate, defendant prayed for an instruction that plaintiff's recovery must be limited to the amount, after deducting all necessary expenses, that an assessment would have realized if made on the death of the assured: *Held*, that the court properly refused the prayer, in view of the provisions of the certificate of membership.—*Oriental Ins. Co. v. Glancey*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 591.

101. INSURANCE—Co-operative Associations—Constitution.—A clause in the constitution of an incorporated life insurance association operating on the co-operative plan, prescribing the manner in which the right to dispose of the insurance money may be exercised, cannot be taken advantage of by one who claims to be a beneficiary, on the ground that there has not been strict compliance with the clause in changing the direction of the benefit.—*Titworth v. Titworth*, S. O. Kan., Jan. 5, 1889; 20 Pac. Rep. 213.

102. INSURANCE—Limitation of Actions—Estoppel.—Acts 18th Gen. Assem. Iowa, ch. 311, § 3, requiring actions upon policies of insurance to be commenced not sooner than ninety days after notice of loss is given, is in the nature of a statutory limitation of such actions, and is not eliminated from a policy by a provision therein that the contract of insurance is wholly embraced in the policy and application of the assured.—*Vore v. Hawkeye Ins. Co.*, S. O. Iowa, Jan. 19, 1889; 41 N. W. Rep. 309.

103. INTOXICATING LIQUORS—License—Bond.—Under act Pa. April 10, supplementing act April 3, 1873: *Held*, that such a bond to sell liquor did not secure judgments against the licensee for selling on Sunday in violation of act February 26, 1855, which became of force in Allegheny county by act May 13, 1887, repealing act April 8, 1872, passed after the license had been issued, and the bond in question taken.—*Crawley v. Com.*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 416.

104. INTOXICATING LIQUOR—License—Mandamus.—Under act Pa. May 13, 1887, a court will not, after refusing license, be required by *mandamus* to pass upon the question of public necessity for such license, on the ground that its refusal was based wholly upon public sentiment, as evidenced by the comparative number of petitioners and remonstrants.—*In re King*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 487.

105. INTOXICATING LIQUORS—Justice of the Peace.—The costs of prosecution, which follow conviction in some criminal causes, are no part of the fine mentioned in § 8, art. 6, of the constitution, which prescribes the jurisdiction of justices of the peace.—*State v. Larson*, S. O. Minn., Jan. 21, 1889; 41 N. W. Rep. 363.

106. JUDGMENT—Confession—Assignment.—Evidence sufficient to justify court in opening judgment by confession on warrant of attorney after its assignment.—*Appeal of Scott*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 430.

107. JUDGMENT—Summons—Justice of Peace.—In serving summons, the constable, by mistake, entered a less amount upon the copy of the summons served upon the defendant than that indorsed upon the original summons, the judgment in excess of the indorsement upon the copy is voidable only, but not void.—*Bassett v. Mitchell*, S. O. Kan., Jan. 5, 1889; 20 Pac. Rep. 192.

108. JURY—Equitable Action.—Under Code Iowa, § 2517, held that a defendant, in an equitable action to foreclose a mortgage, who sets up a counterclaim on which a legal issue is framed, is not entitled to have such issue tried by a jury.—*Eymon v. Lynch*, S. O. Iowa, Jan. 23, 1889; 41 N. W. Rep. 320.

109. LANDLORD AND TENANT—Assignee—Rent.—An assignee of a note given by a tenant in payment of rent is not entitled to the remedy by attachment given by Code Miss., §§ 1802, 1824, to a landlord, grantee of demised premises, or of the reversion thereof, their heirs, executors and administrators.—*Gross v. Bartley*, S. O. Miss., November 26, 1888; 5 South. Rep. 225.

110. LANDLORD AND TENANT—Lease—Forfeiture.—*Held*, under the term of lease providing forfeiture, that the stipulation avoiding the lease did not render it null *ab initio*, but only from the expiration of the time within which the payment was to be made.—*Galey v. Kellerman*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 474.

111. LIMITATION OF ACTIONS—Surcharging Administrators' Accounts.—Code Tenn., § 2776, applies to a bill in equity by distributees to surcharge and falsify an administrator's account, and to recover distributive shares; the statute of limitations under the code being made to operate on the cause, and not on the form, of the action.—*Alvis v. Oglesby's Exrs.*, S. C. Tenn., Jan. 2, 1889; 10 S. W. Rep. 313.

112. LIMITATION—Commencement of Action.—The "sheriff of the proper county," within the meaning of Code Iowa, § 2532, is the sheriff of the county where the action is brought, although the defendant is in fact in another county.—*Hampe v. Shaffer*, S. O. Iowa, Jan. 21, 1889; 41 N. W. Rep. 315.

113. LOGS AND LOGGING—Mechanic's Lien—Duration.—Under a contract to cut and haul two kinds of lumber from the same land, the 60 days during which the lien continues, under Rev. Stat. Me., ch. 91, § 83, run from the date of the last delivery of either kind.—*Phillips v. Foss*, S. J. C. Me., December 27, 1888; 16 Alt. Rep. 453.

114. MARITIME LIENS—Discharge by Sale.—Evidence reviewed on question as to whether pre-existing liens were discharged by sale of the vessel.—*The Raleigh*, U. S. C. C. (N. Y.), Dec 29, 1888; 37 Fed. Rep. 125.

115. MASTER AND SERVANT—Independent Contractor.—Where an independent contractor for the construction of a gas-main is required by the contract to brace and protect all water and other pipes, and by his neglect in not sufficiently bracing the pipe of another company the same breaks, causing an explosion, the company for which the main is constructed is not liable for the damage caused thereby, where there is no evidence of acceptance of the work, and notice of its faulty performance.—*Chartiers Valley Gas Co. v. Waters*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 423.

116. MASTER AND SERVANT—Negligence.—Question of negligence where plaintiff was injured ascending electric light tower to trim lamps, which had already been trimmed.—*Weiden v. Brush Electric Light Co.*, S. C. Mich., Jan. 13, 1889; 41 N. W. Rep. 293.

117. MASTER AND SERVANT—Negligence.—Question of negligence where servant fell down elevator well to which he was unused.—*Corey v. Arlington Mills*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 525.

118. MASTER AND SERVANT—Negligence—Injury.—Question of negligence in an action for injuries to employee on account of defect in hand car.—*Mo. Pac. Ry. Co.*, S. C. Tex., Nov. 9, 1888; 10 S. W. Rep. 334.

119. MASTER AND SERVANT—Defective Appliances.—The risk from an uncovered saw projecting over its

frame and partly across a narrow passage-way, over which a servant in a mill is obliged to go in the performance of his duties, being apparent, is assumed by the servant in accepting and remaining in the service. — *Stephenson v. Duncom*, S. C. Wis., Jan. 29, 1899; 41 N. W. Rep. 337.

120. MEASURE OF DAMAGES — Conversion. — *Held*, that plaintiff was not entitled to punitive damages for the conversion of a steer under the facts of the case but only to the actual value. — *Waller v. Waller*, S. C. Iowa, Jan. 17, 1899; 41 N. W. Rep. 307.

121. MECHANIC'S LIENS—Alterations. — *Held*, under the evidence that the alterations did not amount to a rebuilding and were not within the mechanic's lien law, June 18, 1898. — *Patterson v. Frasier*, S. C. Penn. Jan. 7, 1899; 16 Atl. Rep. 476.

122. MORTGAGE — Deed. — Evidence held not sufficient to change absolute deed into a mortgage. — *Chandler v. Chandler*, S. C. Iowa, Jan. 21, 1899; 41 N. W. Rep. 318.

123. MORTGAGES—Payment—Principal and Agent. — Plaintiff, placed in the hands of her agent a sum for investment in western loans, which the agent procured to be negotiated by C, in Iowa. Part of the amount was loaned through C to defendant, the principal and interest being made payable at the agent's office in Connecticut. C collected the principal and interest of the various loans from defendant, and returned to defendant his coupons: *Held*, that the payment of the principal to C, in response to the usual notice from him of its maturity was justified, and discharged the debt, notwithstanding C's embezzlement of it. — *Wilcox v. Carr*, U. S. C. C. (Iowa), Dec. 31, 1898; 37 Fed. Rep. 180.

124. MORTGAGES. — The mortgagee of real property agreed with a third person, who owned certain personalty situated thereon, that the mortgagee would sell the personalty, and apply \$1,000 of the proceeds in payment of the mortgage debt, which was accordingly done: *Held*, on foreclosure, that neither the mortgagor nor purchasers from him could question the disposition of the surplus over the \$1,000. — *Hayes v. Stockwell*, S. C. Mich., Jan. 18, 1899; 41 N. W. Rep. 324.

125. MORTGAGE—Deed Absolute. — Evidence under which lower court was justified in holding the transaction a sale of land and not intended as a mortgage. — *Wallace v. Johnston*, U. S. S. C., Jan. 14, 1899; 9 S. C. Rep. 243.

126. MORTGAGE—Foreclosure—Installments. — Procedure under Code Civil Proc. Cal. § 723, relating to mortgage foreclosures, providing that if the debt for which the mortgage is held is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease, and that as often as more becomes due the court may order more to be sold. — *Bank of Napa v. Godfrey*, S. C. Cal., Dec. 27, 1898; 20 Pac. Rep. 142.

127. MORTGAGES—Redemption. — A mortgagee who has held possession of land for many years under an invalid statutory foreclosure, believing it regular and valid, and who has made permanent improvements thereon, if charged with rents and profits in a decree for redemption should be credited with the taxes paid during his occupancy. — *Millard v. Truax*, S. C. Mich., Jan. 18, 1899; 41 N. W. Rep. 328.

128. MUNICIPAL CORPORATIONS—Street Improvements. — Contractor who paves street in accordance with contract with city may recover therefrom though on account of change of law no apportionment or assessment has been made as required by statute. — *Kelly v. City of Albany* N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 508.

129. MUNICIPAL CORPORATIONS — Contested Elections. — Laws Mich. 1887, does not apply in the case of elections for aldermen for the city of Detroit, and an application for an investigation of the returns of such election should be made to the board of aldermen. — *Neumann v. Board of City Canvassers*, S. C. Mich., Jan. 11, 1899; 41 N. W. Rep. 267.

130. MUNICIPAL CORPORATIONS—Water Main. — Construction as to the intent of act Mass. 1846, ch. 167, §§ 1, 2.— *Town of Quincy v. City of Boston*, S. J. C. Mass., Jan. 5, 1899; 19 N. E. Rep. 512.

131. MUNICIPAL CORPORATIONS—Public Improvements. — Necessary allegations in partition in action against city for damages to property by grading street under Code Iowa §§ 465, 469. — *Trustees v. City of Anamosa*, S. C. Iowa, Jan. 18, 1898; 41 N. W. Rep. 313.

132. MUNICIPAL CORPORATIONS—Defective Sidewalks—Acts of Abutter. — A city is liable for injuries resulting from a depression in a sidewalk caused by operations of the abutting owner, if it has actual or constructive notice of the defect, though said owner be also liable. — *City of Philadelphia v. Smith*, S. C. Penn., Jan. 28, 1899; 16 Atl. Rep. 498.

133. MUNICIPAL CORPORATIONS — Arbitration and Award. — Where, in a contract for the improvement of a street, the city reserves the right to lay or relay any and all water pipes or sewers during the progress of the work, the contractor cannot recover the additional cost to him of hauling dirt, caused by the laying of a water main in the street, though the city surveyor promised that he should be paid for such extra work. — *Rens v. City of Grand Rapids*, S. C. Mich., Jan. 11, 1899; 41 N. W. Rep. 263.

134. NATIONAL BANKS — Taxation—Stock. — In the assessment and taxation of shares of national bank stock, the owners thereof, having no other credits or moneyed capital, are entitled to deduct their *bona fide* debts from the value of such shares of stock. — *Bressler v. Wayne County*, S. C. Neb., Jan. 4, 1899; 41 N. W. Rep. 366.

135. NAVIGABLE WATERS — Obstruction — Burden of Proof. — Where the act authorizing the construction of the bridge prescribes certain details of construction, the burden, in an action for obstructing navigation, is upon defendants to show compliance with such provisions. — *Penn. Ry. Co. v. Balt & N. Y. Ry. Co.*, U. S. C. C. (N. Y.), Dec. 29, 1899; 37 Fed. Rep. 129.

136. NEGLIGENCE—Pleading — Complainant. — An allegation in a complaint against a railroad company for killing plaintiff's husband, that the injury resulted from the negligence of defendant's employees, implies that there was no contributory negligence on the part of deceased, and this need not be averred. — *Hickman v. Kansas City, M. & B. R. Co.*, S. C. Miss., Jan. 21, 1899; 5 South. Rep. 225.

137. NEGLIGENCE—Instruction—Exemplary Damages. — An instruction in suit for injury through defects of railroad that defendant is liable to exemplary damages if it knew of the defects, and operated the road indifferent to the passengers thereof, is erroneous, in not limiting the recovery of exemplary damages to acts of gross negligence contributing to the accident. — *Mo. Pac. R. Co. v. Johnson*, S. C. Tex., Nov. 23, 1898; 19 S. W. Rep. 325.

138. NEGLIGENCE—Street Railroad — Trespasser. — Defendant liable, for death of boy, invited on car by driver but pushed off by conductor, though he was a trespasser. — *Hestonville, etc. Co. v. Biddle*, S. C. Penn., Jan. 28, 1899; 19 Atl. Rep. 488.

139. NEGLIGENCE—Defective Sidewalk. — Evidence considered a question of negligence where plaintiff fell into coal hole in sidewalk being slightly intoxicated. — *Dickson v. Hallister*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 484.

140. NEGLIGENCE—Railroad Companies—Injuries. — A railroad company is liable for injuries to one crossing the track, occasioned by sending cars in swift motion, with no one at the brakes, upon a switch track where persons commonly pass, without objection from the company, though not a public crossing. — *St. Louis A. & T. Ry. Co. v. Crossnoe*, S. C. Tex., Nov. 23, 1898; 19 S. W. Rep. 342.

141. NEGOTIABLE INSTRUMENTS—Transfer — Innocent Purchaser. — That a negotiable note was signed by the maker, who could not read or write English, believing the payee's representations that it was not a

note, but a mere memorandum of agency, cannot avail against an innocent purchaser for value before maturity. — *Bedell v. Hering*, S. O. Cal., Dec. 26, 1888; 20 Pac. Rep. 129.

142. NEW TRIAL—Jury—Advisory Verdict. — In a probate proceeding, the court submitted two issues of fact to a jury, which found on these issues, and was discharged. The court took no further action in the matter, and the case was not decided: *Held*, that this was not the verdict of a jury, within the meaning of Code Civil Proc. Cal. § 659, but was merely advisory to the judge. — *James v. McCann*, S. O. Cal., Jan. 12, 1889; 20 Pac. Rep. 241.

143. NEW TRIAL—Verdict—Evidence. — When a case is tried on a certain theory, and the jury return answers to special questions of fact submitted to them by the court, and there is no evidence in the record to support or authorize a finding that is essential to a recovery, it is error to overrule a motion for a new trial. — *Southern Kan. Ry. Co. v. Duncan*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 195.

144. NEW TRIAL — Verdict. — Order granting new trial will not be disturbed where the findings of jury were indefinite, contradicted and based upon conflicting evidence. — *Black v. Berry*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 194.

145. PARTNERSHIP—Attorney's Fees. — Evidence to hold a firm for payment of attorneys, contracted by a member thereof, it being a transaction outside the scope of the firm's particular business. — *Conely v. Wood*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 259.

146. PARTNERSHIP—Assignee of Insolvent Partner. — In an action upon a debt due a partnership, it is not necessary, under the Massachusetts statutes, that the assignee of an insolvent partner should be joined as plaintiff in place of the insolvent partner, at least where he makes no objection to the maintenance of the action by the partners. — *Worson v. Pew*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 522.

147. PARTNERSHIP—Appeal. — A partner, who without the consent of his copartner leases property for the use of the firm, is not liable, on dissolution of the partnership, to his copartner for the loss occasioned by such lease, though he acted unwisely, where his conduct was not fraudulent or wanton. — *Charlton v. Sloan*, S. C. Iowa, Dec. 20, 1888; 41 N. W. Rep. 303.

148. PARTNERSHIP—Dissolution—Agreement. — Under an agreement dissolving a partnership, some of its members taking its assets subject to the payment by them of the indebtedness of the firm, "amounting to [a fixed sum]," they cannot be required to pay more than that amount, though a debt was accidentally omitted from the calculation. — *Miles v. Everson*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 473.

149. PARTITION—Improvements — Tenant by Curtesy. — The children of a second marriage are not, after their father's death, entitled to any reimbursement for permanent improvements made by him on land, the separate estate of his first wife, while he was holding it as tenant by the curtesy. — *Clift v. Clift*, S. O. Tex., Nov. 27, 1888; 10 S. W. Rep. 338.

150. PATENTS—Duration — Foreign Patent. — Under Rev. Stat., § 4837, providing that every patent for an invention previously patented in a foreign country shall be so limited as to expire at the same time as the foreign patent, and shall not be in force more than seventeen years, a United States patent does not expire until the termination of the fifteen years during which a Canadian patent continues. — *Bate Refrig. Co. v. Hammond*, U. S. S. O., Jan. 21, 1889; 9 S. C. Rep. 225.

151. PAYMENT — Evidence — Burden of Proof. — A plaintiff, except upon commercial paper, must prove a breach of contract, to entitle him to recover; but, where a defendant in his answer alleges payment, it is not necessary that the plaintiff should make proof of non payment, but the burden then rests upon the defendant to prove such payment. — *Guttermann v. Schroeder*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 230.

152. PAYMENT—Application — Mortgage. — Question of application of payment and rights of purchaser of mortgaged property where payments were made by mortgagor. — *Hiller v. Levy*, S. O. Miss., Nov. 26, 1888; 5 South. Rep. 226.

153. PRINCIPAL AND AGENT—Authority of Agent. — Where an agent has authority to collect a note, but is not authorized to receive anything in payment but money, he cannot accept his own note in payment. — *Wilcox & White Organ Co. v. Lasley*, S. O. Kan., Jan. 5, 1889; 20 Pac. Rep. 228.

154. PRINCIPAL AND AGENT—Fraud of Agent. — An agent is held to the highest good faith, and if he negotiates a sale for his principal he must account to him for the full price of the sale. Equity will deny him relief if he has acted fraudulently as to his principal. — *Jacobs v. George*, S. C. Ariz., Jan. 19, 1889; 20 Pac. Rep. 183.

155. PRINCIPAL AND AGENT—Evidence of Authority. — Question under the evidence as to the authority of the agent to bind the principal in agreement to return part of contract price in case the article sold is not satisfactory. — *Siemens, etc. Co. v. Horstmann*, S. O. Penn., Jan. 28, 1889; 16 Atl. Rep. 490.

156. PRINCIPAL AND SURETY—Liabilities Between Sureties. — Sufficiency of evidence to sustain an action by one of two sureties against the other, to declare a judgment against them and their principal, which had been paid by and assigned to defendant, satisfied by a conveyance by the principal to the defendant of land on which the judgment was a lien. — *Keiser v. Beam*, S. O. Ind., Jan. 23, 1889; 19 N. E. Rep. 534.

157. PRINCIPAL AND SURETY—Contractor's Bond — In an action on a bond executed and filed under § 8, ch. 90, Gen. Stat. 1878, it is immaterial what interest the nominal obligee has, or that he has or has not any interest in the land on which the building is to be constructed, if he be the person who, as owner, has contracted to have the building constructed. — *Stefes v. Lemke*, S. C. Minn., Jan. 14, 1889; 41 N. W. Rep. 302.

158. PUBLIC LANDS—Purchase of Swamp Lands—Contest—Allegations. — Under Pol. Code Cal., § 3413, the complaint in a contest as to the right to purchase such lands must allege that an affidavit containing the matters specified in § 3443 was made and filed, and must set out the substance of such affidavit. — *Reese v. Thorburn*, S. O. Cal., Jan. 15, 1889; 20 Pac. Rep. 131.

159. PUBLIC LANDS—Head-right Certificates—Adverse Possession. — Adverse possession by the wife, after the death of her husband, of an unlocated head-right land certificate issued to him, will not pass title to the land located, or to be located under it, as against the heirs of the husband and of a former wife, to whom he was married when the certificate issued. — *Harvey v. Carroll*, S. O. Tex., Nov. 20, 1888; 10 S. W. Rep. 334.

160. PUBLIC LANDS—Grant by States—Actual Settlers—Patents. — Under Const. Cal., art. 17, § 8, and Pol. Code Cal., § 3500, a certificate of purchase issued to one who is not an actual settler, though his affidavit states that he is such, confers no rights, and neither he nor his assignee can maintain an action to annul a patent to another. — *Davidson v. Cucamonga Co.*, S. C. Cal., Dec. 29, 1888; 20 Pac. Rep. 152.

161. QUIETING TITLE—Adverse Possession. — Where the evidence, in an action to quiet title, shows that plaintiff entered into possession under an oral contract of division with defendant, and has remained in exclusive and adverse possession for over 10 years, a decree quieting his title is proper. — *Quinn v. Quinn*, S. C. Iowa, Jan. 21, 1889; 41 N. W. Rep. 316.

162. QUO WARRANTO — Parties — Pleading. — An information charging respondent with usurping the office of county superintendent of the poor, which states that the prosecution is in behalf of the people of the State, is properly filed in the name of the attorney-general on the relation of a citizen and tax-payer of the county. — *Taggart v. James*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 262.

163. RAILROAD COMPANIES — Fires — Evidence. — A

record of the inspection of locomotives kept by a person who is employed by a railroad company for the purpose of making a daily inspection, and ascertaining their condition, is not evidence of such condition except under certain contingencies, not appearing in this case.—*Hofman v. Chicago, etc. Co.*, S. O. Minn., Jan. 21, 1889; 41 N. W. Rep. 301.

164. RAILROAD COMPANIES—Failure to Run Trains—Receivers.—The act (Supp. Revision, p. 834, pl. 42) authorizing the chancellor to appoint a receiver, if a railroad neglects to run daily trains, confers such power upon the court of chancery, and not upon the chancellor in his personal capacity.—*Delaware Bay, etc. Co. v. Markley*, N. J. Ct. Err. & App., Jan. 23, 1889; 16 Atl. Rep. 428.

165. RELEASE—Judgment.—Sufficiency of allegation in complaint charging a release of a judgment.—*Phunkett v. Black*, S. O. Ind., Jan. 22, 1889; 19 N. E. Rep. 587.

166. REPLEVIN—Bonds.—Plaintiff in replevin gave the usual bond for the return of the property. Judgment was given for defendant, and the removal of the property out of the jurisdiction by plaintiff was enjoined. The injunction was violated, and proceedings for contempt were instituted, which were settled by the plaintiff in the replevin suit giving a bond: *Held*, that the second bond was a bar to an action on the first.—*Buech v. Fisher*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 335.

167. RES ADJUDICATA—Attorney and Client.—An adjudication denying a motion made under Code Iowa, § 2906, estops plaintiff from subsequently bringing an action to recover the amount claimed, though in such special proceeding he only asks for a final order requiring defendant to pay over money collected, and not for judgment against him for the amount.—*Hawk v. Evans*, S. O. Iowa, Jan. 22, 1889; 41 N. W. Rep. 368.

168. SALE—Advance of Money—Ownership.—When a commercial correspondent advances money for the purchase of property and takes possession, either actual or symbolical, he becomes the owner thereof.—*Wheeler v. N. H. Wire Co.*, S. C. Conn., Jan. 23, 1889; 16 Atl. Rep. 393.

169. SCHOOL LANDS—Trial by Court—Evidence.—While the failure to pay interest on school land contracts on the day it becomes due does not work a forfeiture of contract, yet upon failure to pay such interest for 15 years, with no assertion of ownership of the real estate, during 10 years of which time the property has been in the possession of a subsequent purchaser, who obtained the land from the State, in good faith, relying upon the abandonment of the first purchaser, the right of such first purchaser to assert his title as against that of the second will be barred.—*Richardson v. Doty*, S. O. Neb., Jan. 4, 1889; 41 N. W. Rep. 282.

170. SHIPPING—Carriage of Passengers on Freight Boat.—A libel against a vessel for a violation of law alleged to have been committed in using or navigating a freight boat for the carrying of passengers without having been inspected as a passenger steamer, and obtaining a certificate specifying the number of passengers she can carry with prudence and safety, is not properly brought under Rev. Stat. U. S., § 4465.—*United States v. The Frank Sylceta*, U. S. D. C. (Cal.), Dec. 24, 1888; 87 Fed. Rep. 155.

171. SHIPPING—Negligence.—Steamer held liable for injuries caused by negligence of stevedore who undertook to move her.—*Serviss v. The Chattahoochee*, U. S. D. C. (N. Y.), Nov. 30, 1888; 87 Fed. Rep. 153.

172. SPECIFIC PERFORMANCE—Doubtful Title.—Where testator gave all his estate to three societies, and ordered a sale of his realty and the distribution of the proceeds among them, and under Laws N. Y. 1860, ch. 860, he could give but one-half of his property to such societies, and the executor sold the realty to defendant, who refused to complete the purchase, a judgment sustaining a demurrer to a complaint in an action for specific performance, in which it does not appear how much of the estate is realty, and to which the heirs

are not parties, will be affirmed.—*Abbott v. James*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 431.

173. SPECIFIC PERFORMANCE—Contract.—*Held*, under the facts, that time was not of the essence of the contract to sell land, although it had appreciated in value and plaintiff was entitled to a conveyance.—*Day v. Hunt*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 414.

174. SPECIFIC PERFORMANCE—Where it does not appear from the evidence that time is of the essence of a contract for the sale of land, the fact that the vendor tenders the deed about a month later than agreed upon does not prejudice his right to a specific performance of the contract.—*Butler v. Archer*, S. O. Iowa, Jan. 19, 1889; 41 N. W. Rep. 309.

175. STATUTES—Time of taking Effect.—Laws 1885, ch. 483, imposing a tax upon certain legacies, and collateral inheritances, not specially providing when it shall take effect, became a law twenty days after its final passage, under 1 Rev. St. N. Y. p. 157, §§ 11, 12, (7th Ed. p. 433).—*In re Howe's Estate*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 513.

176. TAXATION—Tax-titles—Infancy.—Under Code Miss. 1880, § 878, giving holder of tax-title right to bring bill for confirmation, such a bill may be brought against infants without waiting until expiration of the period of redemption after their disability is removed.—*Metcalfe v. Perry*, S. C. Miss., Dec. 3, 1888; 5 South. Rep. 322.

177. TAXATION—Assessment Books—Public Examination.—Laws N. Y. 1869, ch. 302, § 8, provides that the assessment books shall be kept "open for examination and correction from the second Monday in January until the 1st day of May in each year": *Held*, that the word "until" is used in the sense of "up to," and excludes the 1st day of May.—*Clarke v. Mayor*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 436.

178. TAXATION—Lien—Enjoining Assessment.—Where, before taxes assessed can become a lien on land, the tax-list must be presented to the board of equalization for approval, under Gen. Laws Tex. 44, an injunction will not be granted before such approval to restrain an assessor of a county from assessing lands claimed to be in another county.—*Chisholm v. Adams*, S. C. Tex., Nov. 9, 1888; 10 S. W. Rep. 336.

179. TAXATION—Taxable Property—Mortgage to State.—Under Const. Cal. art. 13, § 4, the owner of land on which there is a mortgage to the regents of the State university is entitled to have the amount of the mortgage deducted from the value of the property for the purposes of taxation, notwithstanding such amount, as an interest of the State, will not be otherwise taxed.—*Smith v. Keagle*, S. O. Cal., Dec. 31, 1888; 30 Pac. Rep. 152.

180. TAX-DEED—Tenancy in Common—Trespass.—Whether the possession of plaintiff under tax-deed was sufficient to maintain trespass against a stranger, he could not recover against defendant, who was a tenant in common, having the legal title to an undivided interest, and hence entitled to possession.—*Todd v. Lunt*, S. J. O. Mass., Jan. 4, 1889; 19 N. E. Rep. 522.

181. TAX DEEDS—Record.—The omission by the register of deeds of the word "is" from the formula "as the fact is," occurring in the form of tax-deeds prescribed by the Rev. St. Wis. § 1178, does not invalidate the record of such a deed.—*St. Croix Land & Lumber Co. v. Ritchie*, S. O. Wis., Jan. 20, 1889; 41 N. W. Rep. 345.

182. TELEGRAPH COMPANIES—Damages.—Damages for injury to fraternal feelings for delay in receiving telegram of a brother's death cannot be recovered.—*W. U. Tel. Co. v. Brown*, S. C. Tex., Nov. 13, 10 S. W. Rep. 323.

183. TELEGRAPH COMPANIES—Damages.—Question of liability of telegraph company for delay in forwarding message written in a usual blank form.—*West. Union Tel. Co. v. Munford*, S. O. Tenn., Jan. 3, 1889; 10 S. W. Rep. 418.

184. TRESPASS—Who Liable.—Under Act Pa. March 29, 1824, the agent of S entered into negotiations with P for the purchase of certain timber, provided it stood on his land. P had a survey made, which by mistake

showed the timber to be upon his land, and the agent cut it down under a contract of sale by which he was to take it away within three years: *Held*, that P was liable to the real owner of the land on which the timber stood. — *McCloskey v. Powell*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 420.

185. TRIAL—Verdict. — A verdict obtained by averaging the amounts marked down by all the jurors is not assented to "by a resort to the determination of chance," within the meaning of Code Civil Proc. Cal. § 457, subd. 2. — *Hunt v. Elliott*, S. C. Cal., Dec. 26, 1888; 20 Pac. Rep. 132.

186. TRIAL—Judgment—Mistake. — Where an action was against two defendants jointly, and the verdict was against one defendant only, and the court by mistake rendered judgment against both, the mistake in the judgment will be corrected without remanding the cause for a new trial. — *Youngson v. Pollock*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 279.

187. TRIAL—Nonsuit. — Where counsel for plaintiff fails to appear at adjourned hour of trial after the testimony had been heard it is improper for the judge to charge the jury over plaintiff's objection, instead of directing nonsuit. — *Helwig v. Wayne Circuit Judge*, S. C. Mich., Jan. 16, 1889; 41 N. W. Rep. 268.

188. TROVER AND CONVERSION—Notice. — Evidence sufficient to support a finding that certain attorneys received money knowing that it belonged to plaintiff or with knowledge of such facts as would charge them with notice. — *Sage v. Haines*, S. C. Iowa, Jan. 21, 1889; 41 N. W. Rep. 366.

189. TRUST—Resulting Trust. — Evidence sufficient to sustain a resulting trust in land in favor of a son and against his mother. — *Appeal of Waif*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 470.

190. TRUST—Constructive Trust. — *Held*, under the facts, that failure of testator to transfer property to heirs was a fraud on them and equity will enforce the trust against her representatives, notwithstanding the statute of frauds. — *Glpatrick v. Glidden*, S. J. C. Me., Dec. 27, 1888; 16 Atl. Rep. 464.

191. TRUSTS — Accounting — Support of Cestui que Trust. — Under a trust to apply the necessary amount of the income of a fund to the maintenance of infants during minority, the claim of a creditor for necessities furnished for the support of the *cestui que trust*, partly on the order of the trustee and partly on that of receivers appointed by the court to manage the estate, should be allowed out of the fund. — *Burroughs v. Bunnell*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 447.

192. TURNPIKE COMPANY—Repairs. — As to liability of turnpike company for repairs to turnpike within the limits of a town. — *Versailles, etc. Co. v. Town*, Ky. Ct. App., Jan. 15, 1889; 10 S. W. Rep. 280.

193. USURY—Bona Fide Holder. — Where usury in the original transaction is shown, and where the note has been renewed a number of times, and usurious interest added to each renewal, and the note then transferred to one who claims to be a *bona fide* purchaser without notice, the burden of proof is on such party to show that he is such purchaser. — *Lincoln Nat. Bank v. Davis*, S. C. Neb., Jan. 3, 1889; 41 N. W. Rep. 281.

194. VENDOR AND VENDEE—Parol Contract—Evidence. — Where a deed has been executed and accepted in pursuance of a verbal contract for the sale of land, an action for the contract price may be maintained. — *Niland v. Murphy*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 326.

195. VERDICT—Jury. — It is proper for the jury to add the amounts named by each and divide the same by twelve to obtain an average verdict. — *City of Kinsley v. Moore*, S. C. Kan. Jan. 5, 1889; 20 Pac. Rep. 222.

196. WILL—Undue Influence. — Influence to vitiate a will must be such as to amount to force and coercion, destroying the free agency of a testator, and there must be proof that the will was obtained by this coercion, and it must be shown that the circumstances of its execution are inconsistent with any hypothesis but undue

influence. — *Latham v. School*, S. C. Neb., Jan. 4, 1889; 41 N. W. Rep. 354.

197. WILL—Undue Influence. — Evidence sufficient to sustain charge of undue influence upon testator. — *Appeal of Mundy*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 483.

198. WILLS—Undue Influence—Finding. — Upon the issue of the validity of an alleged will offered for probate the fact that the jury erroneously found the testator *non compos mentis* does not require the setting aside of their finding, that the will was procured through undue influence and fraud, as the one error does not necessarily imply the other. — *Dexter v. Codrington*, S. J. C. Mass., Jan. 5, 1889; 19 N. E. Rep. 517.

199. WILLS—Construction — Trust. — The question in this case was whether under the terms of the will the intention of the testator was to create one or several trusts. — *Vanderpool v. Law*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 481.

200. WILLS—Devises. — Construction of will with complicated provisions where the substantial question was as to the share of "surviving grandchildren." — *Hood v. Broadway*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 379.

201. WILLS—Probate—Conflict of Laws. — Upon the probate of a will made in another State, there was no proof of the location of the real estate, or whether any of it is in the State where probate was sought: *Held*, an instruction that, the will being executed in accordance with the law of the State where made, the burden was upon the contestants to establish that the testator was incompetent to make a will, should not be given, as, if any of the land devised was in the State where it was sought to be probated, the law of another State would have no bearing on the case. — *In re Bull's Will*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 503.

202. WILL—Description. — Construction of will as to description of property intended to be conveyed. — *Chapman v. Olive*, S. C. Me., Dec. 26, 1888; 16 Atl. Rep. 407.

203. WILL—Conditional Legacy. — Testator gave P a legacy upon condition "that she, after my death, bring in no bill against my estate for labor and services rendered, in which case the amount of the bill so rendered shall be deducted from the said legacy." When the will was made P held a note against testator, given her three and a half years before, purporting to be for extra work and care during his sickness: *Held*, that the note was not a bill for labor and services, within the meaning of the will. — *Farnham v. Barker*, S. J. C. Mass., Jan. 2, 1889; 19 N. E. Rep. 371.

204. WITNESS—Impeachment. — In a writ of entry to determine the location of a boundary line, where a witness testifies that witness' father pointed out to witness the line claimed by defendant as the true line, evidence is inadmissible on plaintiff's behalf, for the purpose of contradicting witness, that witness afterwards pointed out another line. — *Royal v. Chandler*, S. J. C. Me., Dec. 24, 1888; 16 Atl. Rep. 410.

205. WITNESS—Impeachment—Reputation. — Under Mansf. Dig. Ark. § 2902, an inquiry as to whether one, from his knowledge of his "reputation for truth and veracity, morality and chastity," would believe him on oath, is not permissible. — *Chine v. State*, S. C. Ark., Jan. 5, 1889; 10 S. W. Rep. 225.

206. WITNESS—Transaction with Decedent. — Construction of Civil Code, § 329, making witness incompetent to testify in matters where the adverse party is the representative of a deceased person. — *Kansas Mansf. Co. v. Wagner*, S. C. Neb., Jan. 4, 41 N. W. Rep. 287.

The Central Law Journal.

ST. LOUIS, MARCH 15, 1889.

CURRENT EVENTS.

A JUDGMENT, recently delivered by Mr. Justice North in one of the English courts, settles, at least so far as that country is concerned, an important question of law concerning which much difference of opinion has existed, and will interest photographers on this side of the water. There a photographer, who had, in the ordinary course of business, taken the photographs of plaintiff and his wife, claimed the right to print extra copies and expose and display them in his shop window. The court granted the injunction, which was asked to restrain such action, on the part of the photographer, and held that the latter's claim was wholly unfounded, upon the general principle which precludes a person in confidential employment from disclosing knowledge of which, by means of his employment, he has become possessed. A person cannot be photographed and supplied with printed copies except by enabling the photographer to obtain a negative, which must be left in his hands, in order that the prints may be taken, and which is, there seems no doubt, his property. But his use of it is restrained by the right of the sitter, somewhat in the same way that a letter, so far as the paper and writing are concerned, is the property of the receiver, who, nevertheless is restrained from publishing it without the consent of the writer. The decision appears to apply only to cases in which the sitter has ordered photographs in the customary manner of business and not to the numerous instances in which persons of celebrity have been invited by photographers to sit for them, evidently in order that the resulting portraits may be sold.

We are aware of no decision on the precise point in this country, though the question has arisen as to the right of a photographer to sell copies of negatives taken by him, and the Supreme Court of the United States in the notable quarrel between Oscar Wilde and Sarony, a New York photographer, held that

the latter was entitled to a copyright for his work in the artistic production of a picture of the former.

THAT lawyers will do well to be cautious and wary in the communications of their plans, is well illustrated by the experience of a New York attorney, of whom Demot Ennot writes in the Albany Law Journal. It seems that the former, a well-known practitioner stated to a friend with whom he was lunching, "I expect to go out to Cincinnati tomorrow to put the Big Scheme and Great Scott R. Co., in the hands of a receiver." Now it happened that a great division had arisen among the security holders of the Big Scheme & G. S. R. Co., and one of the holders opposed in interest to the clients of S. Mart Aleck, Esq., overheard his remark, and rushed to his lawyer's office with the announcement of his opponent's plan. The latter, remembering the legal maxim that the early applicant catches the receiver, packed his grip and was soon whirling toward the western jurisdiction. His bill had been prepared, and he lost no time in applying for his receiver, who was speedily appointed. Mr. Aleck arrived twelve hours later to find that Big Scheme, etc., had been duly "received." and he now will advise his clients how they can most gracefully hold the bag for the other side.

OUR readers will find, in this issue of the JOURNAL, an admirable presentation of the question, as to the right of the United States government, under the measure known as the Oklahoma bill, to declare forfeited the lands claimed by the Cherokee Indians. The article is from the pen of E. G. Taylor Esq., of Kansas City, and states clearly and concisely the legal contention of those favorable to legislation in that direction. It is intended as an answer to the article of Frank P. Blair Esq., which appeared in the JOURNAL of February 15. In publishing it, we have accomplished all that was desired, which was to obtain an expression of opinion, from both sides of the controversy, and by those who have made the subject a study. We must confess on our own part, and in so declaring

we are undoubtedly stating the experience of our readers, to a very considerable degree of ignorance heretofore on this subject. The title or tenure by which the Cherokee tribe claims this immense tract of land, has been somewhat vague in our mind. But, thanks to Messrs. Blair and Taylor, we are much enlightened. Our readers can, and will no doubt, take their choice and come to a conclusion, as to the merits of this much mooted question, without assistance from us. But it will be noted that both debaters agree on all the material questions, as to the provisions of the treaty and patent under which the Cherokees claim. Mr. Blair contends that their tenure thereunder is an absolute fee-simple. Mr. Taylor argues that it is a determinable fee and subject to reversion.

We have no doubt, at least, that the intention of the Government was, at the time, to grant this land absolutely and irrevocably to the Indians, even though a strict construction of the treaty and patent, and the demands and exigencies of civilization, may now seem to justify what is popularly known as "Injun giving."

THE death, on February 21st, of Francis Wharton, D. D., L. L. D., removes one who for almost half a century has been prominent in the legal literature of this country, and whose writings are conspicuous for their learning and scholarly research. He began his literary career early in life as editor of the Philadelphia Episcopal Recorder, and in 1846 published "a Treatise on the Criminal Law of the United States." This book went through six editions and to-day justly remains a work of high authority. Thereafter he wrote many books the best known being "Contracts" "Criminal Pleading and Practice" "Negligence" "Homicide" and "Digest of International Law." The latter is a recognized standard authority. At the time of his death he was engaged in the completion of his latest literary work—"The Diplomatic History of the United States in the Revolutionary Period," having been selected by a resolution of congress, to put in shape the Revolutionary diplomatic correspondence of this country.

NOTES OF RECENT DECISIONS.

IN *Kimmish v. Ball*, 9 S. C. Rep. 277, the Supreme Court of the United States passed upon the validity of a statute of Iowa, making a person having in his possession, within that State, any Texas cattle which have not been wintered north of the southern boundary of Missouri and Kansas, liable for any damages that may occur from allowing them to run at large and thereby spreading the disease known as the "Texas fever." The statute is found in § 4059 of the Code of Iowa, which refers to the preceding § 4058. Plaintiff claimed damages of defendant for breach of this statute, and defendant demurred on the ground that the sections are in conflict with the constitution of the United States, in that the legislature of Iowa undertakes by them to regulate and interfere with interstate commerce, relying upon *Railroad Co. v. Husen*, 95 U. S. 465, wherein a Missouri statute of similar character was declared invalid. Mr. Justice Field, in upholding the validity of this statute and reversing the decision of the lower court, says:

Nor does the case of *Railroad Co. v. Husen*, 95 U. S. 465, upon which the defendant relies with apparent confidence, have any bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. "It is noticeable," said the court, "that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not." It interpreted the law of Missouri as saying to all transportation companies: "You shall not bring into the State any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. No attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus

infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised. Railroad Co. v. Husen, gives no support to the contention of the defendant,

In *Miller's Admx. v. Newburg Orrel Coal Co.*, 8 S. E. Rep. 600, the Supreme Court of Appeals of West Virginia passed upon an important question as to *de facto* corporations. The specific question to be determined was whether or not a duly incorporated and organized corporation, which continues its corporate business in its corporate name after the time fixed by its charter for its duration has expired, can be sued and made liable as a corporation *de facto* for a tort committed by it after the limit fixed by its charter had expired. The court says:

There can be no doubt that it was the duty of the directors, under the provisions of statute, to wind up its business when its charter expired; but the facts show that they did not do so. On the contrary, the corporation continued to prosecute its business in its corporate name just as it had done before its charter expired. It continued to exist, as a matter of fact, after its franchise or legal right to exist had expired. It thus became a corporation *de facto*, but not *de jure*. As such *de facto* corporation it certainly possessed no special powers, such as the power to condemn property, and other like powers, which the laws confers only upon corporations existing by legal right. But the courts cannot reasonably ignore the existence of such a corporation, if it is an immutable fact; nor are the acts and dealings had by and with it necessarily legally ineffective and of no binding force. *Gas Light Co. v. City of St. Louis*, 11 Mo. App. 55; *Briggs v. Canal Co.*, 137 Mass. 71. The scope of the powers of the officers and agents of a corporation *de facto* must be fixed in the same manner as in case of a corporation *de jure*. Therefore, if an association assumes to carry on business, or enter into contracts in a corporate capacity, under an expired charter, and those dealing with it treat it as if it were a corporation, the individual members of such association cannot be made liable, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, or whether the dealing with the association in its corporate capacity was authorized by the legislature, or prohibited by law, and illegal. If an association assumes a liability, or enters into a contract as a corporation, it is clear the members of the association do not agree to be bound as individuals, either jointly or severally; nor do they agree to be bound as partners to each other, or to those dealing with the association. It is equally true that the parties dealing or contracting with them do not intend to bind them individually. To treat the individuals as parties to such transactions would, therefore, involve not only the nullification of the act which was actually contemplated by the parties on both sides, but the creation of a different obligation, which neither of the parties intended to make. 2 Mor. Priv. Corp. § 748. It is a general rule that a party who has contracted with an association assuming to be a corporation, and acting in a corporate capacity, cannot, after having received the benefit of the contract, set up as a defense to an

action brought upon it by the corporation that the latter was not a legal corporation, or had no authority to make the contract in a corporate capacity. *Brouwer v. Appleby*, 1 Sandf. 158. This rule does not rest upon the doctrine of estoppel, as has sometimes been said, but is founded upon the policy of the common law prohibition against unauthorized corporate action. *Bradley v. Ballard*, 55 Ill. 413; *City of St. Louis v. Gas Co.*, 70 Mo. 69. The same rule is applicable in a suit brought against a corporation upon a contract which has been performed by the other party. A company which has entered into a contract in a corporate capacity cannot, after the contract has been performed by the other party, set up, as a defense to an action for damages, that it was not a *de jure* corporation. *Dooley v. Glass Co.*, 15 Gray, 494; *Manufacturing Co. v. Stuart*, 46 Mich. 482, 9 N. W. Rep. 527. The same rule applies in suits upon other classes of liabilities by or against *de facto* corporations. *Imboden v. Mining Co.*, 70 Ga. 56; 2 Mor. Priv. Corp. §§ 751, 755; *Manufacturing Co. v. Bennett*, 28 W. Va. 16. The principles, it seems to me, to be deduced from our statute and these authorities, is that a private business corporation, acting and carrying on its corporate business in its corporate name, after its legal existence has ended by the expiration of its charter, must be held to be a corporation *de facto*; and that as such, so long as it in fact so carries on its business, and contracts or incurs liabilities with or to third persons dealing with it as such *de facto* corporation, it may sue and be sued at law, either in actions *ex contractu* or *ex delicto*, and it cannot defeat such action by alleging that its charter had expired before the cause of action arose.

The Supreme Court of Ohio, in the case of *Hill v. Myers*, 19 N. E. Rep. 593, decided a question as to the right of a married woman to claim a homestead. The defendant, a married woman, signed a note jointly with her husband, intending to charge her separate estate with the amount. Plaintiff obtained a judgment on the note. Subsequently to the rendition thereof, but prior to any order of sale, she moved into and occupied a part of her separate estate as a family homestead, and therefore claims that a homestead therein should be assigned to her. The plaintiff denies her right of homestead, contending that before defendant had taken any steps towards its acquisition, the plaintiff had acquired an interest in the estate equal to a levy. The court, in allowing the claim of homestead, says:

By virtue of the amendments of section 28 of the Code of Civil Procedure, which are substantially embodied in sections 4906 and 5319 of the Revised Statutes, a radical change has been effected in the remedy against married women. Though the object of this legislation was not to enlarge or vary the liabilities of a married woman, it fundamentally changed the form of the remedy. *Jenz v. Gugel*, 26 Ohio St. 527; *Allison v. Porter*, 29 Ohio St. 186. The disabilities of coverture are so far removed that, where the action concerns her separate property, a personal judgment may be rendered against her in all cases where such judgment

would be proper were she a *feme sole*. Such judgment may be enforced in all respects as if she were an unmarried woman. Execution may be issued against her separate property and estate, to the same extent as against the property of her husband, were the judgment rendered against him; and the same rule will apply to her, for the purpose of setting off a homestead in her property about to be levied upon, that applies to her husband. In instituting suit against her, it is enough to aver that she has separate property subject to be charged, without describing any specific piece of property, as it is not necessary by decree to subject any particular piece. *Insurance Co. v. Babcock*, 42 N. Y. 613, App. But, in proceeding by way of execution against the wife's separate property, the law has, in a liberal and humane spirit, guarded all her rights of homestead. It is provided by section 5819 of the Code of Civil Procedure, that she shall be entitled to the benefit of all exemptions to heads of families. Before levy of execution or seizure under an order of sale she may impress upon her land the homestead character, so that, upon her application at any time before sale, a homestead shall be set off to her by metes and bounds. And not only may she before such levy and seizure dedicate and secure a homestead, by visible occupancy, in the land of which she holds the title, but, if she has become the owner of the superstructure of a dwelling-house occupied by her as a family homestead, although the title to the land is in another, she will be protected in the enjoyment of her homestead as against the judgment of a creditor. With the changed remedy against a married woman, allowing a personal judgment followed by execution, goes *pari passu* the statutory protection of her homestead. And, where no specific lien upon her separate estate has been created, the force and effect of the statute cannot be frustrated by setting out in the petition a description of specific separate property, and rendering a decree that such property shall be applied to the payment of the wife's obligations—where she has asserted by use and occupation a right of homestead—before the issue of an order of sale. To such a decree we do not attach the effect of a levy, nor can the wise and benevolent policy of the law be thus defeated. In authorizing a homestead to be set off to the debtor in the lands and tenements "about to be levied upon," the statute contemplates that he may establish his right to a homestead, by use and occupation of the property before steps have been taken by a levy or seizure under an order of sale to enforce the judgment. It is to the enforcement of the decree or judgment that the prior use and occupation of the property for a homestead must be referred.

It is also held in this case that the fact that the homestead was claimed in lands held by the wife as co-tenant of an undivided interest did not prevent an assignment of homestead. And the case of *Gaylord v. Imhoff*, 26 Ohio St. 317, is distinguished. In that case it was held that the members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property. The court says that that case did not involve a consideration of the exemption of partnership lands when claimed as homesteads—that the incidents annexed to partnership and tenancy in common are diverse."

An interesting question in the law of carriers of passengers came before the Supreme Court of Louisiana, in *Conelly v. Crescent City R. Co.*, 5 South. Rep. 259. The facts were that plaintiff's husband entered defendant's street car. He was suddenly stricken with apoplexy, accompanied with severe vomiting. The car had numerous passengers, to whom this occasioned serious discomfort. In this condition he fell on the floor of the car. The driver, with the assistance of a passenger, lifted him out of the car and laid him down in the street near the gutter. The driver then drove away. Here he remained helpless for several hours, exposed to inclement weather, and without aid or relief. The defendant contended that to all appearances the man was intoxicated, and that in removing him it performed a duty to the other passengers. The court, in overruling this defense, says:

It should need no parade of learned authorities to maintain the proposition that a common carrier cannot treat an unfortunate passenger, stricken with apoplexy while under its charge, in the manner above indicated, without a breach of the plainest obligations of its contract of carriage. If there were any precedent to the contrary, humanity would revolt at it, and it would be one "more honored in the breach than the observance." But there is no such precedent, and those cited by defendant's counsel are far from sustaining their position. No doubt a carrier owes obligations to its well passengers as well as to sick passengers, and is bound to protect the rights of both. When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus, if he had cholera, or small-pox, or *delirium tremens*, or even if, as in this case, he were subject, from any cause, to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street car, the right of the carrier, in protection of the latter's privileges, to exclude him would undoubtedly arise. Such is the reasonable doctrine of the cases cited. *Lemont v. Railroad Co.*, 47 Am. Rep. 238; *Vinton v. Railroad Co.*, 11 Allen, 304; *Murphy v. Railroad Co.*, 118 Mass. 223; *Railroad Co. v. Weber*, 38 Kan. 543, 6 Pac. Rep. 877; *Railroad Co. v. Statham*, 42 Miss. 607. But none of these cases hold that this right of exclusion may be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized. Thus, in the Kansas case above quoted, the court said: "Under these facts, the propriety of his removal cannot be doubted. The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him on the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort."

This was a case of intoxication. And in the case most relied on (*Lemon v. Railroad Co.*), the Supreme Court of the District of Columbia, after recognizing the right of removal, is careful to add: "Of course, for an abuse of this discretion, or for any oppression in its exercise, the company would be responsible." In another case the court, while conceding the right of ejection, said: "It does not follow that the right may be exercised in such manner, under such circumstances, or against a person in such mental or physical condition, as that death or serious bodily harm will necessarily, or even probably, result from putting him off." *Railroad Co. v. Sullivan* (Ky.), 16 Am. & Eng. R. R. Cas. 390. See, also, *Hall v. Railroad Co.* (S. C.), 5 S. E. Rep. 623; *Lovett v. Railroad Co.*, 9 Allen, 557; *Higgins v. Railroad Co.*, 46 N. Y. 23.

THE question as to the burden of proof where defendant sets up an *alibi* in criminal cases, arose in the case of *State v. Child*, 20 Pac. Rep. 275, decided by the Supreme Court of Kansas. There the lower court, in the trial of defendant for assault to kill, instructed the jury that, "as a matter of law, whenever a defendant relies on an *alibi* for his defense, the law casts upon him the burden of showing by a preponderance of the evidence that the *alibi* is true." The supreme court held this statement of law as totally erroneous, saying:

Whatever may be said as to the rule in other States, it can be very safely asserted that the person charged with the commission of a crime within this State is not required to prove his defense, or establish his innocence (and the expressions are synonymous, in the sense we use them), by a preponderance of the evidence. Our statute (section 228, Crim. Code) casts the burden of proof on the State. There is a presumption that clings to a person charged with crime, through every successive step of his trial, that he is innocent, and this presumption is never weakened, relaxed, or destroyed until there is a judgment of conviction. The State is required to prove this guilt beyond any reasonable doubt, and all the defendant has ever been required to do is to produce evidence that creates such a doubt as to entitle him to an acquittal. He is not required to prove his innocence; all that is demanded of him is to show such a state of facts as to create a reasonable doubt of his guilt. This defense of *alibi* is peculiar in this respect, so far as this case is concerned, that the State is bound to prove, in making its case, that the defendant was present at the commission of the crime, and this material fact it must prove beyond any reasonable doubt. The defendant alleges he was not present, and he offers evidence to sustain this allegation. The trial court said he must prove it by a preponderance of the evidence, while the general rule of law, outside of the statutory requirement, casts the burden of proving that fact on the State. The rule announced by the trial court does not apply in this State to insanity, and probably to any other (if we may use the term) affirmative defense to a criminal action. *State v. Crawford*, 11 Kan. 82.

THE somewhat anomalous condition of the law of Tennessee as to the right of specific

performance of an oral contract for the sale of land is well illustrated in the case of *Brakefield v. Anderson*, 10 S. W. Rep. 363, decided by the supreme court of that State. This was a suit to enforce such performance upon the ground of possession and part payment. The courts of that State have always held, contrary to the English and most of the American courts, that part performance of a parol contract for the sale of land will not take it out of the statute of frauds. It is, however, held in this case that the statute is operative to defeat a verbal contract only when interposed by one of the parties; in other words, that such a contract is not void *ab initio*, but only voidable at the election of either party. The court admits that:

The decisions of this court have not been altogether harmonious upon this subject. In several of them such sales have been characterized as void (*Pepkin v. James* 1 Humph. 825; *Crippen v. Bearden*, 5 Humph. 130; *Hurat v. Means*, 2 Swan, 598; *Sheild v. Stamps*, 3 Sneed, 175); and in many others they have been held to be voidable merely (*Sneed v. Bradley*, 4 Sneed, 304; *Hilton v. Duncan*, 1 Cold. 320; *Roberts v. Francis*, 2 Heisk. 134; *Hamilton v. Gilbert*, *Id.* 681; *Mason v. Swan*, 6 Heisk. 455.) In some of these cases of the former class, no distinction was taken, or was necessary to be taken, between the terms "void" and "voidable." But the distinction suggested by the words themselves was expressly made in the cases of the latter class, wherein parole sales were held to be voidable only, and not void. * * * In the case at bar neither party relies upon the statute. On the contrary, the vendee comes with his bill, and seeks the execution of the contract; and the vendor not only does not interpose the defense to the vendee's action, but he brings his answer and cross-bill and affirmatively asks the court to enforce the contract in his behalf. Both parties come with appropriate pleadings and say they want their contract carried out. When this is done the reason of the statute—the danger of fraud and perjury—ceases, and the chancellor instead of setting the contract aside, should have decreed its specific execution.

THE question as to the effect of a discharge in insolvency by a State court was exhaustively considered by the Supreme Court of Oregon in the case of *Main v. Messner* 20 Pac. Rep. 255. There the question on the pleadings, exactly stated, was whether the discharge of defendant from his debts by the State courts of Oregon of which he was a citizen, was a bar to an action by plaintiff who was a citizen of another State and who was not a party to the insolvency proceedings. The court decided in the negative, and after reviewing *Ogden v. Saunders* 12 Wheat 213; *Suydam v. Broadnox*, 14 Pet. 75; *Baldwin v. Hale* 1 Wall. 232; *Pratt v.*

Chase 44 N. Y. 599; Hawley v. Hunt 27 Iowa 307; Bedell v. Scruton 54 Vt. 493; Hill v. Caulton 74 Me. 156; Rhodes v. Borden 67 Cal. 8; Beer v. Hooper 32 Miss. 246; Anderson v. Wheeler 25 Conn. 603; and Crow v. Coon 27 Mo. 512, says:

The fact is—and no principle is more elementary—that all State laws are confined in their operations to its territorial limits, and that it is not in the power of its legislature to give them any extraterritorial force and effect, and, as the authorities indicate, this is particularly true of State insolvent laws. Nor upon principle can it be otherwise. Under any insolvent system there must be some kind of judicial proceedings before any order or decree can be rendered discharging the insolvent from liability. That order or decree, to be valid and operative, must be supported by jurisdiction over the person or the thing; otherwise it is a mere nullity. As the debt attends the person, there can be no jurisdiction of it unless the non-resident creditor submits it to the court, and claims a dividend. If, then, the non-resident creditor does not voluntarily submit himself to the court in which the insolvency proceedings are pending, nor his claim for a dividend or distribution of the insolvent's estate, no order or decree of discharge which such court may render can extinguish his debt, or affect his right to its recovery. There being neither jurisdiction of him or his debt, the decree is a mere nullity, so far as it professes to discharge his debt. To hold otherwise would be to condemn him unheard, and to appropriate his property "without due process of law." This being so, the question in such cases—the discharge of the insolvent being otherwise valid—is simply one of jurisdiction, and the forum in which the remedy is sought cannot affect the principle or alter the rule. As the plaintiffs did not voluntarily submit themselves to the jurisdiction of the court in insolvency, or in any way participate in its proceedings, either by uniting in the application for the defendant's discharge, or by submitting their claim and accepting a dividend from his estate, it results that there was no jurisdiction over them, and that the debt which the defendant owed was not extinguished by his discharge in such insolvency proceedings, and consequently that the defendant cannot plead such discharge in bar of the plaintiff's right of recovery.

In the case of *Pittsburg, etc., R. Co. v. Lyon*, Supreme Court of Pennsylvania, 16 Atl. Rep. 607, it was decided that a rule, made by a railway company to sell tickets and deliver baggage at only one of its several stations in a city, which is less convenient for such passengers as desire to transfer baggage to another road, and to carry all baggage on to the main station though the trains regularly stop at the other stations to allow passengers to alight from or get on them, is, as a matter of law, unreasonable and void. Plaintiff had purchased a ticket from Washington, Pennsylvania, to New Orleans, *via* Pittsburg, and asked to stop and receive his baggage at Birmingham sta-

tion, in Pittsburg, in order to make connection with the New Orleans train. This was refused and he sued the railroad company for damages, for the inconvenience resulting therefrom. The company set up in defense the rule above stated. The court in its decision says:

In view of the undisputed evidence of what occurred, the inconvenience, annoyance, and delay to which plaintiff below was arbitrarily and unnecessarily subjected, the learned president of the common pleas instructed the jury that the regulation in question was unreasonable and invalid. After reciting the facts, he said, among other things: "The question arises whether or not selling tickets to a certain point, or to the city of Pittsburg, and allowing parties to get off at any of these stations under a ticket which would take them to the Union Depot station, they have a right to lay down a rule by which, although the party might get off himself, he would be compelled to go to the Union station for his baggage. I say such a rule is unreasonable, and one the company had no right to make, and therefore the existence of a rule of that kind, with reference to passengers, was a violation of their duty. While the inferior officers of the road may be justifiable in obeying the rule, yet it is such a rule that the company had no right to make, and they become responsible in damages if they undertake to enforce it as against passengers. I put it upon the broadest ground. But there is a narrower ground on which it might be put. It seems they did allow parties, not only to get off themselves,—because that is unquestioned,—but they did allow certain parties—commercial travelers, parties holding 1000-mile tickets, and on some other occasions other parties—to get off, and take their baggage off at that point. But it is immaterial whether or not the party is going by the Lake Erie road or going to Birmingham, or wherever he may go; it is a question of right, so far as the citizen is concerned," etc. It is contended that the above quoted instructions, and others of like import, were erroneous, in that they entirely withdrew from the consideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. While this position is not without the sanction of respectable authority, the better opinion appears to be that the question is generally a mixed one of law and fact. So far as the reasonableness of a given rule depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but, if the facts are undisputed, the question is a proper one for the court. *Railroad Co. v. Tripp*, 17 N. E. Rep. 89, 83 Amer. & Eng. R. Cas. 488, 499, notes, and authorities there cited. As was said in *Vedder v. Fellows*, 20 N. Y. 126, 131: "There are strong reasons why the reasonableness of railroad regulations should be submitted to the court as a question of law, rather than to the jury as one of fact. Ordinarily, jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. * * * What one jury might deem an inconvenient rule another might approve as judicious and proper. There would be no uniformity." The facts of the case at bar being indisputable, it was clearly the province of the court to say, as matter of law, whether the regulation in question was reasonable or not; and it was rightly held to be unreasonable, and invalid. It was of such an arbitrary and vexatious character that no tribunal, court, or jury could well declare it otherwise.

WHAT RIGHTS HAS THE CHEROKEE NATION?

Under the heading "Rights of the Cherokee Nation," the CENTRAL LAW JOURNAL of February 10th¹ contained an article in defense of the rights of the Cherokees to the land known as the "Cherokee Strip," included within the proposed Territory of Oklahoma; and it is also stated editorially in the same issue of the JOURNAL² that it is shown that the proposition of the "Springer Bill," to appropriate these lands, "is in absolute violation of law and justice." I have been invited by the editor to present the other side of this proposition, "simply from a legal standpoint."

In the first place, it should be stated that on its face the Oklahoma bill provides the most ample protection for all rights which the Indians may have, and enacts that no person shall enter upon these lands until the consent of the Cherokees is first obtained by the government to the provisions of the bill and the fact proclaimed by the president. But it is contended on behalf of the Indians that while the bill, on its face, is fair enough to them in this regard, it is in reality but the beginning of measures designed to coerce their consent to the settlement of their lands; and as proof of this they cite the provision of section 13, declaring the grazing leases void. It becomes pertinent, therefore, to inquire by what title the Cherokees hold this "strip," and whether the United States has the legal right to declare these leases void.

The lands in question were acquired by the United States from France by the treaty of April 30, 1803. Prior to 1828 the Cherokees, in consideration of the cession of parts of their lands east of the Mississippi, had been given the right to occupy lands west of that river and partly within the then Territory of Arkansas, and by letters from the president and secretary of war, in 1818 and 1821, they had been promised lands for a permanent home in that locality and also an "outlet" from their homes to the hunting grounds of the far west. Accordingly, in 1828, a treaty was made between them and the United States, in which these facts are cited and the letters of the president and sec-

retary of war are referred to, and in which is this agreement: "The United States agree to possess the Cherokee Nation and to guaranty it to them forever, and that guaranty is hereby solemnly pledged, of 7,000,000 acres of land, to be bounded as follows (describing it). In addition to the 7,000,000 acres thus provided for and bounded, the United States further guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of soil extend."³

In 1830 congress passed the law known as the "act of May 28, 1830," which authorized the president to exchange lands lying west of the Mississippi to Indians for their lands east of that river, and if they prefer it, to guaranty "that the United States will cause a patent or grant to be made and executed to them for the same: *Provided*, always, that such lands shall revert to the United States if the Indians become extinct or abandon the same."⁴ In 1833 and in 1835 the agreements to "possess" the Cherokees of the 7,000,000 acres and of the "outlet" were renewed, and the United States agreed that they, with another tract ceded by the treaty of 1835, "shall all be included in one patent, executed to the Cherokee Nation of Indians by the president of the United States, according to the provisions of the act of May 28, 1830."⁵ And, accordingly, on December 1, 1838, a patent was issued to them for said lands, with the provision in regard to abandonment mentioned.

Now, then, if we stop here, what title have the Cherokees to this "outlet?" It is said that, by reason of the provision in the patent that the land shall revert in case of abandonment, it "is a base or determinable fee."⁶ Kent defines such an estate to be⁷ "an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent."

The event here that is to circumscribe the estate is its abandonment. Has it been aban-

¹ 28 Cent. L. J. 162.

² *Ibid.* 153.

³ 7 Stat. at Large, 311.

⁴ *Ibid.* 411.

⁵ 7 Stat. at Large, 478, 414.

⁶ United States v. Reese, 5 Dill. 403.

⁷ 4 Kent, 9.

doned? It should be borne in mind that the interest granted is an "outlet," which, Webster says, is a "place or means by which anything is let out; exit." That is to say, they were granted nothing more than a right-of-way. That this was the intention and understanding of the parties is shown by the letter of John C. Calhoun, secretary of war, to the chiefs of the Arkansas Cherokees, of October 18, 1821, referred to in the treaty of 1828, when this "outlet" was first guaranteed to them, in which he says: "It is always to be understood that in removing the white settlers from Lovely's purchase, for the purpose of giving the outlet promised you to the west, you acquire thereby no rights to the soil, but merely to an outlet, of which you appear to be already apprised." It is manifest on the face of the treaties that it was never intended to give the Indians the same interest in the "outlet" as in the 7,000,000 acres. As Judge Brewer says: "Manifestly congress set apart that 7,000,000 acres as a home, * * * because, as expressed in the preamble of the treaty, 'congress was intent upon securing a permanent home.' Beyond that the guaranty was of an outlet—not territory for residence, but for passage ground over which the Cherokees might pass to all the unoccupied domains west. But while the exclusive right to the outlet was guaranteed, while patent was issued conveying this outlet, it was described and intended obviously as an outlet, and not as a home."⁸

If this be true, whenever the Cherokees ceased to use it as an outlet—as a passageway to something beyond—there was an abandonment, for the purposes of the grant, and the estate reverted to the grantor, the United States. This is the well established principle of the law. In New York, where land was granted to a turnpike company for a road, in fee simple, the court say: "Such title must, nevertheless, be considered as vested only for the purposes of a road, and when the road is abandoned, the land reverts to the original owners."⁹ So that, under this principle, even though the patent, on its face, had purported to grant the land in fee simple, without any condition, still the law would imply the condition, and, whenever the land

ceased to be used for an outlet, it would revert. And, again, although the treaties and the patent should purport to grant these lands to the Cherokees in fee simple and for all purposes, such a grant must be taken in the light of existing laws and circumstances, and in view of these it is difficult to see how the Cherokees could claim a fee simple absolute, and, indeed, they do not seem to make any such claim, for they do not claim to have the right of alienation, which is inseparable from a title in fee simple absolute.¹⁰ It has always been held, not only by the United States, but by every christian nation holding lands in the western hemisphere, inconsistent with the spirit of their institutions to recognize any other title in the Indian tribes than that of the right of possession. As Chief Justice Marshall said when this question first came before the supreme court: "The Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others."¹¹ As early as 1802 this principle was embodied in the legislation of the United States, in the following terms: "That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution;" and all persons, except authorized agents of the United States, were forbidden to treat with the Indian tribes.¹² This law was in force when the Cherokees took these lands and it is still in force; its principle was based upon the well established policy of the government, and it must be considered as controlling their title. As Attorney General Garland says in regard to this enactment: "This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be fee simple or a right of occupancy

¹⁰ 4 Kent, 5. "Every restraint upon alienation is inconsistent with the nature of a fee-simple."

¹¹ Johnson v. McIntosh, 8 Wheat. 591; Holden v. Joy, 17 Wall. 211.

¹² 2 Stat. at Large, p. 143, § 12; 4 *Ibid.* p. 730, § 12; Rev. Stat. 1873-4, p. 372, § 2116.

⁸ United States v. Soule, 30 Fed. Rep. 918.

⁹ Hook v. Turnpike Co., 12 Wend. 371; People v. White, 11 Barb. 26.

merely, is not material; in either case it applies."¹³ And, as Judge Marshall said: "However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."¹⁴

Clearly, then, the Indians would seem to have but a qualified title to any of their lands. To this "strip" the Cherokees have a qualified title for a specific use; that use having ceased, the title has reverted. It is true that this reversion can only be taken advantage of by the United States.¹⁵ But the fact that the government, in an over-abundance of justice to the Cherokees, has not insisted upon the forfeiture and has even agreed, as it did in the treaty of 1866¹⁶ and as the Oklahoma bill proposes to do, to pay them for these lands, should not be taken advantage of to prove title in the Cherokees. Indeed, the treaty of 1866 only recognizes a right of possession and jurisdiction in the Indians, which they are to retain only until the lands are sold and occupied by friendly Indians, as provided for in the treaty; and it is very questionable whether they have not parted with this right, for an agreed consideration, by the negotiations which have been had under this treaty. Into this question I cannot enter now. This much, however, is certain, they have no right to lease these lands without the consent of the government, and the leases made to the cattlemen are void. Congress is justified, therefore, in passing section 13 of the "Springer Bill," which provides as to these leases that they "are hereby declared void and contrary to public policy." Says Vattel: "The sovereign ought to neglect no means of rendering the land under his jurisdiction as well cultivated as possible. He ought not to allow either communities or private persons to acquire large tracts of land and leave them uncultivated."¹⁷

E. G. TAYLOR.

¹³ Response of Attorney-General Garland to inquiries of Secretary Lamar, in regard to these lands, July 21, 1885.

¹⁴ Johnson v. McIntosh, 8 Wheat. 591.

¹⁵ Holden v. Joy, 17 Wall. 211.

¹⁶ 14 Stat. at Large, 799.

¹⁷ Vattel's Law of Nations, p. 34.

THE ESSENTIALS OF AN AFFIDAVIT.

No other instrumentality in the administration of justice plays a more practical or important part than an affidavit.

Every provisional remedy, nearly every mesne process, and, step by step, throughout the entire progress of a cause, nearly all judicial action, and even the bill of costs under the final order of an appellate tribunal, is bottomed on an affidavit. And yet, out of the vast number of practicing lawyers with whom the preparation and use of an affidavit is a matter of almost daily necessity, very few trouble themselves to analyze closely the real structure of the instrument thus employed.

Five things, and but five, are vitally essential to the validity of an affidavit, in all judicial proceedings according to the course of the common law, namely, where, when, by whom, and before whom, was the instrument sworn to, and to what suit or judicial proceeding, if any, does it relate.

If the instrument shows these five ingredients, and each of them, it is what it purports to be—an affidavit—and may be judicially entertained as such, even though it may be defective in other particulars of secondary importance.

For example, an affidavit may be argumentative—the mere legal argument of the attorney reduced to writing and sworn to by the client, or it may be impertinent, or scandalous, or both, and yet may be an affidavit, and may be considered as such, for whatever it is worth to the court or officer by whom it is entertained. For these are defects going merely to the convenience of judges, or the private rights of litigating parties. But if the instrument purporting to be an affidavit lacks any one of the ingredients enumerated above, it is an absolute nullity and cannot be judicially entertained for any purpose whatever without doing violence to the honest administration of public justice.

To illustrate: First. Where was it sworn to? If perjury has been committed, this goes directly to the jurisdiction over the crime. If the venue is, "State of New York, ss. County of Blackacre," the matter does not concern the courts of Whiteacre, for the Blackacre grand jury has original and exclusive jurisdiction. It was upon this governing

principle that the Supreme Court of New York refused to entertain, as an affidavit, a paper purporting to have been sworn to before a commissioner of deeds of the city of Buffalo, but which had no *venue* showing the county in which the oath was administered.¹

Second. When was it sworn to? If perjury has been committed, this gives directly to the question of time within which a prosecution therefor may be lawfully instituted.

Third. By whom was it sworn to? If perjury has been committed, this of course goes to the identity of the wrong-doer.

Fourth. Before whom was it sworn to? If perjury has been committed, this goes to the identity of the officer whose authority has been tampered with. Upon this governing principle courts refuse to entertain, as an affidavit, any paper from the *jurat* of which the words "before me" have been omitted.

In *Queen v. Inhabitants, etc.*,² Coleridge, J., says: "The defect is not a mere *irregularity* but affects the *jurisdiction*. The objection may seem of but little importance, but if ever we are to use strictness it should be on affidavits and all that relates to their form." This English case, after being closely followed in *Smart v. Howe*,³ was wholly ignored, and its reasoning, on another point, was virtually repudiated by the Supreme Court of Michigan in two later cases.⁴ A comparison of the last four cases cannot fail to interest the careful student of jurisprudence.

Lastly, and most important of all, to what suit or judicial proceedings, if any, does the instrument purporting to be an affidavit relate? This goes directly to the question of *materiality*, an essential ingredient in perjury, the most stealthy in its approaches, and malignant in its consequences, of all known offenses against the administration of justice. This is the governing principle upon which the Supreme Court of Michigan proceeded in deciding the case of *Arnold v. Nye*.⁵ In that case, Thomas M. Cooley, who knows better now, and should have known better then, moved to dismiss a writ of error, basing his motion, in part at least, on papers purporting

to be affidavits, but which were entitled merely *Arnold v. Nye*. The court, however, very properly declined to entertain, as affidavits, papers thus misentitled. The following cases, in addition to those already cited, illustrate almost every conceivable phase of the question under consideration.⁶ From the foregoing authorities, we may fairly gather the general rule that in every jurisdiction, State or national, sound public policy requires an affidavit to contain each of the ingredients specified above, leaving nothing whatever to be inferred or presumed by the courts.

GEO. C. WORTH.

¹ *Whitney v. Warner*, 2 Cow. 499; *Humphrey v. Cande*, 2 Cow. 507; *Davis v. Rich*, 2 How. Pr. 126; *Greenvault v. F. M. Bank*, 2 Doug. (Mich.) 498; *Whipple v. Williams*, 1 Mich. 115; *Lane v. Morse*, 6 How. Pr. 394; *Sundland v. Adams*, 2 How. Pr. 126.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PHYSICIANS—LICENSE.

DENT V. STATE OF WEST VIRGINIA.

United States Supreme Court, January 14, 1889.

The act of West Virginia, requiring physicians to present their diplomas to the State board of health, or to stand an examination by the board, or to file an affidavit that they have practiced medicine in the State for ten years, and thereupon to receive a certificate, and imposing penalties on them for practicing medicine without such certificate, is constitutional.

This case comes from the Supreme Court of Appeals of West Virginia. It involves the validity of the statute of that State which requires every practitioner of medicine in it to obtain a certificate from the State board of health that he is a graduate of a reputable medical college in the school of medicine to which he belongs; or that he has practiced medicine in the State continuously for the period of ten years prior to the 8th day of March, 1881; or that he has been found, upon examination by the board, to be qualified to practice medicine in all its departments; and makes the practice of, or the attempt by any person to practice, medicine, surgery, or obstetrics in the State without such certificate, unless called from another State to treat a particular case, a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. The statute in question is found in sections 9 and 15 of an act of the State, ch. 93, passed March 15, 1882, amending a chapter of its Code concerning the public health. St. 1882, pp. 245, 246, 248.

Under this statute, the plaintiff in error was indicted in the State circuit court of Preston county, W. Va., for unlawfully engaging in the practice of medicine in that State in June, 1882, without a

¹ *Cook v. Staats*, 18 Barb. 407.

² *Queen v. Inhabitants of Bloxham*, 51 E. C. L. 526.

³ *Smart v. Howe*, 3 Mich. 590.

⁴ *King v. Harrington*, 14 Mich. 532; *In re Teachout*, 15 Mich. 347.

⁵ 11 Mich. 457.

diploma, certificate, or license therefor, as there required; not being a physician or surgeon called from another State to treat a particular case, or to perform a particular surgical operation. To this indictment the defendant pleaded not guilty, and, a jury having been called, the State by its prosecuting attorney, and the defendant by his attorney, agreed upon the following statement of facts, namely: "That the defendant was engaged in the practice of medicine in the town of Newburg, Preston county, W. Va., at the time charged in the indictment, and had been so engaged since the year 1876 continuously to the present time, and has during all said time enjoyed a lucrative practice, publicly professing to be a physician, prescribing for the sick, and appending to his name the letters, 'M. D.;' that he was not then and there a physician and surgeon called from another State to treat a particular case, or to perform a particular surgical operation, nor was he then and there a commissioned officer of the United States army and navy and hospital service; that he has no certificate, as required by section 9, ch. 93, Acts Leg. W. Va., passed March 15, 1882, but has a diploma from the 'American Medical Eclectic College of Cincinnati, Ohio;' that he presented said diploma to the members of the board of health who reside in his congressional district, and asked for the certificate as required by law, but they, after retaining said diploma for some time, returned it to defendant with their refusal to grant him a certificate asked, because, as they claimed, said college did not come under the word 'reputable,' as defined by said board of health; that if the defendant had been or should be prevented from practicing medicine it would be a great injury to him, as it would deprive him of his only means of supporting himself and family; that at the time of the passage of the act of 1882 he had not been practicing medicine ten years, but had only been practicing six, as aforesaid, from the year 1876." These were all the facts in the case. Upon them the jury found the defendant guilty, and thereupon he moved an arrest of judgment on the ground that the act of the legislature was unconstitutional and void so far as it interfered with his vested right in relation to the practice of medicine, which motion was overruled, and to the ruling an exception was taken. The court thereupon sentenced the defendant to pay a fine of \$50 and the costs of the proceedings. The case being on writ of error to the supreme court of appeals of the State, the judgment was affirmed, and to review this judgment the case is brought here.

Mr. Justice FIELD, delivered the opinion of the court.

Whether the indictment upon which the plaintiff in error was tried and found guilty is open to objection for want of sufficient certainty in its averments is a question which does not appear to have been raised either on the trial or before the supreme court of the State. The presiding justice of the latter court, in its opinion, states that the

counsel for the defendant expressly waived all objections to defects in form or substance of the indictment, and based his claim for a review of the judgment on the ground that the statute of West Virginia is unconstitutional and void. The unconstitutionality asserted consists in its alleged conflict with the clause of the fourteenth amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law; the denial to the defendant of the right to practice his profession without the certificate required constituting the deprivation of his vested right and estate in his profession, which he had previously acquired.

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the "estate," acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession be generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to calling of profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and

mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetables and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications.

As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms "due process of law" a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived; and there requirement was there designed to secure the subject against the arbitrary action of the crown, and place him under the protection of the law. They were deemed to be equivalent to "the law of the land." In this country the requirement is intended to have a similar effect against legislative power;

that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in *Yick Wo v. Hopkins*, speaking by Mr. Justice Matthews: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." 119 U. S. 356, 369, 6 S. C. Rep. 1064. See, also, *Pennoyer v. Neff*, 95 U. S. 714, 733; *Davidson v. New Orleans*, 96 U. S. 97, 104, 107; *Hurtado v. California*, 110 U. S. 516, 4 S. C. Rep. 111; *Railroad Co. v. Humes*, 115 U. S. 512, 519, 6 S. C. Rep. 110.

There is nothing of an arbitrary character in the provisions of the statute in question. It applies to all physicians, except those who may be called for a special case from another State. It imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters—that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the State a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the State. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient.

The cases of *Cummings v. State of Missouri*, 4 Wall. 277, and of *Ex parte Garland*, *Id.* 333, upon which much reliance is placed, do not, in our judgment, support the contention of the plaintiff in error. In the first of these cases it appeared that the constitution of Missouri, adopted in 1865, prescribed an oath to be taken by persons holding certain offices and trusts, and following certain pursuits within its limits. They were required to deny that they had done certain things, or had manifested by act or word certain desires or sympathies. The oath which they were to take em-

braced thirty distinct affirmations respecting their past conduct, extending even to their words, desires, and sympathies. Every person unable to take this oath was declared incapable of holding in the State "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private," then existing or thereafter established by its authority; or "of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation." And every person holding, at the time the constitution took effect, any of the offices, trusts, or positions mentioned, was required, within sixty days thereafter, to take the oath, and, if he failed to comply with this requirement, it was declared that his office, trust or position should, *ipso facto*, become vacant. No person, after the expiration of the sixty days, was allowed, without taking the oath, "to practice as an attorney or counselor at law," nor after that period could "any person be competent as a bishop, priest, deacon, minister, elder or other clergyman, of any religious persuasion, sect, or denomination to teach or preach, or solemnize marriages." Fine and imprisonment were prescribed as a punishment for holding or exercising any of the "offices, positions, trusts, professions, or functions" specified, without taking the oath, and false swearing or affirmation in taking it was declared to be perjury, punishable by imprisonment in the penitentiary. A priest of the Roman Catholic Church was indicted in a circuit court of Missouri, and convicted of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of \$500, and to be committed to jail until the same was paid. On appeal to the supreme court of the State the judgment was affirmed, and the case was brought on error to this court. As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that for many of them there was no way of inflicting punishment except by depriving the parties of their offices and trusts. A large portion of the people of Missouri were unable to take the oath, and as to them the court held that the requirement of its constitution amounted to legislative deprivation of their rights. Many of the acts which parties were bound to deny that they had ever done were innocent at the time they were committed, and the deprivation of a right to continue in their offices if the oath were not taken was held to be a penalty for a past act, which was violative of the constitution. The doctrine

of this case was affirmed in *Pierce v. Carskadon*, 16 Wall. 234.

In the second case mentioned—that of *Ex parte Garland*—it appeared that on the 2d of July, 1862, congress had passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the United States, either in the civil, military, or naval departments of the government, except the president, before entering upon the duties of his office, and before being entitled to his salary or other emoluments. On the 24th of January, 1863, congress, by a supplemental act, extended its provisions so as to embrace attorneys and counselors of the courts of the United States. This latter act, among other things, provided that after its passage no person should be admitted as an attorney and counselor to the bar of the supreme court, and, after the 4th of March, 1863, to the bar of any circuit or district court of the United States, or of the court of claims, or be allowed to appear and be heard by virtue of any previous admission, until he had taken and subscribed the oath prescribed by the act of July 2, 1863. The oath related to past acts, and its object was to exclude from practice in the courts parties who were unable to affirm that they had not done the acts specified; and, as it could not be taken by large classes of persons, it was held to operate against them as a legislative decree of perpetual exclusion. Mr. Garland had been admitted to the bar of the Supreme Court of the United States, previous to the passage of the act. He was a citizen of Arkansas, and when that State passed an ordinance of secession which purported to withdraw her from the Union, and by another ordinance attached herself to the so-called "Confederate States," he followed the State, and was one of her representatives, first in the lower house, and afterwards in the senate of the congress Confederacy, and was a member of that senate at the time of the surrender of the Confederate forces to the armies of the United States. Subsequently, in 1865, he received from the president of the United States a full pardon for all offenses committed by his participation, direct or implied, in the rebellion. He produced his pardon, and asked permission to continue as an attorney and counselor of this court without taking the oath required by the act of January 24, 1863, and the rule of the court which had adopted the clause requiring its administration in conformity with the act of congress. The court held that the law, in exacting the oath as to his past conduct as a condition of his continuing in the practice of his profession, imposed a penalty for a past act, and in that respect was subject to the same objection as that made to the clauses of the constitution of Missouri, and was therefore invalid.

There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular

church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions, by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The constitution of Missouri and the act of congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts, or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State. Judgment affirmed.

NOTE.—Due Process of Law.—The fourteenth amendment to the United States constitution declares that no State shall deprive any person of life, liberty or property without due process of law. It is as difficult as it is unwise to attempt any exact definition of due process of law.¹ "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."² Such regulations, as the legislature may deem fit to establish, do not by virtue of such legislation become due process of law.³ The term, as applied to judicial proceedings, means a course of legal proceedings according to the rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. Accordingly, a judgment in a personal action, obtained on service of summons by publication against a non-resident, under a State statute, was declared to be void.⁴ A party must be properly brought into court, and when there have an opportunity to prove any fact, which according to the constitution and usages of the common law would be a protection to him or his property.⁵ Valid assessments of taxes to the true owner of the property, and notice to him of the judgment to be rendered against him, are indispensable.⁶ A legislature cannot dispense with personal service of notice of suit, where it is practicable and has been usual under the general law.⁷ A party must have notice of proceedings to condemn his property, and an opportunity for the correction of errors must be given.⁸ A sale of property under a distress warrant, issued by the solicitor of the treasury, under a certificate from the treasury officers, of the balance found due from a collector of customs, in accordance with an act of congress, was held valid, since it was in harmony with the practice prevailing in England for centuries.⁹

¹ Berthoff v. O'Leilly, 74 N. Y. 509.

² Cooley Const. Lim. 356.

³ Westervelt v. Gregg, 12 N. Y. 209.

⁴ Pennoyer v. Neff, 95 U. S. 714.

⁵ People v. Essex Co., 70 N. Y. 228.

⁶ Abbott v. Lindenbower, 42 Mo. 102.

⁷ Brown v. Bd. Commrs., 50 Miss. 468.

⁸ Garvin v. Dausman, 27 Cent. L. J. 312.

⁹ Murray v. Hoboken, 18 How. 272.

A legal process, originally founded in necessity, which has been consecrated by time and approved and acquiesced in by universal consent, is held to be due process of law.¹⁰ Where the laws of a State impose a tax or other burden on property for public use, and a mode is provided for contesting the charge in the ordinary courts of law, there is no lack of due process of law. The determination of due process of law must be left to be decided by the gradual process of judicial inclusion and exclusion, as the cases presented for judicial decision shall require.¹¹ It is not necessary that such laws shall apply to all persons, but it is only necessary that all persons brought under subjection to the statutes shall be treated alike,¹² but the law must not be aimed at one class of the people.¹³

Police Power of the States.—The police power of a State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the State.¹⁴ Private interests must be made subservient to the general interests of the community, which is accomplished by the police power.¹⁵ The legislature is generally the exclusive judge of what is or is not hurtful, the only limitations being those prescribed in the constitution.¹⁶ But under pretense of exercising the police power, the legislature cannot enact laws not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome to the citizen. What are reasonable regulations and what are subjects of police power, must necessarily be judicial questions.¹⁷ In the exercise of its police powers a State may pass laws which incidentally affect commerce between the States.¹⁸ A State law excluding lewd or debauched women from the State is valid.¹⁹

Licenses under Police Power.—The right to pursue any lawful calling is subject to such restrictions as the legislature may lawfully prescribe to protect public health.²⁰ A State can require dentists to be examined and licensed before they can pursue their vocation,²¹ and also locomotive engineers, though such engineers are in charge of trains which pass into other States.²² Owing to the numerous cases on the subject, in addition to the principal case, the right of a State to require a physician to obtain a license before practicing his profession will probably be never again questioned.²³

S. S. MERRILL.

¹⁰ State v. Allen, 2 McCord, 55.

¹¹ Davidson v. New Orleans, 96 U. S. 97.

¹² Mo. Pac. R. Co. v. Mackey, 127 U. S. 205; Mo. Pac. R. Co. v. Humes, 115 U. S. 512; Minneapolis, etc. R. Co. v. Beckwith, 9 S. C. Rep. 207.

¹³ Ho Ah Kow v. Nunan, 18 Am. L. Reg. 676.

¹⁴ Thorpe v. Rutland, etc. R. Co., 27 Vt. 140; Munn v. Illinois, 94 U. S. 147; Beer Co. v. Massachusetts, 97 U. S. 25.

¹⁵ Slaughter House Cases, 83 U. S. 36.

¹⁶ Ex parte Shradler, 33 Cal. 279.

¹⁷ Toledo, etc. R. Co. v. Jacksonville, 67 Ill. 87.

¹⁸ Robbins v. Shelby Co. Tax Dist., 120 U. S. 489.

¹⁹ Ex parte Ah Fook, 49 Cal. 402.

²⁰ Ex parte Spinney, 10 Nev. 323.

²¹ Wilkins v. State, 113 Ind. 514.

²² Smith v. Alabama, 124 U. S. 465; Nashville v. Alabama, 9 S. C. Rep. 28.

²³ Ex parte Spinney, supra; Eastman v. State, 109 Ind. 278; State v. State Med. Board, 52 Minn. 324; Logan v. State, 5 Tex. App. 306; Hewett v. Charter, 16 Pick. 232; Fox v. Territory, 2 Wash. Ter. 297; State v. Dent, 26 W. Va. 1; Finch v. Gridley, 25 Wend. 469; West v. Clutter, 37 Ohio St. 347; Bibber v. Simpson, 59 Me. 181; State v. Gregory, 83 Mo. 123; Brown v. People (Colo.), 17 Pac. Rep. 404.

RECENT PUBLICATIONS.

BLICKENSCHERFER'S BLACKSTONE'S ELEMENTS OF LAW, ETC., with Analytical Charts, Tables and Legal Definitions, Arranged and Displayed by a Systematic and Attractive Method. By U. Blickenscherfer, Attorney at Law, Author of "Abridgment of Elementary Law," "Law Student's Review," "Descent of the Crown of England," etc. Chicago, Ill.: Ulric Blickenscherfer, Publisher. 1889.

This book is certainly novel and ingenious, and bears the marks of great labor on the part of the author. The design is, as stated by him, "to present an old and important subject in a new and attractive form." The subject might have been as appropriately and more succinctly stated "Blackstone boiled down." It is, in effect, the principles of the law, as stated by Blackstone, grouped into short distinct paragraphs, preserving as far as possible the language of the original text. Accompanying it are charts containing the heads, divisions and subheads of the law as Blackstone stated them. We can see wherein the work may be of interest and value to the student of law, and doubtless it is that class the author intended to reach, but one cannot help regretting that the same amount of ingenuity, labor and ability could not have been expended in a direction that would more directly and substantially benefit the practitioner. One feature of this book we cannot but commend—its mechanical execution—and that the more heartily because the author seems to have been his own publisher.

BOOKS RECEIVED.

THE POWERS AND DUTIES OF POLICE OFFICERS AND CORONERS. By R. H. Vickers, of the Chicago Bar. Chicago: T. H. Flood & Co. 1889.

THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES. By Robert S. Blackwell. Fifth Edition. Revised and Enlarged by Frank Parsons. Two Volumes. Boston: Little, Brown & Co. 1889.

GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES. Published During the Year Ending September, 1888. Volume III. Rochester: Lawyers Co-Operative Publishing Co. 1888.

THE LAW OF EXECUTORS AND ADMINISTRATORS. By James Schouler. Second Edition. Boston: Charles C. Soule. 1889.

THE LAW OF AGENCY, Including Special Chapters on Attorneys, Auctioneers, Brokers and Factors. By Floyd R. Mechem. Chicago: Callaghan & Co. 1889.

A MANUAL OF CRIMINAL LAW, as Established in the State of Maryland. By Louis Hochheimer, of the Baltimore Bar. Baltimore: Harold B. Seringer. 1889.

REPORTS OF CASES ADJUDGED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF NEW YORK. Complete Edition. Copiously Annotated by Embodying all Equity Jurisprudence, with Table of Cases Cited. By Robert Desty. Book IV. Containing Paige's Chancery Reports, Vols. 7, 8, 9, 10. Rochester: The Lawyers Co-Operative Publishing Co. 1888.

[Subscribers are invited to send short answers to the following.]

QUERIES AND ANSWERS.

QUERY NO. 15.

A private corporation owned, used and maintained a powder magazine, keeping stored therein large quantities of powder. As a matter of fact the maga-

zine was located so near to numerous inhabited dwelling houses that the natural and probable result of an explosion would be to damage or destroy them. Powder magazine was struck by lightning, causing it to explode, damaging dwelling house of plaintiff. Is corporation liable, under the common law? B.

QUERIES ANSWERED.

QUERY NO. 11.

[To be found in Vol. 28, Cent. L. J. p. 219.]

The heirs have an interest the same as their father would have had if living, viz: the same as the other children (Kent's Commentaries, Vol. 4, p. 391; 78 Mo. 55), and can, of course, maintain a partition suit. The quitclaim conveyed nothing, as at time same was made grantor had no title, and an after-acquired title does not inure to the benefit of grantee in a quitclaim deed. 88 Mo. 475. "His share of farm" is mere surplusage. Leaving out said clause the law would give each child his share. Said clause would not deprive any of the heirs of their rights as given by law, as an heir cannot be disinherited without an express devise or necessary implication. Jarmin on Wills, 532. There is none here to divest the heirs of deceased. H. C. F.

QUERY NO. 14.

[To be found in Vol. 28, Cent. L. J., p. 242.]

1. The child inherits the fee, subject to his mother's right to co-enjoy the homestead during her life. She cannot, by any act, impair his title or his right of possession. It may be sold to pay debts of his deceased father, subject to his right of possession during minority. By removing from and attempting to convey the land, the widow forfeited her homestead, and the title vested in the child during his minority, and, if not sold to pay debts, in fee. Rohrer v. Brockhage, 86 Mo. 544; Kaes v. Gross, 92 Mo. 647. 2. Notwithstanding the conveyance and removal, the child is entitled to the exclusive possession of the land as against his mother's vendee. Roberts v. Ware, 80 Mo. 363; Koehling v. Daniel, 82 Mo. 54. 3. And may maintain ejectment. Koehling v. Daniel, 82 Mo. 54; Rogers v. Mayes, 84 Mo. 530. The conclusion would seem to be that neither title nor right of possession pass by the deed. E. H.

JETSAM AND FLOTSAM.

JUDGE—Prisoner, the evidence shows that you brutally assaulted the plaintiff. Have you anything to offer in extenuation? Prisoner—No, Sir; my lawyer took all the money I had.

THE COURT—How is this, Mr. Johnson? The last time you were here you consented to be sworn, and now you simply make affirmation. Mr. Johnson—Well, yo' honah, de reason am dat I 'spects I ain't quite so suah about de facts ob dis case as de odder.

"PRISONER," said the Judge, "have you anything to say before the sentence of the court is passed upon you?"

"I have, your Honor." (Turning to his lawyer.) "You slick-fingered, smooth-jawed pudd'n'-head! You billy-be-dad-slammed hunk of soap fat! You said you could clear me for \$25, and took your money in advance. You hain't got sense enough to be assistant janitor to a corn-crib, you don't know as much law as a Texas horned frog, and you haven't the moral principle of a blind owl! Go ahead, Judge."

WEEKLY DIGEST

Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ABDUCTION—Indictment—Intent. — Under Rev. St. Ind. § 1915, an indictment failing to allege that the abduction was with the intent of having such person carried away from his residence is bad. — *State v. Sutton*, S. C. Ind., Jan. 12, 1889; 19 N. E. Rep. 602.

2. ADMIRALTY — Cause of Loss. — Where a vessel was negligently run ashore, and a storm coming on, was voluntarily scuttled to save her from total loss: Held, that the stranding, and not the storm, were the proximate cause of the loss. — *Park v. The Baxter*, U. S. D. C. (N. Y.), Nov. 30, 1888; 37 Fed. Rep. 219.

3. ADMIRALTY—Collision. — Question of negligence in overtaking and passing vessel. — *Milliken v. The Northam*, U. S. D. C. (N. Y.), Jan. 9, 1889; 37 Fed. Rep. 238.

4. ADMIRALTY—Jurisdiction—Contract with Stevedore. — A claim for services rendered by a stevedore in loading or unloading a vessel is a maritime contract, within the principles of admiralty jurisdiction. — *Mygatt v. The Gilbert Knapp*, U. S. D. C. (Wis.), Jan. 7, 1889; 37 Fed. Rep. 209.

5. ADVERSE POSSESSION—Good Faith—Prescription of Ten Years. — Good faith and possession are not sufficient to acquire immovable property by the prescription of 10 years. — *Beer v. Leonard*, S. C. La., Dec. 5, 1888; 5 South. Rep. 257.

6. AFFIDAVIT — Acknowledged Before Plaintiff's Attorney. — It is not error to refuse to strike out an affidavit of plaintiff's inability to give security for costs, on the ground that it was acknowledged before plaintiff's attorney as notary. — *Ryburn v. Moore*, S. C. Tex., Nov. 23, 1888; 10 S. W. Rep. 839.

7. APPEAL—Review on Second Appeal. — Questions which were open to dispute, and were either expressly or by implication decided on a first appeal, are not

open for review on a second appeal, but only so much of the proceedings as have taken place after the order remanding the cause. — *McKinney v. State*, S. C. Ind., Jan. 23, 1889; 19 N. E. Rep. 613.

8. ANIMALS—Running at Large. — Construction of Code Ga. § 1455, as to time when law goes into effect. — *Holtzman v. Kingery*, S. C. Ga., Jan. 16, 1889; 8 S. E. Rep. 535.

9. ARREST — Joint Tort-feasors. — Where several are engaged in making a lawful arrest, one is not liable for the unlawful act of another, done without his concurrence, though in furtherance of the common purpose. — *Wert v. Potts*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 375.

10. BRIDGES—Defects—Action. — Under Code Ga. § 690, any personal damage by reason of defects in the bridge may bring an action either against contractor or county. — *Arnold v. Henry Co.*, S. C. Ga., Jan. 9, 1889; 8 S. E. Rep. 606.

11. CARRIERS—Of Freight — Discrimination. — Discriminations by railroad companies in freight rates, based solely on the amount of freights shipped, are unwarrantable. — *Kinsley v. Buffalo, N. Y. & P. R. Co.*, U. S. C. C. (Penn.), Nov. 20, 1888; 37 Fed. Rep. 181.

12. CARRIERS OF GOODS—Delivery. — Under Rev. St. Tex. arts. 231, 292, a railroad company is liable as a carrier for goods not discharged from its car though a third person has agreed with the consignee to unload them. — *Mo. Pac. Ry. Co. v. Haynes*, S. O. Tex., Nov. 30, 1888; 10 S. W. Rep. 398.

13. CONFLICT OF LAWS — Distribution of Property — Domicile of Decedent. — The laws of the State in which the domicile of a decedent is at the time of his death control and govern the distribution of his personal estate, although he may die in another State. — *White v. Tennant*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 596.

14. CONSTITUTIONAL LAW—Drummer's Tax — District of Columbia. — Act Cong. Feb. 21, 1871, (16 St. p. 419, § 1,) confers upon the District of Columbia only municipal powers, and does not authorize it to impose a license upon persons soliciting the sale of goods on behalf of individuals or firms doing business outside of the district. — *Stoutenburgh, Intendant of Washington Asylum v. Hennick*, Jan. 14, 1889; 9 S. O. Rep. 256.

15. CONSTITUTIONAL LAW — Unwise Legislation. — That an act is unwise is no reason for declaring it void. — *Demoval v. Davidson Co.*, S. O. Tenn., Jan. 17, 1889; 10 S. W. Rep. 853.

16. CONTRACT—Construction—Certainty. — In a contract for the sale of an undivided interest in a mine: Held, that under the stipulations appearing in contract, that the sum promised to be paid was certain. — *Bates v. Childers*, S. C. N. Mex., Jan. 18, 1889; 20 Pac. Rep. 164.

17. CONTRACTS—Interpretation. — Where a purchaser agrees to pay the full cost of the labor, tools, and materials used in cutting, dressing, and boxing granite, and "insurance on the same," he is not liable for insurance, where none was ever taken out by the seller. — *Tullison v. United States*, Jan. 14, 1889; 9 S. O. Rep. 255.

18. CONTRACT — Right to Purchase. — A party purchasing may contract, before his purchase, to sell and that contract may be enforced. — *United States v. Trinidad Co.*, U. S. C. C. (Colo.), Jan. 10, 1889; 37 Fed. Rep. 180.

19. CONTRACTS — Waiver of Terms. — In a contract for the construction of a house, it was stipulated that no charge should be made for extra work, unless the same should be ordered in writing: Held, that evidence that the owner had orally requested the performance of certain work might be held a waiver of the stipulation. — *Bartlett v. Stanchfield*, S. J. C. Mass., Jan. 5, 1889; 19 N. E. Rep. 549.

20. CORPORATIONS — Suit by Stockholder. — Facts which stockholder must show to entitle him to bring suit in behalf of the corporation. — *Rathbone v. Parkersburg Co.*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 570.

21. COSTS. — Construction of Act Tenn. 1829, § 3923 as

to right of plaintiff, to costs. — *Stefner v. Burton*, S. O. Tenn., Nov. 12, 1888; 10 S. W. Rep. 352.

23. COUNTIES—County Commissioners. — Term of office under Laws Ind. March 7, 1885, providing for the term of county commissioners, respondent was entitled to serve the regular period of three years from the time of commencing service, and as this carried him to a point where there was a fraction of a term he was entitled to serve to the end of such current regular term. — *State v. Clendenning*, S. O. Ind., Jan. 25, 1889; 19 N. E. Rep. 623.

23. COURTS—District Courts—Jurisdiction — Foreclosure of Tax Liens. — Under ch. 39, Laws 1877, no extraordinary power or jurisdiction is conferred upon district courts, but only an additional remedy or cause of action is thereby given to a county by which it may, under certain conditions, foreclose a tax lien. — *English v. Woodman*, S. O. Kan., Dec. 8, 1888; 20 Pac. Rep. 262.

24. COURTS—Federal Courts—Injunction. — *Held*, under facts that the circuit court would not restrain the right to extend one railroad across another. — *U. P. Ry. Co. v. Denver R. R.*, U. S. D. C. (Colo.), Jan. 5, 1889; 37 Fed. Rep. 179.

25. COURTS — Federal Jurisdiction — Following State Practice. — The courts of the United States sitting in equity may administer equitable rights peculiar to the laws of a State where the courts are held. — *Fechheimer v. Baum*, U. S. O. C. (Ga.), Jan. 3, 1889; 37 Fed. Rep. 167.

26. CRIMINAL LAW—Charge of Judge. — Under Const. S. O. art. 4, § 26, a judge cannot in his charge to the jury give his opinion of the testimony. — *State v. Caddon*, S. O. S. Car., Jan. 3, 1889; 8 S. E. Rep. 536.

27. CRIMINAL LAW—Continuance—Absent Witnesses—Affidavit. — Where an affidavit for a continuance, made by a defendant in a criminal case, sets out evidence which, if proved, would entitle the defendant to an acquittal, the court cannot refuse the continuance because of disbelief in the statements of the affidavit. — *Baker v. Commonwealth*, Ky. Ct. App., Jan. 24, 1889; 10 S. W. Rep. 386.

28. CRIMINAL LAW—Indictment. — *Held*, that the indictment though informal in some respects, stated an offense advised defendant of what he was to meet and was substantially sufficient. — *State v. Palmer*, S. O. Kan., Jan. 8, 1889; 20 Pac. Rep. 270.

29. COVENANTS—Damages—Evidence. — Covenant for damages for breach of contract for the exchange of land: *Held*, under facts that tax-bills were no evidence of value of land. — *Kennershot v. Gallagher*, S. O. Pa., Jan. 23, 1889; 16 Atl. Rep. 518.

30. DAMAGES—Negligence. — Sufficiency of instructions as to want of ordinary care upon question of exemplary damages. — *Mo. Pac. Ry. Co. v. Shuford*, S. O. Tex., Nov. 30, 1888; 10 S. W. Rep. 408.

31. DAMAGES—Personal Injuries — Excessive. — In an action for personal injuries to wife: *Held*, under facts that a verdict for \$5,000 was not excessive. — *Mo. Pac. R. R. v. Mitchell*, S. O. Tex., Nov. 30, 1888; 10 S. W. Rep. 411.

32. DEED — Consideration. — A conveyance to the widow of the grantor's deceased son, of property left by the son, is based upon a consideration of love and affection, which will support it as between the parties. — *Beith v. Beith*, S. O. Iowa, Jan. 22, 1889; 41 N. W. Rep. 371.

33. DEPOSITIONS—Appeal. — Gen. St. Ky. ch. 113, § 31, with reference to depositions of attesting witnesses of a will does not apply to proceedings in the circuit court on appeal from the county court in probate proceedings. — *Moore v. Smith*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 380.

34. EJECTMENT—Improvements — Evidence of Value. — Construction of Code Va., 1873, ch. 132, allowing defendant in ejectment to recover the value of improvements not exceeding the amount to which the value of the premises is increased by them, etc. — *Holl-*

ingsworth v. Funkhouser, S. O. Va., Nov. 8, 1888; 8 S. E. Rep. 592.

35. ELECTIONS AND VOTERS — Counting Ballots. — Construction of U. S. Rev. Stat. § 5515, providing punishment for election officers failing to properly count ballots. — *United States v. Badinelli*, U. S. O. C. (Tenn.), Dec. 20, 1888; 37 Fed. Rep. 144.

36. ELECTIONS AND VOTERS — Failure to Give Notice. — If an election is held to fill a vacancy for the office of a justice of the peace at any other election than at the regular city election, and no official proclamation or public notice is given of the election: *Held*, that the omission to give any public notice of the election to fill the vacancy, and the failure of the electors to participate generally in the election, vitiates the same. — *Cook v. Mock*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 259.

37. EQUITY—Rescission of Contract — Evidence. — In an action to rescind a purchase of land the price paid by defendant is not evidence of value. — *Hwiler v. Owen*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 376.

38. ESTOPPEL—In Pais. — An estoppel *in pais* arises where one is prejudiced by the wilful act or declaration of another, upon whose conduct the former has rightfully acted. — *Essel v. Levy*, S. O. Ohio, Jan. 29, 1889; 19 N. E. Rep. 597.

39. EVIDENCE — Value of Land. — Whether person offered as a witness is qualified to give opinion upon the value of land is largely a matter of judicial discretion. — *Phillips v. Town of Marblehead*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 547.

40. EXECUTORS AND ADMINISTRATORS — Defect in Parties. — In an action by less than all the executors of a will, defendant cannot take advantage of the non-joinder of the other or others by a motion to amend the record, after having pleaded the general issue. — *Conrow v. Conrow*, S. O. Penn., Jan. 23, 1889; 16 Atl. Rep. 522.

41. EXECUTORS AND ADMINISTRATORS — Payment of Debts. — Sale of lands of decedent to pay his debts should not be decreed without allowing his heirs a reasonable time to pay them. — *Hart v. Hart*, W. Va. Ct. App., Dec. 14, 1888; 8 S. E. Rep. 552.

42. EXECUTORS AND ADMINISTRATORS—Proof of Claims. — Construction of Rev. St. Tex. arts. 2276, 2088, 2275, as to presentation of claims against the estate of deceased. — *Jenkins v. Cain*, S. C. Tex., Nov. 23, 1888; 10 S. W. Rep. 391.

43. EXECUTORS AND ADMINISTRATORS — Sale of Decedent's Real Estate. — Under Code Tenn. § 2105, 2106, the county court has jurisdiction of a bill for the sale of a decedent's realty for payment of debts when personal estate is insufficient. — *Davis v. Davis*, S. O. Tenn., Jan. 8, 1889; 10 S. W. Rep. 363.

44. EXECUTORS AND ADMINISTRATORS—Set-off by Tenants. — Upon a contract for a lease of a farm, made by the lessor in his life-time, the rent accruing from such lease, after the death of the lessor, cannot be set-off by a debt due to the tenant from the lessor at the time of his death, although the estate of the lessor is insolvent. — *Washington v. Castleman*, W. Va. Ct. App., Dec. 8, 1888; 8 S. E. Rep. 603.

45. GARNISHMENT—Property Subject to Process—Subscription to Capital Stock. — A balance due on a subscription to the capital stock of a corporation, to be paid when calls should be made therefor, is not liable to garnishment on a claim against the corporation when no call has been made. — *Teague v. LeGrand*, S. O. Ala., Jan. 10, 1889; 5 South. Rep. 287.

46. HOMICIDE — Murder in First Degree. — An instruction that an intentional killing was murder in the first degree, without any qualifications as to malice or deliberation, is erroneous. — *State v. Horrell*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 387.

47. HUSBAND AND WIFE — Community Property. — *Held*, under the evidence that the land in controversy was community property, no intention of the husband

to make wife a gift of the same being apparent. — *Morgan v. Lones*, S. O. Cal., Dec. 31, 1888; 20 Pac. Rep. 248.

48. HUSBAND AND WIFE—Execution—Interest of Wife. — When land in which the wife of the mortgagor has an inchoate marital interest is sold under a foreclosure judgment, and the land is afterwards redeemed by a judgment creditor, and sold under his judgment, by virtue of Rev. St. Ind. § 773, the wife is barred thereby, and acquires no interest, notwithstanding § 2508. — *Patterson v. Rosenthal*, S. C. Ind., Jan. 24, 1889; 19 N. E. Rep. 618.

49. HUSBAND AND WIFE—Loan to Wife. — A husband sued his wife, the complaint alleging an indebtedness for money loaned to her, which she expressly promised to pay; that the money was necessary in her separate business, and was obtained to prevent suits being brought against her: *Held*, under Rev. St. Ind. 1881, §§ 5115, 5117, 5120, the wife could borrow the money of her husband. — *Harrell v. Harrell*, S. C. Ind., Jan. 24, 1889; 19 N. E. Rep. 621.

50. HUSBAND AND WIFE—Wife's Separate Estate. — As to right of the wife in husband's property, as against the creditor, the same having been conveyed to him by her. — *Meade v. Stairs*, Ky. Ct. App., Dec. 20, 1888; 10 S. W. Rep. 272.

51. HUSBAND AND WIFE—Separate Estate—Estoppel. — A married woman may show that a note made by her and secured by mortgage was not a contract in relation to her separate estate. — *Tribble v. Poore*, S. C. S. Car., Jan. 3, 1889; 8 S. E. Rep. 541.

52. INSANITY—Estoppel—Res Adjudicata. — Where a husband is induced to execute a deed of certain property to his wife, and afterwards the wife secures an annulment of the marriage on the ground that the husband was insane at the time, she cannot deny the insanity of the husband in an action brought to set aside the deed on account of such insanity. — *Warfield v. Warfield*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 383.

53. INJUNCTION—Opening Street—Evidence. — An injunction against the opening of streets and alleys should not be granted on evidence of mere naked possession. — *Smith v. City of Nevada*, S. C. Tex., Jan. 15, 1889; 10 S. W. Rep. 414.

54. INJUNCTION—Supreme Court. — Under what circumstances, the supreme court will grant temporary injunction to operate pending an appeal in a cause before it. — *Cohen v. L'equi*, S. C. Fla., Dec. 22, 1888; 5 South. Rep. 285.

55. INSOLVENCY—Fraud—Composition with Creditors. — Under Rev. St. Me. ch. 70, § 62, requires the existence of willful fraud before a creditor to a composition can bring action against insolvent for balance of debt. — *Corbouse Bk. v. Rich*, S. J. C. Me., Jan. 1, 1889; 16 Atl. Rep. 506.

56. INSURANCE—Contracts—Conditions. — In a suit upon a contract to issue a policy of insurance, there can be no recovery for a loss, unless the conditions as to notice and statement of loss contained in policies of the form usually issued by defendant are complied with or waived. — *Barre v. Council Bluffs Ins. Co.*, S. C. Iowa, Jan. 22, 1889; 41 N. W. Rep. 578.

57. INSURANCE AGENT—Bond. — The sureties upon the bond of an insurance agent may be charged with liabilities and defaults prior to its execution in the same month. — *Brit. Amer. Assur. Co. v. Neil*, S. C. Iowa, Jan. 24, 1889; 41 N. W. Rep. 583.

58. INTOXICATING LIQUORS—Questions of sufficiency of the evidence under Pub. St. Mass. ch. 101, § 6, for keeping tenement for the illegal sale of intoxicating liquors. — *Commonwealth v. Bryan*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 555.

59. INTOXICATING LIQUORS—Damages. — In an action by a wife to recover damages for the intoxication of her husband, an instruction that it is not to be understood that a husband is only obligated to furnish a bare subsistence for his wife, but to the extent of his ability

he is under obligation to provide his wife those comforts and surroundings reasonable and necessary for home enjoyment in the society in which she lives, is not objectionable. — *Thill v. Polman*, S. C. Iowa, Jan., 22, 1889; 41 N. W. Rep. 355.

60. INTOXICATING LIQUORS—Evidence. — On the trial of a complaint for unlawfully keeping intoxicating liquors, evidence that intoxicating liquor was found in a public house, as well as in a barn connected with it, both being owned by defendant, was competent. — *Commonwealth v. Tenney*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 556.

61. INTOXICATING LIQUORS—Joint Offense. — Upon indictment against two for illegal keeping, etc., of intoxicating liquor in a tenement "by them used" one may be convicted and the other acquitted. — *Commonwealth v. Garon*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 554.

62. INTOXICATING LIQUORS—License. — Where by rule of board of aldermen, no license shall be granted unless six members assent, this rule determines the matter in every case. — *Commonwealth v. Moran*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 554.

63. INTOXICATING LIQUORS—Ordinances—Construction. — Construction of town ordinances as to power of council to inflict penalty for violations. — *Town Council v. Calhoun*, S. C. S. Car., Jan. 3, 1889; 8 S. E. Rep. 539.

64. INTOXICATING LIQUORS—Repeal of Statute. — Acts 21st Gen. Assem. Iowa, ch. 83, takes away, though containing no express repeal, the right of persons not pharmacists to sell for medical purposes, under Code Iowa, § 1526. — *State v. Aulman*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 579.

65. JUDICIAL SALE—Failure of Purchaser to Comply with Bid. — Purchaser at judicial sale who refuses to comply with his bid is liable for the deficiency upon a resale. — *Camden v. Mayhew*, U. S. S. O., Jan. 14, 1889; 9 S. C. Rep. 246.

66. JUDGMENT—Equitable Relief. — A defendant against whom judgment has been rendered on a note cannot have the judgment set aside on an allegation made for the first time that the note was obtained by fraud. — *Fox v. Mt. Sterling Bank*, Ky. Ct. App., Jan. 18, 1889; 10 S. W. Rep. 365.

67. JUDGMENT—Res Adjudicata—Claim against County. — A adjudication of a claim against a county by the board of commissioners subsequent to the repeal of Rev. St. Ind. 1881, § 5771, and prior to the passage of Acts 1885, p. 80, § 8, allowing the claimant, at his option, to appeal or bring suit against the county, was final, unless appealed from. — *Maxwell v. Board of Commissioners*, S. C. Ind., Jan. 23, 1889; 18 N. E. Rep. 617.

68. JURISDICTION—Federal Courts—Dismissal. — Construction of act Cong. March 3, 1875, § 5, as to dismissal of suit for want of jurisdiction. — *Fuller v. Ins. Co.*, U. S. C. O. (N. Y.), Jan. 7, 1889; 37 Fed. Rep. 163.

69. LIMITATION OF ACTIONS—Suits against Representatives. — Construction of Code Tenn. § 2454, with reference to the time limited for commencing actions against personal representatives. — *Bright v. Moore*, S. C. Tenn., Jan. 1, 1889; 10 S. W. Rep. 385.

70. LIS PENDENS—Purchase of Lands. — A purchaser *pendente lite*, is bound by the judgment rendered against the person from whom he purchased. — *Wallace v. Marquett*, Ky. Ct. App., Jan. 17, 1889; 10 S. W. Rep. 374.

71. MANDAMUS—Exercise of Discretion. — *Mandamus* will not lie to control the exercise of a discretionary authority. — *Satterlee v. Strider*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 552.

72. MARINE INSURANCE—Insurable Interest—Advances by Part Owner. — A part owner of a vessel, who makes advances on a venture engaged in by himself and the other owners, has a lien on the vessel and cargo for his reimbursement which constitutes an insurable interest. — *International Marine Ins. Co. v. Winmore*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 518.

73. MARITIME LIENS—Seaman's Wages. — *Held*, under facts that libellant was entitled to a seaman's lien for services rendered, except during the trip he actually served as master. — *Peterson v. The Nellie and Annie*, U. S. D. C. (Wis.), Jan. 7, 1889; 87 Fed. Rep. 217.

74. MASTER AND SERVANT—Negligence—Fellow servant. — A section boss and section hand are not fellow-servants. — *Mealman v. R. R. Co.*, U. S. C. C. (Colo.), Jan. 10, 1889; 87 Fed. Rep. 189.

75. MUNICIPAL CORPORATIONS—Contracts. — Construction of the act 1887, consolidating cities of New Orleans and Jefferson and the former held responsible for contract obligations of the latter. — *Jef. Gas Light Co. v. City of N. O.*, S. C. La., Dec. 3, 1888; 5 South. Rep. 262.

76. MUNICIPAL CORPORATIONS—Parks—Discontinuance. — The general assembly has power to authorize the discontinuance of a public park, and the alienation of the land. — *Mowry v. City of Providence*, S. C. R. I., Jan. 26, 1889; 16 Atl. Rep. 511.

77. MUNICIPAL CORPORATIONS—Non-uses of Franchise—Dissolution. — Non-user, or failure to elect officers for a series of years, does not work a dissolution of a municipal corporation created by act of the legislature. — *Buford v. State*, S. C. Tex., Nov. 30, 1888; 10 S. W. Rep. 401.

78. NEGLIGENCE—Defective Streets—Evidence. — In an action to recover for personal injuries alleged to have been received by reason of defects in one of the streets of defendant city: *Held*, evidence was admissible, tending to show that at the time of the accident plaintiff was intoxicated. — *Frenbach v. City of Waterloo*, S. C. Iowa, Jan. 22, 1889; 41 N. W. Rep. 370.

79. NEGOTIABLE INSTRUMENTS. — The defendant bank, telegraphed to the plaintiff at L. Cal., that it would pay B's draft upon it for \$2,000. B's draft as subsequently drawn and delivered, was for \$2,000, "with exchange on New York." *Held*, that the acceptance of the bank did not cover on the draft as drawn. — *Lindley v. First Nat. Bank of Waterloo*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 381.

80. NEGOTIABLE INSTRUMENTS—Delivery—Evidence. — *Held*, under the testimony that there was no legal delivery of the notes in controversy. — *Gordon v. Adams*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 557.

81. NEW TRIAL—Appeal. — The discretion lodged in the lower court in the matter of granting new trials will not be disturbed by the supreme court except in a clear case of abuse. — *Peebles v. Peebles*, S. C. Iowa, Jan. 24, 1889; 41 N. W. Rep. 367.

82. NEW TRIAL—Newly-discovered Evidence—Petition. — An affidavit on a petition for new trial for newly-discovered testimony, which does not show what the testimony is, is sufficient. — *Harris v. R. R.*, S. C. R. I., Dec. 5, 1888; 16 Atl. Rep. 512.

83. PARTIES—Intervention. — The denial of a petition to intervene in an action brought to establish a trust in certain real estate, by one claiming the legal title to and possession of a certain portion of the premises involved, is not error. — *Curtis v. Lathrop*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 250.

84. PARTIES—Trust. — The object of the action being to establish an alleged trust, and C not being interested in this question was not a necessary party under Code Colo. § 16. — *Pollard v. Lathrop*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 251.

85. PARTITION—Sale of Undivided Interest. — Under Old Code Md. art. 16, § 99: *Held*, that it was error to decree sale of undivided interest in land. — *Dugan v. Baltimore*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 503.

86. PARTNERSHIP—Accounting. — *Held*, under the facts that a proper settlement was made by the commissioner appointed for that purpose. — *Hume v. McNeese*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 384.

87. PARTNERSHIP—Covenant—Action of—Evidence. — In covenant against a partnership question as to when

sealed instrument signed by one partner only is admissible in evidence. — *Martin v. Bray*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 515.

88. PARTNERSHIP—Firm Property—Patents. — Where one entering a partnership puts in an invention as part of the capital stock, a patent obtained thereon becomes partnership property. — *Hill v. Miller*, S. C. Cal., Jan. 25, 1889; 20 Pac. Rep. 304.

89. PATENTS FOR INVENTIONS—Repairs by Licensee. — The licensee of a patented machine has the right to replace parts which wear out, to discard useless parts and add new ones to improve its action. — *Young v. Foerster*, U. S. C. C. (N. Y.), Jan. 8, 1889; 87 Fed. Rep. 203.

90. PAYMENT—Presumption. — A court will not enforce payment of a note fourteen years after it was made. Payment will be presumed. — *Wilson v. Suggett*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 382.

91. PLEADING—Affidavit of Defense. — An affidavit of defense is insufficient unless it sets forth explicitly all the facts necessary to constitute a substantial defense. — *Reed v. Raymond*, U. S. C. C. (Penn.), Oct. 23, 1888; 37 Fed. Rep. 186.

92. PLEADING—General Denial. — A general denial of all material allegations in the complaint is authorized in Code Colo. 1887. — *Goodrich v. R. R.*, U. S. C. C. (Colo.), Jan. 21, 1889; 87 Fed. Rep. 162.

93. POST-OFFICE—Embezzlement of Letter. — An employee of the post-office can only be convicted of embezzling such letters as are proper subjects of deposit in the mail. — *United States v. Taylor*, U. S. D. C. (Mich.), Dec. 31, 1888; 37 Fed. Rep. 200.

94. PRINCIPAL AND AGENT—Ratification. — A written contract for the purchase of land, made by an agent in his own name, but really for the benefit of another, though without authority of the latter, is ratified by the principal if he takes possession of the land. — *Hall v. White*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 521.

95. PRINCIPAL AND SURETY—Release of Co-surety. — A release of a levy on an execution upon the property of a surety will not release a co-surety from liability. — *Alexander's Heirs v. Byrd*, Va. Ct. App., Jan. 21, 1889; 8 S. E. Rep. 577.

96. QUO WARRANTO—Title to Offices—Qualifications. — As the law prohibits a member of a school board from contracting or performing any work, and from furnishing any materials used in such work, which is under the supervision, direction, or control of such officer, the court, in the exercise of its discretion will refuse to one who has such contract the extraordinary remedy of *quo warranto* to invest him with the office he seeks. — *Weston v. Lane*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 260.

97. RAILROAD COMPANIES—Fire Set by Locomotives—Negligence. — The damage to property by fire escaping from a railroad engine raises an inference of negligence, consisting in a defect in the construction of the engine, or in the appliances used, or in want of care in its management. — *Louisville & N. R. Co. v. Reese*, S. C. Ala., Jan. 9, 1889; 5 South. Rep. 283.

98. RAILROAD COMPANIES—Killing Stock—Farm Crossings. — Under acts Ind. 1886, pp. 148, 234, railway companies, in the absence of negligence, are not liable for injuring or killing stock at private crossings. — *Louisville N. A. & C. Ry. Co. v. Etzler*, S. C. Ind., Jan. 28, 1889; 19 N. E. Rep. 615.

99. RAILROAD COMPANIES—Right of Way. — A railroad company has exclusive dominion over its right of way and depot grounds and may exclude trespassers thereon. — *Fluker v. Georgia, etc. Co.*, S. O. Ga., Jan. 21, 1889; 8 S. E. Rep. 629.

100. RAILROAD COMPANIES—Subscription to Capital Stock. — Question of construction of subscription notes with reference to the maturity of the notes and conditions precedent to their payment. — *Johnson v. Ga. R. Co.*, S. C. Ga., Jan. 21, 1889; 8 S. E. Rep. 531.

101. RAILROAD COMPANIES—Taxation Bridges. — Comp. Stat. Neb. ch. 77, § 39, does not require returns for taxation, of bridges constructed across the Missouri river. — *Cass County v. C. B. & Q. R. R. Co.*, S. O. Neb. Jan. 3, 1899; 41 N. W. Rep. 246.

102. REMOVAL OF CAUSES—Separable Controversy. — A lessee is interested in the controversy in a suit to set aside his lessor's title to the leased premises as fraudulent, and when he, being a resident of the same State as complainant, is made a party defendant, the controversy is not wholly between citizens of the different States, and is not removable. — *Miller v. Sharp*, U. S. O. C. (Iowa), Jan. 9, 1899; 37 Fed. Rep. 161.

103. REPLEVIN—Adverse Possession. — Code Ga. § 4038, construed with reference to defense of peaceable possession for four years. — *Gaillard v. Hudson*, S. O. Ga., Jan. 14, 1899; 8 S. E. Rep. 534.

104. REPLEVIN—Affidavit—Amendment. — The original affidavit in replevin may be amended so as to state sufficiently what is already stated therein indefinitely. — *Meyer v. Lane*, S. O. Kan., Jan. 5, 20 Pac. Rep. 238.

105. RES ADJUDICATA. — An assignee of mining royalties as security, of which an undivided moiety has been assigned to others, binds such others by her acts in suing for such royalties, though she be in control of the security, and have superior rights in it, since she is in any case trustee for the others. — *Perry v. Mills*, S. O. Iowa, Jan. 23, 1899; 41 N. W. Rep. 378.

106. SALVAGE—Derelict. — Held, under facts that a vessel was *prima facie* derelict and abandoned. — *The Ann L. Lockwood*, U. S. D. C. (Del.), Dec. 23, 1898; 37 Fed. Rep. 283.

107. SUPREME COURT—Review of Territorial Courts. — Rev. St. U. S. § 702, does not give the supreme court authority to review the decision of the supreme court of the territory of Montana in a criminal case. — *Tarnsworth v. Montana*, U. S. S. O. Jan. 14, 1899; 9 S. O. Rep. 253.

108. SHIPPING—Bills of Lading—Misconduct of Master. — A master who inserts in the bill of lading, "Vessel not responsible for difference in weight," is not chargeable with misconduct in signing such bill of lading though it calls for more cargo than was actually received on board. — *McKay v. Eavis*, U. S. D. C. (N. Y.), Dec. 21, 1898; 37 Fed. Rep. 229.

109. SPECIFIC PERFORMANCE—Laches. — Where defendant who has contracted with plaintiff for right of way and deposited the money with H and failed for two years to tender deed to H, who in the meantime became insolvent, plaintiff denied remedy through laches. — *C. E. I. & P. Ry. Co. v. W. I. & N. Ry. Co.*, S. O. Iowa, Jan. 23, 1899; 41 N. W. Rep. 376.

110. TAXATION—Deeds—Curative Acts—Constitutional Law. — The owner of land, in paying the amount of taxes levied upon it, is authorized to rely upon the treasurer for the proper application of the money paid, and the treasurer's failure to make such proper application is ground for redemption from a sale for such taxes. — *Henderson v. Robinson*, S. O. Iowa, Jan. 23, 1899; 41 N. W. Rep. 371.

111. TAXATION—Tax sales. — Construction of Code Va. § 469, as to sale of lands for delinquent taxes. — *Couch v. Marye*, Va. Ct. App., Nov. 22, 1898; 8 S. E. Rep. 582.

112. TRESPASS—Damages. — In an action for damages for wrongful occupation of land, where evidence fails to show length of use of land and value thereof, etc., plaintiff can recover only nominal damages. — *W. I. Hams v. Brown*, S. O. Iowa, Jan. 23, 1899; 41 N. W. Rep. 377.

113. TRIAL—Verdict—Waiver of Objection. — A verdict allowing a sum for items not accurately declared for will not be set aside when defendant has neither demurred to the writ nor objected to evidence in support of such items. — *Brown v. Reed*, S. J. O. Me., Jan. 3, 1899; 16 Atl. Rep. 504.

114. TRUSTS—Construction. — Construction of a trust to pay debts when creditors compromise their claims. —

Tennent v. Headles, W. Va. Ct. App., Nov. 24, 1898; 8 S. E. Rep. 544.

115. TRUSTS—Void for Uncertainty—Resulting Trusts. — Where property is conveyed upon a void trust, a resulting trust in the same arises in favor of the grantors. — *Helshell v. Trout*, W. Va. Ct. App., Dec. 1, 1898; 8 S. E. Rep. 557.

116. UNITED STATES DISTRICT ATTORNEY—Fees. — The excess of fees taxed and received by a district attorney over the amount allowed by statute belongs to the government. — *Bliss v. United States*, U. S. O. C. (Mo.), Jan. 2, 1899; 37 Fed. Rep. 191.

117. VENDOR AND VENDEE—Contract. — An agreement for the conveyance of a designated number of acres "in" a specified larger tract of land, is ineffectual, because of uncertainty, to transfer or create an interest or right in any land. — *Brockway v. Frost*, S. O. Minn., Jan. 31, 1899; 41 N. W. Rep. 411.

118. WILLS—Construction—Bodily Heirs. — Construction of use words "bodily heirs" in a will. — *Mitchell v. Simpson*, Ky. Ct. App., Jan. 15, 1899; 10 S. W. Rep. 372.

119. WILLS—Construction—Legacy. — Under a clause in a will bequeathing money to a legatee "or his legal representatives," the fund should be paid to the guardian of the legatee, an infant, as such bequest vests absolutely in the legatee. — *Livermore v. Somers*, N. J. Ct. Chan., Jan. 18, 1899; 16 Atl. Rep. 513.

120. WILLS—Construction—Remainder. — Construction of will with reference to the time when remaindermen are entitled to possession of property devised. — *Crawley v. Blackman*, S. O. Ga., Jan. 9, 1899; 8 S. E. Rep. 533.

121. WILLS—Construction—Words of Inheritance. — Construction of a will as to whether "heirs" was used as word of inheritance or purchase. — *Wedekind v. Hallemberg*, Ky. Ct. App., Jan. 12, 1899; 10 S. W. Rep. 368.

122. WILLS—Election of Husband. — Construction of act Pa. May 4, 1865, as to election of husband in property of deceased wife. — *Appeal of Lee*, S. O. Pa., Jan. 23, 1899; 16 Atl. Rep. 514.

123. WILLS—Mental Incapacity. — Interpretation of phrase "in a proper state" to dispose of estate in an instruction to jury in an action to set aside a will for mental incapacity in the devisor. — *Gordon v. Morrow*, Ky. Ct. App., Jan. 17, 1899; 10 S. W. Rep. 373.

124. WITNESS—Confidential Relation—Attorney and Client. — Under Acts Ga. 1887, p. 30, excusing an attorney from testifying against his client, unless his information is derived from his client by virtue of his relation as attorney, he is compellable to testify. — *Skellie v. James*, S. O. Ga., Jan. 25, 1899; 8 S. E. Rep. 607.

125. WITNESS—Impeachment. — Where defendant had, on cross-examination of plaintiff, read certain parts of her deposition, taken by him, for the purpose of impeachment, it was competent for plaintiff to read the whole to the jury. — *Korte v. Hoffman*, S. O. Mo., Feb. 4, 1899; 10 S. W. Rep. 390.

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CURRENT EVENTS.

THE legislatures of many of the States, notably New York, Massachusetts, Michigan, Ohio, and Wisconsin are attempting to amend the libel law. There is certainly need of it, and yet, most of the amendments proposed seem to lean somewhat in the wrong direction. In Michigan, some three years ago, the press of the State secured the passage of a statute which was eminently satisfactory to them. By that law, it was provided, that a plaintiff could recover only actual damages, if it should appear that the publication was made in good faith, and did not involve a criminal charge, that its falsity was due to a misapprehension of the facts, and that the error was corrected in the paper as soon as it was brought to the attention of the editor. Actual damages were defined to be "all damages the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other damages." This law was recently declared unconstitutional by the Supreme Court of the State, in *Park v. The Detroit Free Press Co.*, 28 Cent. L. J. 56, and immediately the press of the country, headed by the New York Herald, made vigorous protests and began a general agitation of the subject.

It is, without doubt, difficult, in legislation of this character, to steer clear between the Scylla of unrestrained journalistic license, and the Charybdis of unreasonable, exacting responsibility. But it is possible to do so, and to frame a law which, at the same time, protects decent journalism and also gives ample remedy to the one who suffers from wrongful aspersions. The amendment, as proposed in New York and Massachusetts, prevents the maintenance of an action for libel, for the publication of any matter of legitimate interest to the public, if such publication is made without actual malice, and if the author or publisher thereof causes a retraction, of any thing untrue, to be made as soon as practicable after being requested

to do so. This law is objectionable for many obvious reasons. Though the old common law presumption of malice in nine cases out of ten, is absurd, yet in the same proportion of cases, proof of actual malice would be exceedingly difficult. And the specific value of a retraction or correction in a libel published and scattered broadcast, is of minute degree.

There is no reason why newspapers and their publishers should be singled out as special objects of legislative protection, and that laws should be framed to exempt them from a rigid responsibility for torts committed. With as much show of justice, can the railroads demand that they be relieved from the results of their negligence under certain conditions.

The bill, as introduced in the Wisconsin legislature, seems to be in the right direction. It forbids the recovery of any but actual damages sustained where actual malice is not proved, and prevents the bringing of any action for libel, unless the plaintiff shall have asked for a retraction or correction; but it makes the retraction or correction pleadable in mitigation of damages, and bars all suits begun by lawyers for a contingent fee.

This seems to be as much as newspapers should ask or expect. All that the latter really need is protection against trivial or trumped up suits, started simply for effect or compromise, without any intention to prosecute to the end and often supported and encouraged by a hungry attorney. All that the public desire is to require of publishers care and caution in the dissemination of news, of a possible personal nature, and to be secure from unwarranted attack.

It is proper to notice the death, on March 19th, of Hon. John A. Campbell, ex-associate justice of the Supreme Court of the United States. Born in Georgia, in 1811, he removed to Alabama, where he soon took front rank, as a member of the bar. From 1837 to 1858 the story of his life was the routine of an industrious, painstaking, earnest lawyer. An examination of the Alabama reports from the 5th volume of Porter's reports through the 21st Alabama will reveal the fact that Mr. Campbell was engaged in every civil case of importance that went to

the supreme court from his section of the State. In 1853 he was appointed by President Pierce to fill the vacancy in the Supreme Court of the United States, caused by the death of Justice McKinley. As a member of that court, of which Mr. Taney was then chief justice, he held a high position by reason of his great ability and profound learning. At the outbreak of the war, he resigned his position, and up to 1884, when he retired, continued in the active practice of his profession at New Orleans.

NOTES OF RECENT DECISIONS.

A NOVEL question of priority of mortgages arose in the case of *Constant v. University of Rochester*, 19 N. E. Rep. 631, in which the New York Court of Appeals reverses the decision of the supreme court of that State. This was a suit to foreclose a mortgage held by plaintiff, executed by one Meehan, February 17, 1883. The University of Rochester was joined as defendant, being the holder of a mortgage on the same property, dated January 11, 1884. The former was not recorded, but the court below found that plaintiff's mortgage was a lien superior to that of the university, on the ground, that although plaintiff's mortgage was never recorded, yet the agent who obtained the university's mortgage had knowledge of the existence of plaintiff's mortgage, having himself procured it and it being at the time in his office, and that this knowledge must be imputed as notice to his principal. The court says:

The transaction out of which the mortgage to the university arose occurred eleven months subsequent to the transaction out of which the mortgage in suit arose; and the former mortgage was neither a part of the same transaction as the latter, nor had it the least connection therewith. Under the law, as decided by the older cases in England, such fact would have been an absolute defense to the claim that there was any constructive notice to the defendant arising out of notice to its agent, because such notice was in another and entirely separate transaction. *Warrick v. Warrick*, 8 Aik. 291; *Mountford v. Scott*, 1 Turn. & R. 274; *Hargreaves v. Rothwell*, 1 Keen, 154; *Nixon v. Hamilton*, 2 Dun & Walsh, 364; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; * * * This modification of the old English rule is recognized in the comparatively late case of *The Distilled Spirits*, 11 Wall. 356. Mr. Justice Bradley, in delivering the opinion of the Supreme Court of the United States, stated that the doctrine in England seems to be established that, if the agent at

the time of effecting a purchase has knowledge of any prior lien, trust, or fraud effecting the property, no matter when he acquired such knowledge, his principal is effected thereby. If he acquire the knowledge when he effects the purchase, no question can arise to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend upon facts and other circumstances. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule, as now understood; and the learned justice states that the rule, as finally settled by the English courts, is, in his judgment, the true one, and is deduced from the best consideration of the reasons on which it is founded. And see *Story on Agency*, § 140; *Bank v. Davis*, 2 Hill, 451; *Holden v. Bank*, 72 N. Y. 286; *Cragle v. Hadley*, 90 N. Y. 131; *Welsh v. Bank*, 73 N. Y. 424; *Bank v. Savery*, 82 N. Y. 291. From all these various cases it will be seen that the furthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received, or the knowledge obtained, in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent one had, and which he had obtained in another transaction, at another time, and for another principal, was present to his mind at the very time of the transaction in question. Upon a careful review of the testimony in this case, we have been unable to find any such proof. It is true the learned trial judge finds that, contemporaneously with the execution of the mortgage to the university, Dean caused to be made a statement upon the basis that the amount was to be loaned to the mortgagors, and that out of the money coming to them, as a consideration for the mortgage to the university, the amount of the bond and mortgage to the plaintiff's decedent, with interest, was to be paid, and that mortgage was to be satisfied; and he further found that the university through Dean, had notice of the mortgage of the plaintiff's decedent in connection with, and as part of, any proposed transaction by which there was to be loaned to the mortgagor the amount of the bond and mortgage to the university. What is meant by the word "contemporaneously," as used in this finding, is perhaps not absolutely clear. If it meant that the statement mentioned was procured to be made by Dean as a part of and coincident with the execution of the mortgage to the university, it is not, as we think, based upon any evidence. There is no proof whatever in this case that Dean procured this statement to be made by anybody; and Dean himself says that a statement of this nature would, by the course of practice in his office, have come to him (made by some one in his office) the day after the loan was closed. He does not pretend to recollect this particular statement, nor is there any evidence that he procured it to be made. His testimony shows that he had no special recollection of the things which took place upon the occasion of the execution of the bond and mortgage to the university, further than appeared by his books and other memoranda then made by others; and he does not pretend to say that this particular statement was presented to him, or that he had the least knowledge of its existence, or of the facts therein stated, until the day after the closing of the transaction, and the execution of the mortgage to the university. This is every particle of evidence that there is upon which a finding could be based such as the learned judge made, of knowledge or notice on the part of Dean of the existence of the Constant mortgage at the time of the

transaction with the university, and the execution of the mortgage to it. * * * * The plaintiff is bound to show by clear and satisfactory evidence that when this mortgage to the university was taken by Dean he then had knowledge and the fact was then present to his mind, not only that he had taken a mortgage to Constant eleven months prior thereto on the same premises which had not been recorded, but that such mortgage was an existing and valid lien upon the premises. * * * The other question has been argued before us which has been the subject of a good deal of thought. It is this: Assuming that Dean had knowledge of the existence of the Constant mortgage at the time of the execution of the mortgage to the university, is his knowledge to be imputed to the university, considering the position Dean occupied to both mortgages? While acting as the agent of Constant in taking the mortgage in question as security for the funds which he was investing for him, it was the duty of Dean to see that the moneys were safely and securely invested. The value of the property in question was between eleven and twelve thousand dollars, and it was obviously the duty of Dean to see to it that the mortgage which he took upon such property as a security for a loan of \$8,000 for Constant should be a first lien thereon. See *Whitney v. Martine*, 88 N. Y. 535. In order to become such first lien, it was the duty of Dean to see to it that the Constant mortgage was first recorded. In January, 1884, when acting as agent for the university to invest its moneys, he owed the same duty to the university that he did to Constant, and it was his business to see to it that the security which he took was a safe and secure one. Neither mortgage was safe or secure if it were a subsequent lien to the other upon this property. This duty he continued to owe to Constant at the time he took the mortgage to the university. At the time of the execution of the latter mortgage, therefore, he owed conflicting duties to Constant and to the university; the duty in each case being to make the mortgage to each principal a first lien on the property. Owning these conflicting duties to two different principals, in two separate transactions, can it be properly said that any knowledge coming to him in the course of either transaction should be imputed to his principal? Can any agent occupying such a position bind either principal by constructive notice, where confessedly that is all the notice that each principal had? It has been stated that in such a case, where an agent thus owes conflicting duties, the security which is taken, or the act which is performed, by the agent, may be repudiated by his principal, when he becomes aware of the position occupied by such agent. *Story*, Ag. § 210. The reason for this rule is that the principal has the right to the best efforts of his agent in the transaction of the business connected with his agency, and where the agent owes conflicting duties he cannot give that which the principal has the right to demand, and which he has impliedly contracted to give. Ought the university to be charged with notice of the existence of this prior mortgage, when it was the duty of its agent to procure for it a first lien, while at the same time in his capacity as agent for Constant it was equally his duty to give to him the prior lien? Which principal should he serve? * * * I have found no case precisely in point where the subject has been discussed and decided either way. I have very grave doubts as to the propriety of holding in the case of an agent situated as I have stated that his principal in the second mortgage should be charged with knowledge which he acquired in another transaction, at a

different time, while in the employment of a different principal and where his duties to such principal still existed and conflicted with his duty to his second principal. We do not deem it however necessary to decide the question in this case. Gray J. dissents.

THE right to establish a trust by evidence as to the rules and customs of the Catholic church was one of the many important questions before the Supreme Court of Ohio in the case of *Mannix v. Purcell*, 19 N. E. Rep. 572, in which celebrated case it was sought to withhold from the hands of the assignee of Bishop Purcell, certain property, alleged to have been held in trust by him for the use of the church. The court, in deciding the question above stated, says:

The parties have gone back fifteen centuries into the laws and canons of the church, for proof of the nature of the tenure by which the archbishop held the legal title to the ecclesiastical property, and the proof is overwhelming that he was not invested with an absolute title to it as his own. It is practically conceded that he held it in trust, but the parties were very far from a concurrence of views concerning the terms of the trust. The right to go to the rules and canons of the Catholic Church for the purposes of establishing, defining, and limiting the trust is denied. That parol evidence may be resorted to to engraft a trust upon a title held by deed absolute upon its face is a question which in this State has passed beyond the range of serious discussion, though the proof in such cases should be clear, strong, and convincing. *Mathews v. Leaman*, 24 Ohio St. 615; *Broadrup v. Woodman*, 27 Ohio St. 559. The contention is that to resort to the law of the church as proof upon which to qualify the absolute terms of the grant is to permit the law of the church to supersede or dominate the civil law, and much sensitiveness is shown by eminent counsel upon this subject. There is here no ground for alarm. It is no innovation upon the law of evidence, in determining questions like the one at bar, to call, in aid of the civil tribunal, upon the law of the particular church involved for the purpose of determining the title to church property. It surely is not unreasonable, in a case like the present, to hold one of the great prelates of the church of Rome to the terms upon which, by the very law to which he has vowed his fealty, he has consented to accept the legal title to property which is appointed to the uses of the church to whose service he has with most solemn unction dedicated his life. It is but a form of establishing, by convenient and very convincing proof, what entered into the contemplation of the parties to the grant at the time the title vested. It has been held that where a religious body becomes divided, and the right to the property is in conflict, the civil courts will consider and determine which of the divisions submits to the church, local and general. This division is entitled to the property. In determining which of the divisions has maintained the correct doctrine, the findings of the supreme tribunal of the denomination in question is binding upon the civil courts. *McGinnis v. Watson*, 41 Pa. St. 9; *Ramsey's Appeal*, 88 Pa. St. 60; *Society v. Society*, 25 Ohio, St. 128; *Ferraria v. Vasconcellos*, 31 Ill. 25; 3 Am. & Eng. Cyclop. Law, 135. So where a bequest is made for a church, to take effect whenever a congregation shall be formed, the proper eccle-

elastical authorities are the judges of the formation of such congregation. *Insurance Co.'s Appeal*, 99 Pa. St. 443. If, by the laws of a Masonic lodge, the master—or of an Odd Fellows, the noble grand—was to be the repository of the legal title to all the real property of the lodge, to be held in trust for its uses, would there be anything startling in the proposal to prove the law of the lodge in a controversy between the latter and its chief officer involving the title to such property? Yet in such a case it could as well be contended that the courts were permitting the law of Freemasonry or Odd Fellowship to supersede the law of the State as it can now be asserted that we are suffering such law to be superseded by the canons and decrees of Rome. It is no more than establishing, by a form of proof which the courts have held to be competent, the terms upon which, by the convention of the parties, the title to church property was granted and accepted.

It is not libelous to publish of a professional man "that he has removed his office to his house to save expenses," says the Supreme Court of Minnesota, in the case of *Stewart v. Minnesota Tribune Co.*, 41 N. W. Rep. 457. The court says:

It is not every false charge against an individual, though reduced to writing, and maliciously published, that will sustain an action for damages. It must appear that the plaintiff has sustained some special loss or damage following as the necessary or natural and proximate consequence of the publication, or the nature of the charge itself must be such that the court can legally presume that the party has been injured in his reputation or business, or in his social relations, or has been subjected to public scandal, scorn, or ridicule, in consequence of the publication. *Stone v. Cooper*, 2 Denio, 299; *Cooley, Torts* (2d ed.), 241-243; *Townsh. Sland. & Lib.* 121; *Pol. Torts*, 207-211. Assuming that the charge was maliciously made, it did not import anything unlawful, disreputable, or unprofessional. A professional man has a perfect moral and legal right to change the location of his office to his house, in his discretion, for any reasons satisfactory to himself, whether to save expense or otherwise. What ground is there then for the legal inference that the plaintiff has been degraded and injured by the publication? It is not claimed that the charge as published would tend to injure him, because the change or the report of a change of his office would diminish his professional business in amount or profits, and no case is made for special damages. 3 Bl. Comm. *124; *Terwilliger v. Wands*, 17 N. Y. 60; 72 Am. Dec. 428-433. But it is claimed that the words "to save expense" are, under the circumstances set forth in the complaint, susceptible of a defamatory meaning, such as would be calculated to injure plaintiff in his private and professional character and standing in the community, and occasion loss or damage in consequence thereof. But we do not think such inference is warranted, or that the injury complained of could be reasonably construed or contemplated as the natural and proximate consequence of the publication, giving the language used its proper and legitimate interpretation; and the charge itself cannot be expanded or enlarged by simple averment. *Donaghue v. Gaffy*, 53 Conn. 51, 2 Atl. Rep. 397; *Platto v. Geilfuss*, 47 Wis. 493; *Homer v. Englehardt*, 117 Mass. 540; *Stone v. Cooper*, *supra*; *Walker v. Tribune Co.*, 29 Fed. Rep. 829. The allusion to the plaintiff in the article com-

plained of may be conceded to be impertinent, and in bad taste; but the law of libel, however salutary as a remedy in proper cases, cannot be invoked to redress every breach of good morals or good manners in newspaper publications respecting individuals.

THE right of the jury in proceedings for condemnation of land, under eminent domain, to consider benefits to the land, was exhaustively reviewed, by the Supreme Court of Kansas, in *Leroy & W. R. Co. v. Ross*, 20 Pac. Rep. 197. The specific question there was whether special benefits from the construction of the railroad may be set off against the damages to the remainder of the land. Under the constitution are such benefits to be deducted or allowed from the compensation required to be paid? The court cites the provisions of the constitution which reads that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money * * * irrespective of any benefit from any improvement." This section was construed in *Railroad Co. v. Orr*, 8 Kan. 419; *Hunt v. Smith*, 9 Kan. 137. In Iowa, Arkansas and Indiana, similar statutes were construed in *Frederick v. Shave*, 32 Iowa, 254; *Railroad Co. v. Anderson*, 39 Ark. 167; *Railroad Co. v. Fitzpatrick*, 10 Ind. 120; *Railroad Co. v. Horn*, 41 Ind. 179, all adversely to the claim made by the railroad company here. The court concludes:

It is contended, however, that as the provisions of our constitution concerning right of way were taken from the constitution of Ohio, the decisions of that State prior to the adoption of our constitution must control. To this we agree, and the result is the same as given above. In *Giesy v. Railroad Co.*, 4 Ohio. St. 308, it was said: "The jury, in assessing the amount, have no right to consider or make any use of the fact that it has been increased in value by the proposal or construction of the improvement." The opinion in that case was delivered by Ranney, J., one of the ablest of the Ohio judges. He said, among other things: "The word 'irrespective' relates to this full compensation, and binds the jury to assess the amount without looking at or regarding any benefits contemplated by the construction of the improvement. When this is done, and the consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken; which is but saying that nothing shall be deducted from that value on account of such benefits. And see *Railroad Co. v. Ball*, 5 Ohio St. 568. * * * Both of the Ohio decisions referred to were rendered only a few years prior to the adoption of our constitution. The case of *Kramer v. Railroad Co.*, 5 Ohio St. 140, cited as supporting the allowance of special benefits was made under the Ohio constitution of 1802, and not the constitution in force at the time of the adoption of our own. The Ohio constitution of 1802 permitted the

railroad to set off against the value of the property taken for public use the increased benefits arising from the improvement, and it therefore differed widely from the Ohio constitution in force in 1859. It is contended, however, by the railroad company that, as this court, in *Railroad Co. v. Blackshire*, 10 Kan. 477, recognized that the fair way of determining the injury for the appropriation of a right of way is to determine the market value of the premises before the right of way is set apart, and then again after, and that the difference will be the true measure of damages; and as this rule has also been followed by the court in many cases,—that this permits benefits to be considered, and therefore that the construction given to the constitutional provisions already referred to cannot be sustained. If this latter rule permitted separate benefits to be considered, so far as they affect the value of the premises injured, we suppose the rule must give way to the provisions of the constitution, which all concede are paramount. But this rule does not conflict with our construction of the constitutional provision, excepting in a few cases only; and the conflict is more theoretical than substantial. The jury do not generally consider benefits when they ascertain the market value of the land before the appropriation, and then the market value of the land after the appropriation or construction of the railroad, and determine the difference as the damages. But even if the rule in the *Blackshire* Case is not always accurately correct, the railroad company cannot complain of the adoption of the rule, because, under its construction, it is beneficial, not detrimental.

THE strict watch which the law keeps upon one acting in a fiduciary capacity, to prevent his obtaining any advantage by reason of such position is well illustrated in the case of *Denholm v. McKay*, 19 N. E. Rep. 551, decided by the Supreme Judicial Court of Massachusetts. There, by the terms of a partnership agreement, the surviving partner had the right, at his option, to take the assets of the business at a price agreed on with the representatives of the deceased partner. The surviving partner was made one of the executors of the deceased partner. The court held that he did not have the right to sell the assets to himself, although there were two other executors acting with him: *Whichcote v. Lawrence*, 3 Ves. 740; *Morse v. Royal*, 12 Ves. 355; *Boynton v. Brastow*, 53 Me. 362. And since the executors assumed without due authority to fix the price at which the surviving partner might take the partnership assets, their agreement was not final, but might be avoided by those interested in the estate within a reasonable time. But such a transaction will stand unless within reasonable time steps are taken to avoid it. This rule is of general application whenever a sale is made by any one occupying a position of trust, if he is also interested directly or in-

directly as purchaser: *Jones v. Dexter*, 180 Mass. 380; *Morse v. Hill*, 186 Mass. 60; *Learned v. Foster*, 117 Mass. 365; *Ives v. Ashley*, 97 Mass. 198; *Oil Co. v. Murbang*, 91 U. S. 587. The court also considers the question of delay or laches on the part of those interested, and says:

It is contended that the facts show such acquiescence on the part of the mother, and that, as she was guardian over the children, they also are bound thereby. The discussion of this question by counsel has been but slight. The rights of infants are sedulously protected by courts of law and of equity, as well as by statute. Illustrations of this may be found in the limited power of guardians to bind their infant wards by express contracts (*Oliver v. Houdlet*, 18 Mass. 287; *Hospital v. Fairbanks*, 182 Mass. 414, 421; *Rollins v. Marsh*, 128 Mass. 116; *Thacher v. Dinmore*, 5 Mass. 299); in the statutes of limitation, which do not run against infants (Pub. St. ch. 196, § 5; *Id.* ch. 197, § 9); in the doctrine of estoppel, which ordinarily is not applicable to infants or other persons incapable of contracting for themselves (*Pells v. Webquish*, 129 Mass. 469, 472; *Merriam v. Railroad Co.*, 117 Mass. 241, 244; *Pierce v. Chace*, 108 Mass. 254, 258; *Bemis v. Call*, 10 Allen, 512; *Lowell v. Daniels*, 2 Gray, 161); and in the rules of practice in courts of equity, as to the effect of answers by guardians (*Mills v. Dennis*, 8 Johns. Ch. 367; *James v. James*, 4 Paige, 115, 119; *Stephenson v. Stephenson*, 6 Paige, 353; *Tucker v. Bean*, 65 Me. 352; *Turner v. Jenkins*, 79 Ill. 233, 232; *Berrett v. Oliver*, 7 Gill. & J. 191; *Holden v. Hearn*, 1 Beav. 445, 455; 2 Kent. Comm. 245; 1 Daniell, Ch. Pr. 169.) The practice in Massachusetts is shown in *Walsh v. Walsh*, 116 Mass. 377. The assent of a guardian *ad litem* of a minor *cestui que trust* to an account rendered by a trustee is no bar to a revision and correction of the account when reopened. *Blake v. Pegram*, 101 Mass. 592. The doctrine is usually declared, in general terms, that laches is not to be imputed to an infant; and no exception is made to infants under guardianship. Thus in *Lewin, Trusts* (7th ed.), 449, it is said: "Persons not *sui juris*, as *femes covert* and infants, cannot be precluded from relief on the ground of acquiescence during the continuance of the disability." See, also, 1 Perry, Trusts, § 467; *Burns v. Thayer*, 115 Mass. 89; *March v. Russell*, 8 Mylne & C. 30, 44; *Blanford v. Marlborough*, 2 Atk. 545; *Campbell v. Walker*, 5 Ves. 678; *Allen v. Sayer*, 2 Vern. 368; *Meanor v. Hamilton*, 27 Pa. St. 137; *Platt v. Smith*, 12 Ohio St. 571, 572. On the whole, in view of these authorities and considerations, we are of opinion that, even if it be assumed that the conduct and delay of the mother showed such acquiescence as to bar her personally—respecting which it is unnecessary for us to give an opinion—the minor children are not affected thereby.

AN important qualification of the right of an insurer who has paid a loss to a mortgagee to be subrogated to the securities of the latter, was made by the Supreme Court of Appeals of Virginia, in the case of *Phoenix Ins. Co. v. First Nat. Bank*, 8 S. E. Rep. 719. The insurance company having paid the mortgagee the amount of the loss under its

policy, \$700, which was a *part only* of the mortgage debt demanded of the mortgagee \$700 worth of bonds, the evidences of the debt, claiming that it had become entitled to them on the principle of subrogation. It was held that the principle of subrogation did not apply to such a case because the amount paid by the insurance company did not cover *in full* the mortgage debt. The court in its decision says:

The case involves only one single question: Does an insurer, who has paid a loss to a mortgagee that covers only a part of the mortgage debt, acquire, as against the mortgagee, a right to demand and take from the mortgagee the evidences of the debt secured to the amount of the loss paid by the insurer, whether the mortgagee be able or not to obtain satisfaction of his debt from the remaining evidences of the debt? or, in other words, must not the creditor's debt be paid in full before the insurer can take from him, by subrogation, any part of that debt? The doctrine which is applicable to this case, and which squarely meets this question, is clearly laid down by Mr. Justice Story in pronouncing the opinion of the Supreme Court of the United States in *Carpenter v. Insurance Co.*, 16 Pet. 501, where the learned judge says: "No doubt can exist that the mortgagor and mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that, where the mortgagee insures solely on his own account, it is but an insurance of his debt, and, if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation, and, even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances." And in *Insurance Co. v. Stinson*, 103 U. S. 25, Mr. Justice Bradley concludes the opinion with the remark: "After a loss has occurred, and the insurance has been paid sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor." In a note to *King v. Insurance Co.*, 54 Amer. Dec. 696, the learned annotator says: "The doctrine of the principal case, that the insurer is not entitled to demand such subrogation or assignment under a policy, * * * which does not expressly provide for it, is the established law of Massachusetts, * * * and that doctrine seems to be adopted in May, Ins. § 456; Wood, Ins. 782; and in later editions of Mr. Phillip's work, (2 Phil. Ins. § 1712.) But it must be admitted that the decided preponderance of authority is against this doctrine, and in favor of the insurer's right of subrogation and assignment in such cases upon paying the loss, and, if necessary, the balance due on the mortgage." Citing *Fland. Ins.* 400; *Carpenter v. Insurance Co.*, 16 Pet. 495; and numerous other authorities. The authorities demonstrate the

correctness of the decree appealed from, and we are therefore of opinion that the same must be affirmed.

UNDER what circumstances a court, in a trial for murder, should charge the jury upon murder in the second degree, is well illustrated in the case of *Blocker v. State*, 10 S. W. Rep. 439, decided by the Court of Appeals of Texas. The facts are sufficiently stated in the following extract from the opinion of the court:

In this case there is no direct evidence of express malice on the part of the defendant towards the deceased. It was not shown that defendant entertained any grudge or any enmity whatever against the deceased, nor does the evidence disclose any motive actuating the defendant to commit the homicide. The only evidence of express malice consists in the character of the weapons used; the manner of their use; that the defendant was accompanied by another person, armed with a gun; that defendant, in company with such other person, followed the deceased to the place of the homicide; and that after the killing the defendant and his companion precipitately fled from the scene. That the evidence sufficiently establishes express malice we do not doubt nor question, but we are not prepared to say that there is no evidence from which a jury might not legitimately conclude and find that the homicide was upon implied, and not upon express, malice. No witness saw or heard what transpired between the parties at the very time of the killing. It is not known what words, if any, passed between the parties, or what, if anything, provoked the killing. * * * Counsel for the defendant earnestly and ably contend that in all prosecutions for murder in this State, without regard to what the evidence adduced may be, it is the imperative duty of the trial court to submit to the jury the issue and law of murder in the second degree. We have been profoundly impressed with the strength of the reasoning advanced in support of this position. Article 607 of the Penal Code provides: "If the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and, if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty and in either case they shall also find the punishment." This provision is imperative, and a verdict of guilty of murder, without specifying the degree of murder of which the defendant is found guilty, is a nullity. *Willson, Crim. St.* § 1051. It unquestionably confers upon the jury the power to fix the crime in the second degree where it ought, under the law and the facts, to be fixed in the first; and a verdict of murder in the second degree will not be set aside upon the ground that the testimony showed the homicide to be one of murder in the first degree. *Blake v. State*, 3 Tex. App. 531; *Baker v. State*, 4 Tex. App. 223; *Powell v. State*, 5 Tex. App. 234; *Parker's Case*, 22 Tex. App. 105, 3 S. W. Rep. 100; *Monroe v. State*, 23 Tex. 227; *State v. Lindsey*, 19 Nev. 47, 5 Pac. Rep. 822. This power of the jury to find the degree is unrestricted, and cannot be controlled or abridged by the charge of the court, or by the omission of the court to submit the issue of murder in the second degree. It has, however, been held in this State that, if the court does not instruct upon murder in the second degree, but the jury finds the defendant guilty of that degree, the conviction cannot

stand. *Taylor v. State*, 3 Tex. App. 387; *Garza v. State*, *Id.* 286. The writer is inclined to the opinion that such a verdict must be received by the court, and judgment entered in accordance therewith, and that it would operate as an acquittal of murder in the first degree. In accord with the writer's view, it has been held in other States, under statutes similar to ours, that the court cannot deprive the jury of their power and right to fix the degree by imperatively instructing them that, if they find the defendants guilty, they must find him guilty of murder in the first degree. *Rhodes v. Com.*, 48 Pa. St. 398; *Lane v. Com.*, 50 Pa. St. 375; *Shaffner v. Com.*, 72 Pa. St. 61; *Robbins v. State*, 8 Ohio St. 193; *Beaudien v. State*, *Id.* 639; *State v. Lindsey*, 19 Nev. 47, 5 Pac. Rep. 822; *People v. Ah Lee*, 60 Cal. 85; *State v. Dowd*, 19 Conn. 387; *Roberts v. People* 19 Mich. 411; *People v. Williams*, 73 Cal. 533, 15 Pac. Rep. 97; *Whart. Hom.* §§ 186-198. Such an imperative instruction is regarded as an unwarranted assumption of the province of the jury, and will vitiate a conviction of murder in the first degree. We have, however, found no authority which directly holds that an omission to submit to the jury the issue and law of murder in the second degree, where the evidence conclusively shows murder in the first degree, presenting no facts from which a jury might legitimately find murder in the second degree, will vitiate a conviction for murder in the first degree. In this State the decisions are numerous and uniform the other way; holding that, where there is no evidence from which, by any possible legitimate construction, the jury could conclude that the homicide was murder in the second degree, the court may properly decline to submit to the jury the issue and law of murder in the second degree: *O'Connell v. State*, 18 Tex. 343; *Henning's Case*, 24 Tex. App. 315; *Trimble's Case*, 8 S. W. Rep. 814, and others cited. These decisions have been the law of this State and have met with the tacit sanction and approval of the bar and the legislature of the State. We shall adhere to them as the established law of the land, in cases coming within their purview. We take occasion, however, to suggest to trial judges that they should be exceedingly cautious in murder trials, in declining to charge upon murder in the second degree. Instances are comparatively rare in which such a charge may be properly dispensed with.

In *Thompson v. Rubber Co.*, Supreme Court of Errors of Connecticut, 16 Atl. Rep. 554, in an action for malicious prosecution, it was held that the discharge of the plaintiff by the criminal court was not *prima facie* evidence of the want of probable cause. The court thus concludes on the question: "The want of probable cause must be shown by facts and circumstances existing, and information which came to the defendant, at the time the prosecution was instituted. Facts subsequently transpiring, and information subsequently received, cannot, from the nature of the case, influence his action at that time."

POWERS AND LIABILITIES OF ASSIGNEES.

1. Who may be.
2. Bona Fide Purchaser.
3. Powers and Duties.
4. Power to Sell.
5. Liability.
6. Continuing Assignee's Business.
7. Distribution.

Assignee.—An assignee is a trustee selected either by the insolvent, or by his creditors, for the purpose of collecting and converting the assets of his debtor into money, and distributing it among the creditors. These trustees are known by different designations in the various States. In some they are called assignees, others commissioners or trustees. In Louisiana, they are designated syndics. Their appointment, powers, duties and liabilities are largely regulated by statute. There are, however, quite a number of general principles alike applicable to all, some of these will be given in the following:

1. *Who may be.*—It is an essential qualification of an assignee, not only that he should be capable from age, health, and education of performing the duties of the office, but also that he should be of sufficient character and pecuniary ability to afford assurance to creditors, that the fund will be safe in his hands and that the trust will be properly administered. Thus, where the debtor selected for assignees three relatives, one of whom was incapacitated by residence, one by blindness, and the third by want of education, it was held that it was evidence of an intent on the part of the assignor to keep the control of the property in his own hands, and the assignment was void.² So where the debtor selected his brother who was at the time unfit to attend to business by reason of a lingering disease which the assignor himself knew and believed was incurable and of which he died, it was held void.³ But the relationship of parties though calculated to awaken suspicion, is of itself no evidence of fraud in

¹ *Burrill on Assign.* 118; *Welt v. Franklin*, 1 Binn. 516; *Guerin v. Hunt*, 6 Minn. 375. Most of the States have laws now requiring bond to be given, and the financial ability of the assignee is not such an important feature as it was when no bond was required.

² *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Angell v. Rosenberry*, 12 Mich. 241.

³ *Currie v. Hart*, 2 Sandf. Ch. 353.

a conveyance of property.⁴ If, however, a relative is made assignee and also a preferred creditor, it is almost conclusive evidence of fraud.⁵ Where the creditors are consulted and consent to the assignment, no fraud will be presumed.⁶ And they may agree that the assignor himself shall act as trustee or agent in certain cases.⁷ The fact that the assignee is an attorney at law⁸ or is not a freeholder,⁹ will not disqualify him unless prevented by statute.¹⁰

2. *Bona Fide Purchaser.* — There was formerly considerable contention whether the assignee did not take the property assigned or transferred to him as a *bona fide* purchaser, and that he not only acquired the rights of the assignor in the transferred property, but that he acquired those additional rights which belong to a *bona fide* purchaser for value. Decisions holding him to be a *bona fide* purchaser, are to be found in some of the earlier decisions of New York,¹¹ Michigan,¹² Missouri,¹³ Virginia.¹⁴ But the prevailing rule now, is that he only succeeds to the rights, equitable and legal of the assignor.¹⁵ While this rule is generally acceded to in Ohio, yet it is not, however, without some qualifications. In *Lindeman v. Ingham*,¹⁶ it was held that where the assignor had given a mortgage and then made an assignment that the mortgagee could not foreclose the mortgage, but that the assignee had the exclusive right to sell the property and apply the proceeds in the payment of the mortgagors claim. And in a case arising in the circuit courts of that State recently, it was

held that although a mortgage unrecorded was valid as between mortgagor and mortgagee, it was invalid as to the assignee of the mortgagor.¹⁷ It seems to us that this decision is open to much criticism, and although it was somewhat influenced by local statutes, I doubt very much whether it correctly states the law.

3. *Duties and Powers.* — The assignee is clothed with all the necessary powers to obtain possession of the property assigned, and to collect the debts by process of law.¹⁸ He may attack the validity of a judgment entered upon the confession of the assignor,¹⁹ he may contest for creditors the claims of a mortgagee under a defective mortgage, to a preference in the distribution of the proceeds;²⁰ he may bring an action to set aside a fraudulent conveyance,²¹ he may restrain by injunction attaching creditors from interfering with property fraudulently conveyed,²² he may contest the validity if any claim against the estate;²³ he has power to appoint and employ all necessary clerks and agents to assist him in the performance of his duties, and allow and pay them suitable compensation for their services.²⁴ He should proceed with promptness in the collection of all debts, or he may be liable for all loss occasioned by delay,²⁵ he may bring an action even against the assignor when he wrongfully withholds property,²⁶ he may compromise such debts as cannot be wholly collected, provided it is done in good faith for the best interest of the creditors.²⁷ He is the agent of the creditors of the insolvent as well as of the law. He is the instrument by which, instead of by attachment, the property of the insolvent is

⁴ *Dunlap v. Bournville*, 26 Pa. St.; *Montgomery's Executors v. Kirksey*, 26 Ala. 172; *Baldwin v. Buckland*, 11 Mich. 387; *Nesbit v. Digby*, 13 Ill. 83.

⁵ *Currie v. Hart*, 2 Sandf. Ch. 353.

⁶ *Reed v. Emery*, 8 Paige, 417.

⁷ *Thompkins v. Wheeler*, 16 Pet. 106.

⁸ *Tucker v. Parks*, 7 Coll. 62.

⁹ *Simon v. Mann*, 33 Minn. 412.

¹⁰ *Rev. Stat. Wis.* 1878; *Rev. Stat. Minn.* 1878.

¹¹ *Dey v. Dunkam*, 2 Johns. Ch. 188.

¹² *Hollister v. Long*, 2 Mich. 309; but this was expressly overruled in *Pleron v. Manning*, 2 Mich. 445.

¹³ *Gates v. Labaume*, 19 Mo. 17; *Hardcastle v. Fisher*, 24 Mo. 70.

¹⁴ *Wiskham v. Martin*, 13 Gratt. 427; *Exchange Bank v. Knox*, 19 Gratt. 729.

¹⁵ *Burrill on Assign.* 539; *Willis v. Henderson*, 5 Ill. 13; *Reid v. Sands*, 37 Barb. 185; *Griffin v. Marquart*, 17 N. Y. 23; *Maas v. Goodwin*, 2 Hill, 275; *Walker v. Miller*, 11 Ala. 1067; *Knowles v. Lord*, 4 Whart. 500; *Haggerty v. Palmer*, 6 Johns. Ch. 437.

¹⁶ 36 Ohio St. 1.

¹⁷ *Snyder v. Betz*, 2 C. C. Ohio, 483.

¹⁸ *Ven Heusen v. Radcliffe*, 17 N. Y.; *Taylor v. Taylor*, 74 Me. 582.

¹⁹ *Nichols v. Kribbs*, 10 Wis. 79.

²⁰ *Building Assn. v. Willson*, 41 Ind. 506.

²¹ *Huntseecker v. Heing*, 11 S. & R. (Pa.) 250; *Freedland v. Freedland*, 102 Mass. 475.

²² *Lynch v. Roberts*, 57 Ind. 150.

²³ *Byrne v. Creditors*, 33 La. Ann. 198.

²⁴ *Meannel v. Murdock*, 13 Ind. 164; *Nye v. Van Husan*, 6 Mich. 329; *Casey v. Jones*, 37 N. Y. 608; *Van Dine v. Willitt*, 38 Barb. 319; *Mann v. Whitbeck*, 17 Barb. 388; *Vernon v. Morton*, 8 Dana, 247.

²⁵ *Winn v. Crosby*, *Daily Reg.* Dec. 14, 1876; *Royall's Admr. v. McKenzie*, 25 Ala. 303.

²⁶ *Pike v. Beacon*, 21 Me. 280.

²⁷ *Rogers v. DeForest*, 7 Paige, 272; *Anon v. Gilpke*, 5 Hun, 245; *Barnum v. Hempstead*, 7 Paige, 568; *Grier v. Tribber*, 3 Ind. 11; *Grover v. Wakeman*, 11 Wend. 187.

secured for the benefit of the creditors.²⁸ But before he can carry out the trust he must give bond to be approved by some competent authority.²⁹ In some States he must take an oath to honestly perform the duties of his offices.³⁰ He cannot be compelled to perform the unfinished contract of his assignor to deliver goods.³¹ He must keep clear and distinct and accurate accounts.³² As a creditor of the assignor, the assignee can gain no advantage from his position.³³ An assignee who allows the assignor to retain possession of and use any of the property, is responsible for the value of such use.³⁴

4. *Power to Sell.*—The power to sell is very often given by the deed of assignment, and sometimes by statute; but it is always necessarily implied by every conveyance for the payment of debts.³⁵ The assignee must use not only good faith, but every degree of care and diligence in conducting the sale.³⁶ And he should be present to superintend and conduct it.³⁷ The sale should be made at as early a date as it profitably can be,³⁸ and the assignee can generally use his discretion as to time, so that the delay is not unreasonably long.³⁹ Generally he has discretion to sell either at public or private sale.⁴⁰ If he sell at public sale he should give the creditors notice, so that they may attend and see that the property is not sacrificed.⁴¹ He should also give public notices.⁴² It is a general rule perhaps without exception, that an assignee cannot be a purchaser, either directly or indirectly of any of the effects of the assignor's,⁴³

either at public or private sale. It is said that he can convey by an attorney in fact.⁴⁴ But no covenants can be required of an assignee in a conveyance by him, except to his own incumbrances.⁴⁵ Doubtful claims may be disposed of for less than their face value.⁴⁶

5. *Liability.*—The liability of an assignee, is for the most part commensurate with the duty which the assignment imposes on him.⁴⁷ This duty may in its most general terms be stated to be to observe good faith in all his transactions, and to exercise all reasonable diligence and carefulness in the management of the trust.⁴⁸ For gross misconduct, or violation or abuse of the trust, he is not only personally responsible,⁴⁹ but may be dismissed from office.⁵⁰ He is answerable for property or money lost by his gross negligence,⁵¹ and it need not always be gross negligence to make him liable.⁵² He is liable for every loss occasioned by his negligence, want of caution, or mistake,⁵³ as for neglecting to collect debts assigned,⁵⁴ omitting to recover property from the debtor,⁵⁵ for permitting the debtor to retain possession of assigned property,⁵⁶ and for failing to take proper security for property sold.⁵⁷ Loss through an honest mistake will not generally be charged to him,⁵⁸ although it is not very easy to say when he will not be held liable for even an honest mistake.⁵⁹ The only safe way where the assignee is in doubt is to apply to the court for instruction.⁶⁰ The legal presumption always is that the assignee has faithfully executed

²⁸ *Shipman v. Aetna Ins. Co.*, 29 Conn. 245.

²⁹ *Van Hein v. Elkers*, 8 Hun, 516; *Renelleman v. Willard*, 15 Mo. App. 375; *Goll v. Hutbell*, 61 Wis. 293; *Bates v. Simmons*, 62 Wis. 69; *Windham v. Patty*, 62 Tex. 490.

³⁰ N. Y. Rev. Stat. 2266.

³¹ *Matter of Adams*, 15 Abb. (N. Y.) 61.

³² *Perry on Trusts*, § 821; *Bishop on Insolvent Debtors*, § 291.

³³ 1 Am. & Eng. Ency. of Law, 877.

³⁴ *Harrison v. Mock*, 10 Ala. 616.

³⁵ *Williams v. Otey*, 8 Humph. 563; *Perry on Trusts*, pp. 147, 386.

³⁶ *Johnson v. Easton*, 2 Ired. Eq. 330; *Quackenbush v. Leonard*, 9 Paige, 347; *Chesley v. Chesley*, 49 Mo. 540.

³⁷ *Burrill on Assign.* 561.

³⁸ *Inloes v. Am. Ex. Bank*, 11 Ind. 173.

³⁹ *Hawkins v. Alston*, 4 Ired. Eq. 137; *Haynes v. Crutchfield*, 7 Ala. 189.

⁴⁰ *Huger v. Huger*, 9 Rich. Eq. 217; *Perry on Trusts*, 412, 415, 422.

⁴¹ *Hart v. Crane*, 7 Paige, 37.

⁴² *McDermott v. Lorillard*, 1 El. Ch. (N. Y.) 273.

⁴³ *Van Horne v. Fonda*, 5 Johns. Ch. 588; *Hawley v.*

Cramer, 4 Cow. 718; *Slade v. Van Necten*, 11 Paige, 21; 2 Kent's Commrs. *438.

⁴⁴ *Blick v. Schenck*, 10 Barb. 285. See *Cranston v. Crane*, 97 Mass. 459.

⁴⁵ *Ennis v. Leach*, 1 Ired. Eq. 416; *Barnard v. Duncan*, 38 Mo. ; *Welsh v. Davis*, 3 S. C. 110.

⁴⁶ *Shaeffer v. Child*, 7 Watts (Pa.), 84.

⁴⁷ *Burrill on Assign.* ; Am. & Eng. Ency. of Law.

⁴⁸ *Freeman v. Cook*, 6 Ired. Eq. 373.

⁴⁹ *Williams v. Otey*, 8 Humph. 563.

⁵⁰ 2 Story Eq. Jur. § 1287; *Perry on Trusts*, § 817.

⁵¹ *Hurt v. Fisher*, 1 Harr. & G. 88; *Meacham v. Sternes*, 9 Paige, 405.

⁵² *Litchfield v. White*, 7 N. Y. 438.

⁵³ 2 Kent's Commrs. *230.

⁵⁴ *Royall's Admr. v. McKenzie*, 25 Ala. 363.

⁵⁵ *Simpson v. Gowdy*, 19 Ind. 292; *Blackburn's Appeal*, 39 Pa. St. 160.

⁵⁶ *Harrison v. Mock*, 16 Ala. 616.

⁵⁷ *Miller v. Holcombe*, 9 Gratt. 665.

⁵⁸ *In re Durfee*, 4 R. I. 401; *Perry on Trusts*, § 562.

⁵⁹ *Ward v. Lewis*, 4 Pick. 518; *Chittenden v. Brewster*, 14 Ala. 315.

⁶⁰ *Freeman v. Cook*, 6 Ired. Eq. 373; *Burrill on Assign.* 631.

his trust unless the contrary is fully shown.⁶¹ And where the assignees act in good faith, and with due diligence, they receive the favor and protection of the court, and their acts are regarded with the most indulgent consideration;⁶² but where they betray their trust, they will be rigorously dealt with.⁶³

6. *Continuing Assignor's Business.*—It has been held by leading courts, that the assignor may direct in general terms a sale of property and collection of debts assigned, and may also direct upon what debts and in what manner and order the proceeds shall be applied, but beyond this can prescribe no conditions whatever as the management or disposition of the assigned property.⁶⁴ The general rule seems to be that where such stipulations are intended chiefly to benefit the assignor, they will be invalid,⁶⁵ if to the benefit of the creditors valid.⁶⁶ Independently of any provision in the deed of assignments, the assignee may continue the business of the assignor during such a length of time as is manifestly for the interest of the estate.⁶⁷ He should, however, continue the business no longer than is required to work up the material on hand.⁶⁸ When a stock of goods in a retail business is assigned, the assignee cannot continue the business and retail the goods as before with a view of obtaining higher prices.⁶⁹ He should generally close the business within a reasonably short length of time after the assignment is made.⁷⁰

7. *Distribution.*—The distribution of the assets among the creditors is said to be the end and object of all insolvency proceedings.⁷¹ It is the most important of all the proceed-

ings connected therewith. Where the deed of assignment contains preferences, allowable by the laws of the place where the assignment is made, those preferred creditors should be first paid.⁷² It should be remembered, however, that in quite a large number, perhaps a majority of the States of the Union, have laws forbidding preferences; and that such stipulations in the deed of assignment will make it void. At common law preferences are allowed. By act of congress in cases of insolvency, the United States is a preferred creditor and must be first paid.⁷³ It has been held, however, that the preference of the United States only applies in cases of a voluntary assignment, and not where there is a legal insolvency or involuntary assignment.⁷⁴ By statute, it is generally declared that taxes, assessments, and debts due the State are entitled to priority in payment. Likewise a claim for labor performed within a certain time, and usually limited in amount. Rent is sometimes made a claim entitled to priority. Where the creditor holds security for the payment of his claim, the courts are not united in their decisions. Some hold that he is entitled to a dividend on the entire amount of his claim not to exceed the balance remaining unliquidated by the entire exhaustion of the security fund.⁷⁵ The general rule, however, seems to be that he would only be entitled to a dividend on the balance remaining unpaid after the security fund had been exhausted.⁷⁶ Care should be taken by the assignee that the proper persons participate in the distribution. He will not be excused that he had through a misapprehension of his duties, or a misconstruction of the instrument paid over all the money to other creditors.⁷⁷ Where there is a difficulty in ascertaining the order of priority of payment, or where there are conflicting claims, the assignee ought to apply to the court for instructions.⁷⁸ Such application may be

⁶¹ McCubbin v. Cromwell, 7 Gill. & J. 157; Goodwin v. Nix, 38 Ill. 115.

⁶² Burrill on Assign. 633.

⁶³ Paige v. Olcott, 28 Vt. 461; Miller v. Holcombe, 9 Gratt. 674; Diffenderfer v. Winslow, 3 Gill. & J. 311.

⁶⁴ Dunbar v. Waterman, 17 N. Y. 9; Renton v. Kelley, 49 Barb. 536; Schluesel v. Willett, 34 Barb. 615.

⁶⁵ King v. Kenan, 38 Ala. 63; Inloes v. Am. Ex. Band. 11 Ind. 173; Marks v. Hill, 5 Gratt. 400; Berry v. Riley, 2 Barb. 307.

⁶⁶ Hitchcock v. Cadruns, 2 Barb. 381; Foster v. Saco, 12 Pick. 451; Woodward v. Marshall, 22 Pick. 468; Rayless v. Alston, 5 Ala. 297.

⁶⁷ Patton's Estate, 2 Pars. (Pa.) Select Cases, 108; Woodward v. Marshall, 22 Pick. 468.

⁶⁸ Hanlin v. Mill River, 34 Conn. 458; Doyle v. Smith, 1 Cole (Tenn.), 15.

⁶⁹ Hart v. Crane, 7 Paige, 38; Whallon v. Scott, 10 Watts, 237; Connah v. Sedgwick, 1 Barb. 210.

⁷⁰ Levey's Accounting, 1 Abb. (N. C.) 186.

⁷¹ Burrill on Assign. 686.

⁷² Gundry v. Vivian, 17 Wis. 437; Gates v. Labeaume, 19 Mo. 17.

⁷³ U. S. Rev. Stat., § 3466; State Bank, etc. v. U. S., 6 Pet. 35, 36.

⁷⁴ Thelluson v. Smith, Pet. C. C. 193.

⁷⁵ Morris v. Olivine, 25 Pa. St. 21; Patten's Appeal, 45 Pa. St. 151; Miller's Appeal, 35 Pa. St. 481.

⁷⁶ Burrill on Assign. 606; Wurtz v. Hass, 13 Iowa, 515; Midgely v. Slocumb, 32 How. Pr. 423.

⁷⁷ Ward v. Lewis, 4 Pick. 518.

⁷⁸ Pratt v. Adams, 7 Paige, 615.

made either by motion or by a bill in equity;⁷⁹ but all parties interested ought to have notice.⁸⁰

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⁷⁹ Codwise v. Gelson, 1 Johns. 521.

⁸⁰ Stone v. Miller, 62 Barb. 431; People v. Loper, 7 N. Y. 431. The reader will find the following articles in law journals to be of interest: "Power of Assignee to Avoid Previous Conveyances of Assignor:" 21 Cent. L. J. 494. "Powers of Foreign Involuntary Assignees:" 27 Cent. L. J. 111. "Assignments at Common Law by Statute:" 7 Cent. L. J. 243, 283, 301. "Right to Assign Contracts Involving Performance of Services but not Personal Services:" 11 Cent. L. J. 243. "Assignment of Part of a Demand," annotated case: 23 Cent. L. J. 489. See also Am. & Eng. Ency. of Law, Title, "Assignments," etc., and "Insolvency."

CORPORATIONS—DIRECTORS—DUTIES— LIABILITY.

MARSHALL V. FARMERS' & MECHANICS' SAV. BANK.

Supreme Court of Appeals of Virginia, January 24, 1889.

Directors of a corporation undertake to bring ordinary skill and knowledge to the discharge of their duties, and they are required to be diligent and careful in performing such duties, and they must inform themselves of the proceedings of the corporation, and if any loss results from their neglect of such requirements, or if by fraud or mismanagement of its officers, agents or directors, which ordinary care and attention on their part would have prevented, they are individually liable for the loss so accruing.

LACY, J., delivered the opinion of the court:

The suit was brought by the appellant, James A. Marshall, for himself and on behalf of the other creditors of the appellee corporation, the Farmers' & Mechanics' Savings Bank of Virginia, a broken bank, to reduce into possession and distribute among said creditors the assets of the said bank, and to charge the individual defendants, who were the officers and directors of said bank, with the difference between the assets and liabilities of the said bank, upon the ground that the said directors had not had a meeting for at least one year prior to the 1st day of December, 1876, the date of the suspension and failure of the said bank, and for at least one year prior to the ascertainment of embarrassed condition of said bank, which occurred sometime before its said suspension, and that they did not give that care, supervision, and attention to the business affairs of said corporation which the duties of the office and the nature of the trust reposed in them required; but, on the contrary, neglected the same, and intrusted entirely the business concerns of the bank to the president and one, and possibly two, directors, who recklessly and improvidently loaned the money and securities of the said defendant corporation to various embarrassed and insolvent corporations, firms, and individuals, without tak-

ing proper and sufficient security for the protection of the depositors and creditors of the said bank, and being themselves connected with or interested in said embarrassed and insolvent corporations; by reason of which said conduct upon the part of said directors the appellant insists that heavy losses have fallen upon the bank, and that the said directors are individually and personally liable to the depositors and creditors of the bank for the losses so occasioned by the neglect of the duties of their office as directors. The bank answered the bill of the plaintiff through its president, and the directors answered individually, wherein negligence is denied; and it is also denied that the business of the bank was intrusted wholly to the president; but it is admitted that, "instead of regular formal weekly meetings of the board as prescribed by the by-laws of the bank, informal meetings were substituted—it being proved soon after the bank went into operation that formal weekly meetings were unnecessary." The questions involved were referred to a commissioner in chancery for examination and report. The commissioner reported that the said directors not only did not exercise ordinary care and diligence but that they were guilty of gross negligence.¹

* * * * *

On the 30th of March, 1887, the circuit court of Alexandria city rendered a decree in the cause, whereby "the said report, so far as it finds the directors of the Farmers' & Mechanics' Savings Bank, or any of them, personally responsible for the losses sustained by the bank, be, and the same is, overruled—it appearing to the court that no such dereliction of duty on their part is shown as to fix upon them such personal liability; and that as to the said directors, and the personal representatives of such as are dead, the plaintiff's bill be, and the same is hereby, dismissed, with costs. It is further adjudged, ordered, and decreed that the said report be, and the same is hereby, confirmed and ratified in all other particulars." From this decree the plaintiff applied for and obtained an appeal to this court.

By the appellees no error is assigned, so the question involved here does not raise any other question than the single inquiry, was there such negligence on the part of the directors of this bank as to make them, or any of them, personally liable for its losses? There is no dispute as to what the losses have been, and their several amounts; and of the terms or periods as to which each director is liable, if at all. The appellees insist through their learned counsel that while there have been errors of judgment, and unfortunate loans made, there has been no negligence. The liability of directors for losses growing out of their mismanagement of the concerns of the bank, and their negligence in the discharge of their duties, has been often the subject of judicial in-

¹ A part of the opinion of the court, which simply states the findings of the commission, is here omitted.—[ED. CENT. L. J.]

vestigation and decision: It is a question at this day well understood by the profession, and is not controverted to any degree by the learned counsel in this case. We find the settled rule upon this subject well stated in a recent work of great practical usefulness. The American and English Encyclopædia of Law, under the head "Banks," speaking of directors, says: "The directors of a bank have the general control and government of its affairs, and constitute the corporation. They are bound to exercise ordinary skill and diligence, and are liable for losses resulting from mismanagement of the affairs and business of the bank"—citing *Society v. Underwood*, 9 Bush, 609, which appears to have been criticised in *Zinn v. Mendel*, 9 W. Va. 580-597, and by Mr. Redfield in 13 Am. Law Reg. (N. S.) 218; *Dunn v. Kyle*, 14 Bush, 134; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Chester v. Halliard*, 34 N. J. Eq. 341; *Spering's Appeal*, 71 Pa. St. 11. There it is further said: "But for excusable mistakes concerning the law, and for errors of judgment when acting in good faith, they are not liable"—citing *Spering's Appeal*, *supra*; *Dunn v. Kyle*, *supra*; *Godbold v. Bank*, 11 Ala. 191; *Hodges v. Screw Co.*, 1 R. I. 312. See 2 Am. & Eng. Cyclop. Law, 114, 116. Morse, in his work on Banks and Banking, says: "If bank directors do not manage the affairs and business of the bank according to the directions of the charter, and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both. *Hodges v. Screw Co.*, *supra*. They may be held to account to an injured party in a court of chancery (*Bank v. St. Johns*, 25 Ala. 566); or they, or any one of their number, who shared in the wrong doing, may be sued at law for damages. *Conant v. Bank*, 1 Ohio St. 298. * * * They are required simply to show a reasonable capacity for the position they accept; to use it in their best discretion and industry; to show the scrupulous *bona fides* and conscientiousness in every matter, however minute, which is exacted rigorously from all trustees of the property of others; and to obey accurately the requisitions of the charter, or of the general law under which they are organized." Morse, Banks, 133.

Mistakes as to what is the law serve to excuse cases where correct knowledge could be reasonably expected only from a professional man, and even in such cases, if the directors feel any doubts, they may be guilty of neglect if they fail to seek and be guided by competent legal advice. But ignorance of any fact in the bank's affairs which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited. *Id.* 135. The high degree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que trustent*, respectively. If this can be asserted with regard to the generality of cor-

porations, it is peculiarly and exceptionally true with regard to banking corporations. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors. The law is, as it ought to be, very jealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied. It is not enough to exculpate a director that no actual dishonesty can be shown; that he cannot be positively proved to have been influenced by interested motives. *Id.* pp. 113, 114. Mr. Morawetz, in his work on Private Corporations, says, as to the degree of care to be exercised (section 552:): "Attempts have been made to define the degree of care and prudence which directors must exercise in the performance of their duties. In some of the cases it has been said that inasmuch as directors are usually not paid for their services they are to be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and are bound to exercise only ordinary care and prudence—and that they are liable to the corporation only for what is called *crassa negligentia*, or gross negligence. But all this is, at the best, misleading. The plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances, the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution."

Directors, as trustees of a corporation, are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs. *Hun v. Cary*, 82 N. Y. 65; *Charitable Corporation v. Sutton*, 2 Atk. 405; *Litchfield v. White*, 3 Sandf. 545; *Hodges v. Screw Co.*, *supra*. Directors are not merely bound to be honest; they must also be diligent and careful in performing the duties they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and, if they commit an error of judgment through mere recklessness, or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences. See the case of *Hun v. Cary*, 82 N. Y. 65; Earl, J., saying, in delivering the opinion in that case: "One who voluntarily takes the position of director, and invites confidence in that relation, undertakes like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable

to public officers, to professional men, and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe keeping and management of them to their skill and prudence. They undertook, not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust." Directors can never set up as a defense that they were ignorant of a provision of the company's charter or by-laws. See *Spering's Appeal*, *supra*, and the opinion of Chief Justice Greene in *Hodges v. Screw Co.*, *supra*.

We cannot better close the discussion upon this question than by citing the case of *Bank v. Bossieux*, 4 Hughes, 398, 3 Fed. Rep. 817, much relied on by the learned counsel for the appellant, who says: "This question has been the subject of investigation and judicial determination by the United States circuit court for the eastern district of Virginia. Judge Hughes in an elaborate opinion, stating the law with great force and clearness, exhibiting a thorough and patient examination of all the authorities, held the defendant directors liable upon this ground: 'Gross inattention and negligence, allowing fraud or misconduct on the part of agents, officers, or co-directors, which could have been prevented if they had given ordinary care and attention to their duties.' Indeed, this opinion is not only the most thorough examination, but the ablest exposition, of the law upon the subject the writer has been able to find after examining many authorities, and he might well be content to rest the law of this case upon the opinion of Judge Hughes. In it he reviews the case of *Spering's Appeal*, and shows that the very principle was declared in that case upon which he found the directors of the Dollar Savings Bank liable. He declares that "negligence may be of such a character as to amount to fraud." Citing *Jones' Ex'rs v. Clark*, 25 Grat. 655, and *Neal v. Clark*, 95 U. S. 707. In that case Judge Hughes says: "It will abundantly appear from authorities and reported cases to be cited in the sequel that the managing officers of corporations are personally liable for the results of gross negligence, or what the jurists call *crassa negligentia*. If by reckless inattention to the duties confided to them by their corporation frauds and misconduct are perpetrated by officers, agents, and co-directors, which ordinary care on their part would have prevented, then I think it may be said with truth that it is now elementary law, to be found in all the books, that directors are personally liable for the losses resulting. Moreover, all authorities now tend to the conclusion that directors of banks and other moneyed corporations hold the relation to stockholders, depositors, and

creditors of trustees, to *cestuis que trust*, and as such are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust." *Bank v. Bossieux*, 4 Hughes, 398, 3 Fed. Rep. 817, and the authorities cited in the opinion.

We will now proceed to briefly review the facts of this case to which this well established rule of law is to be applied. The question arises in this case as between the directors and the depositors, and not between the directors and the stockholders. The by-laws of this bank prescribed weekly meetings. It is conceded that these were scarcely ever held; the answers admitting that formal meetings were not held. The decree of the circuit court of Alexandria city, that it appears to the court that there has been no such dereliction of duty on the part of the directors, or any of them, as to fix upon them personal responsibility, cannot be sustained upon any sound principle whatever. Upon what principle can Andrew Jameison be held not to be personally liable for the acts already detailed concerning him. The commissioner reports that he took \$2,187.33 out of the cash drawer; that he withdrew without authority the bonds of the bank, deposited elsewhere, caused their sale, and appropriated the money to his own use; overdraw his account \$341.64, and in other ways converted to his own use the property of the bank, aggregating \$11,713.97. The passenger railway company was allowed to overdraw its account to the amount of thousands (\$11,341.91) at one time. The notes of the company were discounted to the amount of \$6,500, and at maturity neither protested, renewed, collected, nor sued on, and the overdraft was allowed to increase for a year and more without security, until it reached \$7,530.45, which were entirely lost to the bank; he being the president of this company part of the time, and one of the bank directors being president of the company the other part of the time in question, while the treasurer of the railway company was the cashier of this savings bank. Stilson was allowed to withdraw the sole valuable security for his note of \$2,000, and that was lost. He lent his brother \$3,311.62 practically without any security, and that was lost; and actually lent him \$1,211.62 a few months before the bank closed its doors; lending to Robert Jameison with no security, except worthless indorsers, \$2,300, when he had already gone to protest on a note of \$500.

But the co-directors seek to escape responsibility for all this, including the large loss to the Washington & Ohio Railroad, by claiming to have no actual knowledge of it all. Did they exercise ordinary diligence to inform themselves, as their duty certainly required that they should? They were required to meet weekly by their own by-laws. They did not always meet semi-annually—meeting sometimes once a year, as we have stated. They were in duty bound to cause the books of the bank to be examined at regular intervals. This they never did at all throughout their whole career, nor did they ever call for a

statement of their accounts with other banks. Their vaults and their cash drawer were emptied by illegal abstractions and insolvent loans, and they admit that they never knew it, and pleaded this as their exculpation. The stock subscribed for was not paid up as has been stated, and yet such part as was paid up was treated as a loan, and interest paid on it, and a large part had never been paid up at the time of the suspension, and some of it has not yet been paid up. Having a bank with so small a nominal capital, with empty vaults, and despoiled cash drawer, they owed at the suspension of the bank, to depositors who had intrusted to them their money, \$53,063.63, on which they have been able to pay 10 per cent. If these directors had any duty to perform whatever towards their depositors, the records of this case do not show its performance. They plead ignorance. One of their number was the president of the Washington & Ohio Railroad in its last hours, and knew its condition, and secured himself; but the notes due the bank were allowed to sleep unprotected, unsecured, unrenewed, uncollected, and unsued on. One of their number was the president of the Alexandria Passenger Railroad Company, and knew its condition. One of their number was the brother of their defaulting debtor, Jameison, who was insolvent at the time of the loan of thousands to him without security. It is difficult to concede that they could have been ignorant of all this. But suppose they were. Their duty required that they should have looked well into all these matters, and if they have negligently trusted them to others, and loss has occurred, should it fall on them, or upon the depositors who had trusted them, and whose trust they had accepted, and to whom they had solemnly promised such care and attention as were to be expected of good business men.

We think the record shows that these directors, and all of them, have been guilty of such negligence in the premises as makes them personally liable for the losses caused by their negligence, and we are of opinion that the circuit court of Alexandria city erred in holding them exonerated. While this is true, there is nothing in the record which shows any bad faith, or tends to show any dishonesty, on the part of some of these gentlemen who appear to have confided their duties to others, and to have been betrayed by them; but this was such negligence as will fix liability upon them, and their act in assuming this attitude of trust and confidence was voluntary, and led to the confidence which has resulted in loss. We are of opinion to reverse the decree of the circuit court of Alexandria city, appealed from, and to render such decree here as the said court ought to have rendered.

NOTE.—Directors of corporations are described as agents of the corporation,¹ also as trustees for the stockholders who are the *cestui que trust*,² and also as

mandatories,³ and their duties and liabilities agree with the duties required by such persons. Their undertaking implies a competent knowledge of the agency assumed by them and a pledge, that they will diligently supervise, watch over, and protect the interests intrusted to them.⁴ They are required to keep within the limits of their powers, to exercise good faith and honesty, but are only required to exercise the care, which an ordinarily prudent man would exercise in his own business of a similar nature.⁵

Directors of a bank are liable: for fraud or embezzlement by themselves; wilful misconduct or breach of trust committed for their own benefit and not for the benefit of the stockholders; acts *ultra vires*; gross inattention or negligence, allowing fraud or misconduct by agents, officers, or conductors, which ordinary care or attention on their part could have prevented.⁶

Care Required.—Directors of a bank are not liable for frauds committed by others in conducting its business, which are unknown to them, if they take the usual and uniform method adopted by banks in examining their books and into the conduct of their business.⁷ But they cannot be heard to say, that they were not apprised of facts, the existence of which is shown by the books, accounts and correspondence of the bank, or which by the exercise of proper diligence they might have known,⁸ and upon such showing they will be held liable for the losses sustained.⁹ They cannot claim to have acted in ignorance of what it was their duty to know.¹⁰ When they discount paper known to be worthless, or cause the cashier or other officer of the bank to do what is forbidden by its charter, they are responsible.¹¹ They are not liable for the non-exercise of discretionary powers, though for such non-exercise loss accrues.¹² They are not liable for error of judgment, when compelled to choose between difficulties, but when the error is gross, the necessity not apparent, and the consequences fatal, they will be held liable.¹³ They are not liable for losses caused by the dishonesty or carelessness of a cashier or other officer employed by them, if they used due care in his selection, nor for losses from investments made, if they acted in good faith and with ordinary care and prudence.¹⁴ They are not allowed to make a profit out of their trust, as by contracts with the corporation in which they are interested, individually or as stockholders in another corporation.¹⁵ Though all contracts by a director

ociety v. Underwood, 9 Bush, 609; Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

³ 19 Cent. L. J. 305.

⁴ Godbold v. Branch Bank, 11 Ala. 191.

⁵ Brannin v. Loving, 82 Ky. 370; Ackerman v. Halsey, 37 N. J. Eq. 341; 23 Cent. L. J. 172; Williams v. McDonald, 37 N. J. Eq. 409.

⁶ Bank v. Bossieux, 4 Hughes C. C. 387.

⁷ Savings Bank v. Caperton (Ky.), 88 W. Rep. 885; Manhattan Co. v. Lydig, 4 Johns. 377.

⁸ United Society v. Underwood, *supra*; German S. Bank v. Wulfekuhler, 19 Kan. 60; Falne v. Mead, 69 How. Pr. 318.

⁹ United Society v. Underwood, *supra*.

¹⁰ Corbett v. Woodward, 5 Sawy. C. C. 403.

¹¹ Savings Bank v. Caperton, *supra*.

¹² Williams v. Halliard, 38 N. J. Eq. 373; Thompson, L. Off. & Ag. Corp. § 357.

¹³ Percy v. Millaudon, 8 La. 568.

¹⁴ Dunn v. Kyle, 14 Bush, 134; Brannin v. Loving, *supra*; Sperring's Appeal, 71 Pa. St. 11; Williams v. McDonald, 37 N. J. Eq. 409; Godbold v. Branch Bank, *supra*.

¹⁵ Ryan v. Leavenworth R. R., 21 Kan. 365; Wardell v.

¹ Wardell v. R. R. Co., 103 U. S. 651; 19 Cent. L. J. 305; Thompson, L. Off. & Agents of Corp. § 351.

² European, etc. R. R. v. Poor, 59 Me. 277; United So-

with the corporation are not held to be absolutely void, yet they must be open and for the benefit of the corporation, and upon the least suspicion will be set aside.¹⁶ When a director was not present at a meeting of the directors and did not know the improper act was to be done, he was held not to be responsible therefor;¹⁷ but if he acquires a knowledge of such proposed action, he must labor to prevent it and to avert its injurious consequences,¹⁸ and it is held that he must file a bill in equity to prevent it, if he cannot otherwise prevent its consummation.¹⁹ Those directors, who were not members of the investment committee, are not liable for irregular or unsafe investments in the absence of cognizance or complicity on their part,²⁰ but when a trustee by culpable negligence enables a co-trustee to squander or dissipate the trust estate, he is liable.²¹ It has been said, that it will do the community no harm to hold the relus of accountability more tightly than they have been held for years past.²²

Who may Sue.—Suits against directors for damages for breach of their trust may be brought by the corporation,²³ or by its receiver;²⁴ or in case of the refusal of either to do so, by a stockholder,²⁵ or by a depositor who has suffered thereby.²⁶

R. R. Co., 108 U. S. 651; *European, etc. R. R. v. Poor*, 59 Me. 277.

¹⁶ *Twin Lick Oil Co. v. Marbury*, *supra*.

¹⁷ *Land Credit Co. v. Fermoy*, 5 Ch. Ap. 763; *Ashhurst v. Mason*, 20 Eq. 225; *Oargill v. Bower*, 10 Ch. Div. 502.

¹⁸ *Percy v. Millaudon*, *supra*.

¹⁹ *Joint Stock, etc. Co. v. Brown*, 8 Eq. 881.

²⁰ *Williams v. Hilliard*, 38 N. J. Eq. 373.

²¹ *Smith v. Pettigrew*, 34 N. J. Eq. 216; *Weetjen v. Vibbard*, 5 Hun, 265; *Percy v. Millaudon*, *supra*.

²² *Calhoun v. Richardson*, 30 Conn. 210.

²³ *Chester v. Halliard*, 34 N. J. Eq. 341.

²⁴ *Brinkerhoff v. Bostwick*, 38 N. Y. 52; *Bank of Bos-sieux*, *supra*.

²⁵ *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Brinkerhoff v. Bostwick*, *supra*.

²⁶ *Chester v. Halliard*, *supra*; *Melsch v. Savings Fund*, 5 Phila. 30.

RECENT PUBLICATIONS.

AMERICAN AND ENGLISH CORPORATION CASES. A Collection of Corporation Cases, both Private and Municipal (Excepting Railway Cases), Decided in the Courts of Last Resort in the United States, England and Canada. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor, Vol. XXI. Northport, Long Island, N. Y.: Edward Thompson Co., Publishers.

There is scarcely a corporation lawyer in the land who is not familiar with the "American and English Corporation Cases," and there are doubtless few who do not own the series. To those few, we say that here is nothing in the domain of corporation law that will be more valuable and useful. It is not only convenient to have at hand a set of volumes which contains all the corporation cases that arise from time to time, but the value is enhanced by a series of notes appended to the principal cases, which contains in succinct form all the adjudications pertaining thereto. The reputation and ability of the editor—Mr. James M. Kerr—is a sufficient guarantee of faithful work and conscientious results.

BOOKS RECEIVED.

TREATISE ON PRIVATE CORPORATIONS. The Effect of the clause of the Constitution of the United States that forbids a State to pass a "Law Impairing the Obligation of Contracts" upon the Police Control of a State over Private Corporations. By Wm. Wharton Smith, of the Philadelphia Bar. Philadelphia: Rees Welsh & Co., Law Publishers, 19 South Ninth Street. 1889.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW. Compiled under the editorial supervision of John Houston Merrill, late editor of the American and English Railroad Cases and the American and English Corporation Cases. Volume VIII. Northport, Long Island, N. Y.: Edward Thompson Co., Law Publishers. 1889.

THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS, by George C. Holt, of the New York Bar. New York: Baker, Voorhis & Co., Law Publishers, 68 Nassau Street. 1888.

[Subscribers are invited to send short answers to the following.]

QUERIES AND ANSWERS.

QUERY NO. 1.6

The owner of a farm wishing to sell or trade the same, employs a real estate agent to sell it for him, and contracts in writing with the agent, and agrees to pay a certain commission, in case the agent can effect a sale or trade for him at a stated price; but in case of a trade, then with his approval. The agent afterwards finds a man living a considerable distance away who is willing to trade other land for that which the agent was employed to sell, and furnishes a full description and plat of the same. The agent exhibits this plat and description to his employer, also a statement as to incumbances, and the latter expresses himself as satisfied therewith, and verbally agrees to consummate the sale provided the property proves as represented, after he has made personal examination thereof. He promises to start on a certain day to go and see the land offered him, but he fails and refuses to go at all, without any excuse therefor. Is he liable to pay the agent his commission same as though a sale had been effected?

M. A. T.

JETSAM AND FLOTSAM.

THE FORCE OF HABIT.—We heard the other day of a man who had been brought up in a village debating society, and had been lately elevated to the dignity of a judge in a criminal court. The counsel for a defendant appeared before him at the hour named for the trial, but the prosecuting attorney had not arrived. The defendant's counsel said he believed the hour fixed had passed, and the judge said it had. "I move," said the counsel, "that the complaint be dismissed, and the defendant discharged." "Is the motion seconded?" said the judge. "I second the motion," said the prisoner. "It is moved and seconded," said the judge, "that the complaint be dismissed, and the defendant discharged. So many as are in favor of that motion will say 'Aye.'" The defendant and his counsel voted "Aye." The contrary minded "No." There was no response. "The 'Ayes' have it; the motion is carried."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMIRALTY—Appeal—Review. — On appeal in admiralty to the circuit court, in reviewing testimony, the effect which the manner of a witness produced upon the judge below is proper to be considered.—*Levy v. The Malville*, U. S. C. C. (N. Y.), Dec. 31, 1888; 37 Fed. Rep. 271.

2. ACCORD AND SATISFACTION—Compromise—Res Adjudicata. — In an action for penal sum in a contract: Held, that circumstances showed that a compromise had been effected by the parties prior to the suit and was a bar to the action. — *Parr v. Greenbush*, N. Y. Ct. App., Jan. 22, 1889; 19 N. E. Rep. 684.

3. APPEAL—Final Order. — Pending an appeal in a foreclosure suit, an order upon the receivers to make a loan is a final order and *mandamus* will be granted directing the allowance of an appeal therefrom. — *In re Farmers', etc. Trust Co.*, Jan. 21, 1889; 9 S. C. Rep. 265.

4. APPEALS—Notice. — In § 3164, of Code Iowa, the word "decision" used in the notice means an adjudication other than a final decision. — *Welsor v. Day*, S. C. Iowa, Jan. 25, 1889; 41 N. W. Rep. 476.

5. APPEAL—Review—Objections to Instructions. — On appeal, objections to instructions given by the trial court should point out in what particulars such instructions are erroneous. — *Dale v. Purvis*, S. C. Cal., Jan. 14, 1889; 20 Pac. Rep. 296.

6. ATTORNEY AND CLIENT—Evidence. — In a suit for attorney's fees the attorney is a competent witness in his own behalf as to the value of his services, and is entitled to show his experience and knowledge and give his judgment as to their value, upon his own theory of the case. — *Babbitt v. Bumpus*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 417.

7. BANKS—National Banks—Preference. — Held, under facts that a transfer of checks and drafts by plaintiff to another bank was made with a view to prefer the latter and was void under Rev. St. U. S. § 5242.—*Nat. Bank v. Butler*, Jan. 28, 1889; 9 S. C. Rep. 261.

8. CHATTEL MORTGAGES—Estoppel—Garnishment. — A chattel mortgage which is withheld from the records anno; avall again at a creditor who subsequently takes

the note of the mortgagor in settlement of a suit and extension of credit, in good faith, in the belief that the mortgagor's property is unincumbered.—*Sanger v. Freie Presse Co.*, S. C. Wis., Jan. 20, 1889; 41 N. W. Rep. 436.

9. CLOUD ON TITLE. — A cloud is the claim of an interest in lands, appearing in some legal form which it would be inequitable to enforce.—*Rigdon v. Shirk*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 698.

10. COMMON CARRIER—Shipping. — A ship is liable as carrier from the acceptance by it of the goods on the wharf.—*Rosenthal v. The Louisiana*, U. S. C. C. (La.), Jan. 11, 1889; 37 Fed. Rep. 254.

11. CONSTITUTIONAL LAW—Auditing Claims. — An act of N. Y. Legislature authorizing board of claims to audit a claim for services rendered health officer is constitutional. — *O'hara v. State*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 669.

12. CONSTITUTIONAL LAW—Obligation of Contracts. — Rev. St. Mo. §§ 6798, 6900, cannot be allowed to operate as to impair obligation of a judgment obtained by holders of bonds of township issued in aid of railroads.—*Seibert v. Harshman*, Jan. 21, 1889; 9 S. C. Rep. 271.

13. CONSTITUTIONAL LAW—Taxation. — Act Ill. May 31, 1879, providing for deed to purchaser of land for taxes is constitutional. — *Gage v. Stewart*, S. C. Ill. Jan. 25, 1889; 19 N. E. Rep. 702.

14. CONTRACTS—Custom and Usage. — In an action for building a stone wall, evidence of a custom known as "masons" measure is admissible for plaintiff though it is not shown that defendant knew of such custom. — *Patterson v. Crouther*, Md. Ct. App. Jan. 10, 1889; 16 Atl. Rep. 531.

15. CONTRACTS—Instructions. — Defendant agreed to furnish water by means of his dams, to run a specified quantity of logs for plaintiff. In case the dams should be washed out before the logs were run, defendant was either to repair them, or refund a proportionate amount of the consideration. After the specified quantity had all been run out, the dams washed out, and plaintiff repaired them without being requested: Held, that plaintiff could not recover for such repairs.—*George W. Roby Lumber Co. v. Gray*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 420.

16. CORPORATIONS—Quo Warranto—Constitutional Law. — In Michigan the constitutionality of a statute may be inquired into by the people in a proceeding in the nature of a *quo warranto*, to try the right of the respondents to exercise the franchise of a corporation, though the respondents justify under such statute. — *Atty. Gen. v. Perkins*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 426.

17. COUNTIES—Division—Constitutional Law. — Legislature of Colorado has plenary authority to divide counties.—*Wash. Co. v. Weld Co.*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 273.

18. COUNTY OFFICERS—Compensation. — Construction of § 20, ch. 28, Comp. St. Neb. providing for compensation of county treasurers, as to manner of computing amount collected.—*Grable v. Roderick*, S. C. Neb., Jan. 23, 1889; 41 N. W. Rep. 404.

19. COURTS—Due Process of Law. — In an action by the heirs of a deceased debtor to set aside judicial sale of his land on ground that they were not parties: Held, under facts that they had not been deprived of property without due process of law. — *Marrow v. Brinkley*, Jan. 21, 1889; 9 S. C. Rep. 267.

20. COURTS—Supreme Court—Appeal—Filing Record. — This court has no jurisdiction of an appeal, unless the transcript of the record is filed here at the next term after taking the appeal.—*Hill v. Chicago & E. R. Co.*, Jan. 21, 1889; 9 S. C. Rep. 269.

21. COURTS—Supreme Court—Jurisdictional Amount. — Facts did not bring the case within subd. 4, § 639, Rev. St. U. S. providing for review of judgments of circuit court in a "case brought on account of deprivation of right secured by the constitution."—*Hanover Ins. Co. v. Kinneard*, Jan. 21, 1889; 9 S. C. Rep. 269.

22. COVENANTS — Estoppel — Res Adjudicata. — In order to constitute a breach of the covenant for quiet enjoyment in the deed, it is not necessary that there be an actual ouster and dispossession of the covenantee, under process. — *Ogden v. Ball*, S. S. Minn. Jan. 29, 1889; 41 N. W. Rep. 453.

23. CRIMINAL LAW — Appeal — Want of Citation. — An appeal taken from a judgment rendered in a proceeding apparently criminal will not be dismissed for want of citation to the plaintiff, who cannot be permitted to change the character of the proceedings. — *State v. Miller*, S. C. La., Dec. 3, 1888; 5 South. Rep. 258.

24. CRIMINAL LAW — Conspiracy. — A person may be guilty of a murder actually perpetrated by another, if he combines with such other party to commit a felony, engages in its commission, and death ensues in the execution of the felonious act. — *State v. Barrett*, S. C. Minn., Jan. 29, 1889; 41 N. W. Rep. 463.

25. CRIMINAL LAW — Instructions — Province of Jury. — It is not error to refuse to charge that the jury are the judges of the law, and that if they believe the act mentioned absurd, and a violation of the laws of Pennsylvania, they should acquit the defendant. — *Harrison v. Commonwealth*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 611.

26. CRIMINAL LAW — Jury. — Construction of act Gen. Assem. Ala. Feb. 28, 1887, § 17, as to challenges in capital cases. — *Todd v. State*, S. C. Ala., Dec. 19, 1888; 5 South. Rep. 278.

27. CRIMINAL LAW — Preliminary Hearing — Erroneous Commitment. — An order by a magistrate, committing persons charged with an offense for trial in a county other than where the offense is committed, is erroneous. — *In re Schurman*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 277.

28. DAMAGES — Negligence. — In an action for damages to a boat occasioned by negligence of another boat, damages can only be allowed for repair in a manner corresponding with the previous condition of the boat. — *O'Neil v. The I. M. North*, U. S. D. C. (N. Y.), Dec. 21, 1888; 37 Fed. Rep. 270.

29. DEED — Delivery — Parol Evidence to Explain. — Where a deed to land is complete on its face, its delivery to the grantee is absolute, whatever conditions may be orally attached. — *Hargrave v. Melbourne*, S. C. Ala., Jan. 10, 1889; 5 South. Rep. 285.

30. DEFECTIVE STREETS. — Construction of Laws Mich. 1879, providing for recovery of damages arising from defective streets. — *Kowalka v. St. Joseph*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 416.

31. DISCOVERY — Equity. — *Held*, under facts that a discovery could not be compelled before issue joined. — *Keeley v. Perkins*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 525.

32. DISORDERLY HOUSE — What Constitutes Keeping. — Rev. St. Ind. 1881, § 2097, providing that whoever keeps a place where intoxicating liquors are sold, or suffered to be drank in a disorderly manner, forbids the keeping of a place in a disorderly manner, and not merely the selling, etc., in such manner. — *Nace v. State*, S. C. Ind., Jan. 25, 1889; 19 N. E. Rep. 729.

33. DIVORCE — Cruelty. — Facts held to justify the charge of cruel treatment in a bill for divorce. — *Taylor v. Taylor*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 413.

34. DRAINAGE — Commissioner's Bond. — Construction of Indiana act April 8, 1881, providing for recovery on drainage commissioner's bond. — *Smith v. State*, S. C. Ind., Jan. 29, 1889; 19 N. E. Rep. 744.

35. EASEMENT — Right of Way. — A right of way is an interest in lands, and a grant thereof by parol is void, under the statute of frauds. — *Bonelli v. Blakemore*, 5 South. Rep. 228.

36. EJECTMENT — Adverse Possession — Instruction. — Where the evidence shows that defendant in ejectment has been in adverse possession for the statutory period, an instruction that, "unless he had a right to the possession of such lands when he took possession of them, he has no right now," is erroneous. — *Probst v. Trustees*

of Board of Domestic Missions, etc., Jan. 21, 1889; 9 S. C. Rep. 263.

37. EJECTMENT — Improvements — Adverse Possession. — The possession of one who enters under a conveyance in fee from a grantor owning only a life estate becomes, after the death of the grantor adverse to the remainder man so as to entitle him under Rev. St. Wis. § 3096, to recover for improvements made. — *Barrett v. Strahl*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 439.

38. EJECTMENT — Title to Swamp Lands — Evidence — Judicial Notice. — One who seeks to recover land included in a swamp-land grant, need not show a chain of title from the United States to him. Judicial notice is taken of the acts of congress granting the swamp land to the State. — *Nitche v. Earle*, S. C. Ind., Jan. 29, 1889; 19 N. E. Rep. 749.

39. ELECTIONS AND VOTERS — Intimidation of Voter. — Where it does not appear from evidence that defendant acted with evil intent in challenging a vote, a conviction cannot be had under Rev. St. U. S. § 5511, for "inducing a voter by threat to refuse to vote." — *United States v. Gulton*, U. S. D. C. (Mo.), Jan. 14, 1889; 37 Fed. Rep. 263.

40. EMINENT DOMAIN — Damages. — Where a railroad is located across a block of land in a town site, which has been platted into lots, the measure of damages to the owner of the block is the difference in the value of the whole block before and after the location. — *Cox v. Mason City & Ft. D. R. Co.*, S. C. Iowa, Jan. 24, 1889; 41 N. W. Rep. 475.

41. EQUITY — Multifariousness. — Equity rule Md. 33, gives courts of equity the power to dismiss a bill as to such of the subject-matter as may be improperly joined. — *Reckefus v. Lyon*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 530.

42. EQUITY — Pleading — Accounting. — In order to unite a claim to recover back an estate, or to have a trust declared therein, with a claim for an accounting, it must be pleaded as a separate cause of suit. — *Langell v. Langell*, S. C. Ore., Dec. 20, 1888; 20 Pac. Rep. 286.

43. ESTOPPEL. — In an action to determine title, between the grantee of a mortgagee and holder of tax title: *Held*, under facts that the former was not estopped to deny the title of latter. — *Yule v. Webster*, S. C. Neb., Jan. 9, 1889; 41 N. W. Rep. 391.

44. EVIDENCE — Pleading. — An admission by a party in his pleading in an action is evidence tending to prove the same fact in another suit between the same parties, but is not conclusive. — *Rich v. Minneapolis*, S. C. Minn., Jan. 29, 1889; 41 N. W. Rep. 455.

45. EVIDENCE — Remarks of Counsel — Replevin. — A conversation, had after the commencement of the action between the attorney for the plaintiff and a man who was afterwards called by defendant as a witness, as to the probable result of the suit: *Held*, inadmissible in evidence on the part of the defendant. — *Angle v. Bilby*, S. C. Neb., Jan. 9, 1889; 41 N. W. Rep. 397.

46. EVIDENCES OF TITLE — Innocent Purchaser. — One giving to another evidence of right to sell his property loses right to reclaim it from an innocent purchaser. — *Foster v. Ambler*, S. C. Fla., Dec. 14, 1888; 5 South. Rep. 263.

47. EXCEPTIONS — Bill of — Contents. — Sufficiency of bill of exceptions under Ill. practice act § 42. — *Gould v. Howe*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 714.

48. EXCEPTIONS — Bill of — Contents. — Under Rev. St. Ind. 1881, § 630, a bill of exceptions must state that it contains all the evidence. — *Mattinger v. L. S. & M. S. R. R.*, S. C. Ind., Jan. 26, 1889; 19 N. E. Rep. 733.

49. EXECUTION — Contempt. — *Held*, under facts, that court would be justified in treating the case as not one of "substantial dispute" within the meaning of § 2447, N. Y. Code of Procedure and motion for contempt denied. — *Filienthal v. Wallack*, U. S. C. C. (N. Y.), Jan. 8, 1889; 37 Fed. Rep. 241.

50. EXECUTORS AND ADMINISTRATORS — Action Against Foreign Executor. — In New York, a foreign executor

may be sued to enforce the specific performance of a contract lawfully made by him in his representative capacity.—*Johnston v. Wallis*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 653.

51. EXECUTORS AND ADMINISTRATORS — Appointment of a Non resident.—The appointment of a non-resident as administrator by a State court, does not make him a resident of the State, within the meaning of Code Civil Proc. N. Y. § 1780. — *Robinson v. Nav. Co.*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 626.

52. EXECUTORS AND ADMINISTRATORS—Degree of Care.—The care, prudence, and judgment which the man of fair average capacity and ability exercises in the transaction of his own business furnishes the standard to govern an administrator in the discharge of his trust duties.—*Dundas v. Crisman*, S. C. Neb., Jan. 16, 1889; 41 N. W. Rep. 449.

53. EXECUTORS AND ADMINISTRATORS — Pledge — Orphans' Court.—Where an executor pledges stock of the decedent as security for his individual debt, to one aware of the ownership of the stock, the orphans' court has power to compel a transfer, under act Pa. May 19, 1874. — *Appeal of Odd Fellows' Sav. Bank*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 606.

54. EXEMPTION—Mandamus.—An officer holding an execution can be compelled by mandamus to appraise the debtor's property exempt from execution. — *Cunningham v. Conway*, S. C. Neb., Jan. 23, 1889; 41 N. W. Rep. 452.

55. FRAUDS—Statute of—Part Performance.—If the contract, for want of the signature of the corporation, was not within the statute of frauds, the possession of the several tracts, and the erection of buildings thereon, was sufficient part performance. — *U. P. R. R. v. McAlpine*, Jan. 28, 1889; 9 S. C. Rep. 286.

56. FRAUDULENT CONVEYANCES—Creditors.—Question under the evidence whether the transaction was fraudulent as to creditors of an insolvent. — *Beidler v. Crane*, S. C. Ill., Jan. 14, 1889; 19 N. E. Rep. 714.

57. GUARDIAN AND WARD—Interest.—Under ordinary circumstances a guardian is not chargeable with compound interest on the funds of his ward in his hands.—*In re Ward's Estate*, S. C. Mich., Jan. 11, 1889; 41 N. W. Rep. 431.

58. HOMESTEAD—Practice.—Under Pal. Code Dak. ch. 38, § 14, the district court has no authority, on motion, to quash a levy, on the ground that the property levied on is the debtor's homestead. — *Dorsey v. Hall*, S. C. Dak., Feb. 4, 1889; 41 N. W. Rep. 471.

59. HOMICIDE—Aliens.—In collateral proceedings strict and technical rules should not be applied when determining whether or not the disability arising from alienage has been removed by proceedings under the naturalization laws. — *State v. Barrett*, S. C. Minn., Jan. 28, 1889; 41 N. W. Rep. 459.

60. HORSE AND STREET RAILROADS—Elevated Railway—Construction.—A plan formulated by commissioners under the rapid transit act, (Laws N. Y. 1875, ch. 606,) which provides that there shall not be more than two tracks in any one street, is not defective therefor. — *In re Kings County El. R. R.*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 654.

61. HORSE AND STREET RAILROADS—Franchises—Route Prescribed.—Under Laws N. Y. 1872, ch. 833, creating the Metropolitan Transit Company, and providing for a main line of road through designated streets, the company could take for its main line the route as prescribed, and no other.—*In re Metropolitan Transit Co.*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 645.

62. HUSBAND AND WIFE—Agent.—One cannot hold a married woman for purchases made by the husband as her agent unless the credit was given to her and not to her husband.—*McQuaid v. Fontane*, S. C. Fla., Dec. 22, 1888; 5 South. Rep. 274.

63. HUSBAND AND WIFE—Contracts of Wife.—Code Ala. § 2360, removing disabilities of coverture, construed. — *Young v. Pollak*, S. C. Ala., Dec. 19, 1888; 5 South. Rep. 279.

64. INDICTMENT—Sentence—Continuance.—In the cases of misdemeanors, several distinct offenses of the same kind may be joined in the same indictment.—*Burrell v. State*, S. C. Neb., Jan. 11, 1889; 41 N. W. Rep. 399.

65. INDICTMENT AND INFORMATION—Filing in Vacation—Misdemeanor.—A county attorney may file an information in vacation for a misdemeanor cognizable before a justice of the peace. — *In re Eddy*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 283.

66. INSTRUCTIONS—Remarks of Judge.—A remark made by the court, not designed as an instruction, and not addressed to the jury, will not be treated as having affected the verdict, where, in order to consider it, the jury must have disregarded the charge of the court. — *Cormac v. Bronze Co.*, S. C. Iowa, Jan. 25, 1889; 41 N. W. Rep. 480.

67. INSURANCE.—A provision in a fire insurance policy that it shall be void if the insured neglects, for thirty days after notice thereof, to pay any assessment, does not defeat an action on the policy, where the non-payment is of an assessment falling due after loss of the property insured.—*Seyk v. Millers' Nat. Ins. Co.*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 413.

68. INSURANCE—Payment of Assessments—Waiver of Conditions.—Where a certificate issued by a benefit association provides that it shall be void unless assessments are paid within ten days after receiving notice, but it was the habit of the association to receive payments within sixty days from notice of assessment, the association is estopped to claim a forfeiture because the assessments were not paid within the ten days. — *Odd Fellows Assoc. v. Sweetser*, S. C. Ind., Jan. 24, 1889; 19 N. E. Rep. 722.

69. INSURANCE POLICY—Arbitration.—A provision in a policy that no suit or action against the insurer "shall be sustained in any court until after an award shall have been obtained" by arbitration, "fixing the amount" due after loss, is void. — *Ins. Co. v. Etherton*, S. C. Neb., Jan. 16, 1889; 41 N. W. Rep. 406.

70. INTOXICATING LIQUORS — Bonds — Constitutional Law.—Where a liquor bond is in strict compliance with the statute, the fact that the justification of the sureties annexed to the bond does not conform to the statute is no defense to the liability of the sureties. — *People, to Use of Clinton v. Laning*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 424.

71. INTOXICATING LIQUORS — Validity of Ordinance — Giving away Liquors.—Under a statute granting the power to towns to license, regulate, and restrain the sale of intoxicating liquor, an ordinance prohibiting the bartering or giving away of liquor without a license is valid.—*Vinson v. Monticello*, S. C. Ind., Jan. 26, 1889; 19 N. E. Rep. 734.

72. JUDICIAL SALES — Do:btful Title — Relief of Purchaser.—Where the proof in partition discloses the existence of persons, not parties to the action, who might have an interest in the property involved, a purchaser at the partition sale is entitled to be relieved from his contract of purchase.—*Toole v. Toole*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 682.

73. JUDICIAL SALES—Payment of Taxes.—Act Md. 1874, ch. 483, § 63, providing for the payment of taxes in arrear at judicial sales means all taxes not barred by provisions of § 81.—*Perkins v. Gaither*, Md. Ct. App., Jan. 10, 1889; 16 Atl. Rep. 631.

74. LIBEL AND SLANDER—What Constitutes —Newspaper Publication.—A publication that a financial statement of a county made by the county auditor was false in that it omitted an item of \$15,000, and that it was suspected to be otherwise false, is libelous. — *Prosser v. Callie*, S. C. Ind., Jan. 25, 1889; 19 N. E. Rep. 735.

75. MASTER AND SERVANT — Evidence.—Where a woman of 25 years of age lives with her step-mother, working as a dress-maker, and giving some of her earnings to her step-mother, and doing some of the household work, she cannot recover from her step-mother for services rendered.—*Feiertag v. Feiertag*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 414.

76. **MECHANIC'S LIENS—Evidence.** — Upon an issue whether the lumber furnished by plaintiff amounted in value to a certain sum, a witness, not shown to be acquainted with the market prices of lumber at the time, was not competent to testify. — *Russell v. Hayden*, S. C. Minn., Jan. 29, 1899; 41 N. W. Rep. 456.

77. **MECHANIC'S LIEN—Release.** — Construction of a release made by subcontractor in a mechanic's lien suit. — *Shropshire v. Duncan*, S. O. Neb., Jan. 16, 1899; 41 N. W. Rep. 468.

78. **MORTGAGE—Foreclosure—Payments.** — On a foreclosure of a mortgage, payments made by a mortgagor, as rent, on the mortgaged premises, under an agreement with the mortgagee, should be credited on the mortgage debt. — *Brake v. Sparks*, S. O. Ind., Jan. 24, 1899; 19 N. E. Rep. 719.

79. **MUNICIPAL CORPORATIONS—Bonds—Mandamus.** — In an application for a writ of mandamus, to compel the State auditor to register and certify municipal bonds, a writ will not issue until a strict compliance with all the prerequisites of the statutes is shown. — *State v. Babcock*, S. O. Neb., Jan. 16, 1899; 41 N. W. Rep. 450.

80. **MUNICIPAL CORPORATIONS—Contractor's Bonds.** — Construction of Sp. Law, 1887, Minn. ch. 2, subc. 5, § 5, providing for bond of contractor for street improvements. — *Bk. of Duluth v. Henry*, S. C. Minn., Jan. 31, 1899; 41 N. W. Rep. 411.

81. **MUNICIPAL CORPORATIONS—Recording.** — Construction of act March 19, 1867, Penn., requiring all deeds and title papers to be registered, etc. — *Phila. v. Dungan*, S. C. Penn., Jan. 26, 1899; 16 Atl. Rep. 524.

82. **NEGLIGENCE—Questions for the Jury.** — Where there was no affirmative evidence of negligence on the part of a deceased, and no eye witness of the accident, and where there was no question as to defendant's negligence, it was for the jury to pass upon the question of negligence, and the court erred in directing a nonsuit. — *Galvin v. N. Y. City*, N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 675.

83. **NEGLIGENCE—Obstruction in Street.** — Question of negligence of a city in leaving wooden roller stand in the street. — *Hughes v. Fon Du Lac*, S. C. Wis., Jan. 29, 1899; 41 N. W. Rep. 407.

84. **NEGOTIABLE INSTRUMENTS—Injunction.** — Injunction lies to prevent a note against which an equity exists from being transferred to an innocent holder. — *Wilhelmsen v. Bentley*, S. C. Neb., Jan. 9, 1899; 41 N. W. Rep. 387.

85. **NEGOTIABLE INSTRUMENTS—Pleading.** — In an action against the indorsers of a promissory note, made and payable in another State, the court will not, on demurrer, take judicial notice of a law of that State relating to the liability of indorsers, which is not pleaded. — *Cont. Bank v. Wells*, S. C. Wis., Jan. 29, 1899; 41 N. W. Rep. 409.

86. **NUISANCE—Injunction.** — Power of court of equity to enjoin nuisance not one *per se*. — *Brown v. Manry*, S. C. Ind., Jan. 12, 1899; 19 N. E. Rep. 526.

87. **ORDINANCES—Licensing Vehicles.** — Act Pa. April 8, 1885, § 3, does not authorize an ordinance requiring vehicles to be licensed. — *Millerstown v. Bell*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 612.

88. **PARTITION—Disputed Equitable Title—Equity.** — Courts of equity will exercise jurisdiction to settle disputed equitable titles, and will then grant final relief by way of partition under the same bill. — *Appeal of Hays*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 600.

89. **PARTITION—Disputed Title—Mesne Profits.** — Where the title of complainant in a suit for partition is denied, but the suit is carried to decree, the parties are to be treated, on the taking of an account for mesne profits as in an action for mesne profits after recovery in ejectment. — *Worthington v. Hies*, Md. Ct. App., Jan. 17, 1899; 16 Atl. Rep. 534.

90. **PARTNERSHIP.** — A contract between wholesale and retail dealers, by which the former furnishes stock,

and the latter stores, insures, and sells for a share of the profits, does not constitute a partnership. — *Brown v. Watson*, S. C. Tex., Dec. 7, 1898; 10 S. W. Rep. 806.

91. **PARTNERSHIP—Pleading—Parties.** — When a party is omitted who is liable to be jointly sued upon a personal contract, the objection, where the objection does not appear on the face of the petition, can only be taken by answer in the nature of a plea in abatement. — *Maurer v. Midway*, S. C. Neb., Jan. 9, 1899; 41 N. W. Rep. 356.

92. **PATENTS—Use Before Application.** — Under Rev. St. U. S. § 4899, one who allows his partners to use his invention in the machines owned by the firm before he obtains his patent cannot sue them for infringement as regards the same machines. — *Wade v. Metcalf*, U. S. S. C., Jan. 21, 1899; 9 S. C. Rep. 271.

93. **PLEADING—Notice of Set-off—Striking from the Files.** — A notice of set-off, filed before the declaration is filed or required to be filed, is properly stricken from the files. — *Bailey v. Bk. of Des Moines*, S. C. Ill., Jan. 25, 1899; 19 N. E. Rep. 695.

94. **PLEADING—Verification by Attorney—Sufficiency.** — Under Code Civil Proc. Cal. § 446, an attorney's verification reciting that affiant "is the attorney for defendants, and as such attorney the facts are more fully known to him than said defendants," is insufficient. — *Silcox v. Lang*, S. C. Cal., Jan. 15, 1899; 90 Pac. Rep. 297.

95. **PRACTICE—Motion for Verdict—Waiver of Objection.** — Where defendant moves the court to direct a verdict for him on the ground that plaintiff has not shown facts sufficient to entitle him to recover, and the motion is denied, he waives his exception by proceeding to introduce evidence. — *Robertson v. Perkins*, Jan. 28, 1899; 9 S. C. Rep. 279.

96. **PRACTICE—Pleadings.** — An application for leave to answer, after default, must be considered and passed upon by the trial court before it will be considered by the appellate court. — *Keyes v. Clars*, S. C. Minn., Jan. 29, 1899; 41 N. W. Rep. 453.

97. **PRACTICE IN CIVIL CASES—Refusal to Nonsuit—Exceptions.** — A refusal to nonsuit a plaintiff is not exceptionable. The remedy is by a motion for new trial. — *Bunker v. Goldsboro*, S. J. C. Me., Jan. 8, 1899; 16 Atl. Rep. 543.

98. **PROBATE LAW—Sale of Land.** — Under act Pa. April 18, 1853, the orphan's court has jurisdiction to order a private sale of land. — *Moorhead v. Wolf*, S. C. Pa., Jan. 7, 1899; 16 Atl. Rep. 520.

99. **PUBLIC LANDS—Grants to State—Flowage.** — Lands were granted by the United States by act of Cong. Aug. 8, 1846, to the State of Wisconsin, to aid the latter in improving the navigation of the Fox and Wisconsin rivers: Held, that it was intended that the lands should be sold by the State, and the proceeds applied to making the improvements. — *Zemlock v. United States*, S. C. Wis., Jan. 29, 1899; 41 N. W. Rep. 446.

100. **PUBLIC LANDS—Lost Corners—Evidence.** — Under Mich. statutes, directing a surveyor to locate lost corners and record his survey, the record of the survey is evidence to show the true location of the corners but the surveyor's work is not *prima facie* correct. — *Hess v. Meyer*, S. C. Mich., Jan. 18, 1899; 41 N. W. Rep. 422.

101. **RAILROAD COMPANIES—Accident at Crossing—Contributory Negligence.** — Whether plaintiff's decedent was under all circumstances guilty of contributory negligence in crossing track was exclusively for the jury. — *Palmer v. R. R.*, N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 678.

102. **RAILROAD COMPANIES—Crossing Track—Negligence.** — A person who attempts to cross a track where there was nothing to prevent his seeing a train if he had looked for it is negligent and cannot recover for injuries received. — *Mariand v. R. R.*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 623.

103. **RAILROAD COMPANIES—Foreclosure—Cross-bill.** — Where a cross-bill is necessary to the defense of a party, he must file it to establish his defense. — *American*

Trust Co. v. E. & W. R. R., U. S. C. C. (Ala.), Jan. 11, 1899; 37 Fed. Rep. 242.

104. RAILROAD COMPANIES—Municipal Aid.—Municipal bonds issued without authority and void may be validated by an act of the legislature passed for that purpose.—*Deyo v. Oloc Co.*, U. S. C. C. (Neb.), Jan. 2, 1899; 37 Fed. Rep. 246.

105. RAILROAD COMPANIES — Stock Killing. — The term "wagon crossing" as used in Gen. Stat. Minn. 1878, ch. 24, § 54, refers to wagon roads used for public travel crossing railroads. — *Salter v. C. M. & W. Ry. Co.*, S. C. Minn., Jan. 29, 1899; 41 N. W. Rep. 408.

106. RAILROAD COMPANIES — Stock Killing Cases. — Under Code Iowa, § 1289, owner cannot recover for the killing of a cow when he was present and had an opportunity to drive the cow from the track.—*Moody v. R. R.*, S. O. Iowa, Jan. 25, 1899; 41 N. W. Rep. 477.

107. RAILWAY COMMISSION—Mandamus.—Sect. 8, ch. 10, Gen. Laws 1887, Minn., vests the supreme court with original jurisdiction of proceedings by *mandamus* to compel compliance with act. — *State v. Ry. Co.*, S. C. Minn., Jan. 31, 1899; 41 N. W. Rep. 465.

108. RELEASE AND DISCHARGE—Validity. — Release given by plaintiff for injuries received as passenger can only be avoided for insanity.—*Mo. Pac. Ry. Co. v. Brasili*, S. C. Tex., Dec. 7, 1898; 10 S. W. Rep. 406.

109. SALE — Statute of Frauds — Pleading. — A defendant, denying in his answer the making of the contract upon which the action is brought, may avail himself of the defense that the agreement was void under the statute of frauds. — *Fontaine v. Bush*, S. C. Minn., Jan. 31, 1899; 41 N. W. Rep. 467.

110. SALE—When Title Passes. — Under a contract by which the vendor agrees to deliver materials of a specified quality on the cars at a place named, to be used by the vendee in the erection of a court-house, the title to such materials, placed on the cars as agreed, consigned to the vendee, is in the vendee, and they are liable to a levy under an execution against him, while still on the cars. — *Rechtin v. McGary*, S. C. Ind., Jan. 26, 1899; 19 N. E. Rep. 781.

111. SCHOOL DISTRICTS—Contracts—Corporation. — Where one has given his promissory note to a corporation as such, he cannot, in an action upon the note, deny the incorporation of the plaintiff. — *School district No. 61 v. Collins*, S. C. Dak., Feb. 9, 1899; 41 N. W. Rep. 466.

112. SCHOOL DISTRICTS—Contracts—Ratification. — Though a board of directors have exceeded its powers in making a contract, its action is ratified by a vote of the electors authorizing it to settle a disputed claim growing out of such contract. — *Everts v. Rose Grove*, S. Iowa, Jan. 29, 1899; 41 N. W. Rep. 478.

113. SCHOOLS AND SCHOOL DISTRICTS—Validity of Warrant. — An order for the payment of school funds, drawn with the concurrence of two only of the three trustees of a district, one of whom is interested in it, is void.—*Shakespeare v. Smith*, S. C. Cal., Dec. 29, 1898; 20 Pac. Rep. 800.

114. SECURITY FOR COSTS. — A motion to dismiss will not be sustained where plaintiff files security for costs a few days after the expiration of the time within which it was ordered by the court. — *King v. Jackson*, S. C. Neb., Jan. 16, 1899; 41 N. W. Rep. 448.

115. STATUTE OF FRAUDS — Part Performance. — The delivery of possession to complainant and her husband, and the construction of the house under their direction and control, constituted a sufficient part performance to satisfy the statute of frauds. — *Brown v. Sutton*, U. S. S. O., Jan. 26, 1899; 9 S. C. Rep. 273.

116. STATUTES—Repeal—Marriage — License Fee. — Acts Md. 1886, ch. 261, and ch. 497, both repealing Code art. 60, relating to marriages, are inconsistent. They were passed on different days, but approved the same day: *Held*, that they will be presumed to have been approved in their numerical order.—*State v. Davis*, Md. Ct. App., Feb. 8, 1899; 16 Atl. Rep. 529.

117. STREET RAILROADS — Location of Road. — In proceedings under Laws N. Y. 1875, ch. 606, relating to the construction of steam railways in cities, posted notices along the road is sufficient notice to parties interested. — *In re Union El. R. Co.*, N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 664.

118. TAXATION—Action by Tax-payer — Objections to Sale. — A private citizen, suing as a tax-payer, under the "act for the protection of tax payers," (Laws N. Y. 1881, ch. 581,) to restrain the execution and delivery of the leases to the purchaser, a corporation, cannot object that the contract of purchase by the latter was *ultra vires*. — *Starin v. Staten Island Co.*, N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 670.

119. TAXATION—Assessment. — Laws, 1881, § 1, ch. 5, Minn., providing for assessing taxes upon property for past years does not authorize the including in such assessment of penalties for such years.—*State v. Land Co.*, S. C. Minn., Jan. 31, 1899; 41 N. W. Rep. 465.

120. TAXATION — Assessment. — A court of equity will not restrain the collection of a tax unless it is necessarily unjust and unequal.—*Campbell v. Bayfield Co.*, S. C. Wis., Jan. 29, 1899; 41 N. W. Rep. 437.

121. TAXATION—Payment. — In an action to set aside tax-sale, evidence of payment of taxes was not rebutted by the fact that the stub of the receipt did not show payment on the lot in controversy. — *Right v. Slocum*, S. O. Iowa, Jan. 25, 1899; 41 N. W. Rep. 477.

122. TAX-SALE — Redemption by Tenant in Common. — When a tenant in common takes a deed of the whole property from a purchaser at a tax-sale, he must be presumed, to have done so in the exercise of a legal right, and the whole property will be redeemed from the sale.—*Hurley v. Hurley*, S. J. C. Mass., Jan. 16, 1899; 19 N. E. Rep. 545.

123. TRUSTS—Compensation of Trustees. — Under the statute allowing commissions to a trustee for "receiving and paying out" money, an allowance of one moiety upon receipt, and the other upon disbursement, of the fund is proper. — *In re Willat's Estate*, N. Y. Ct. App., Jan. 22, 1899; 19 N. E. Rep. 690.

124. TRUSTS — For Married Woman. — A decree of district court of Pa., allowing a trustee of land of a married woman to convey the property to her, and discharge him from acting longer as trustee, rendered with the consent of the *cestui que trust* and her husband is valid until reversed on appeal. — *Digham v. Henriot*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 618.

125. WILLS—Construction. — A devise to A and in case she dies single to B, vests an absolute estate in A upon her marriage. — *Appeal of Davison*, S. O. Penn., 16 Atl. Rep. 598.

126. WILLS—Requisites—Effect of Probate. — A paper drawn at the instance of deceased as his will, but never signed or seen by him, does not comply with the act of 1833, Penn., providing that a will must be signed by the testator, and such a paper is a nullity. — *Wall v. Wall*, S. O. Penn., Jan. 28, 1899; 16 Atl. Rep. 598.

127. WITNESS—Reputation—Impeachment. — Where the cross-examination of impeaching witnesses shows that they know nothing of the reputation for truth and veracity of the witness in the neighborhood in which he lives, their testimony should be excluded. — *Clapp v. Engledow*, S. O. Tex., Dec. 11, 1898; 10 S. W. Rep. 462.

128. WRITS—Service by Publication—Non resident Defendant. — Under Code Civil Proc. N. Y. § 489, an order for service of summons by publication cannot be granted, as to a non-resident defendant, where it does not appear that the cause of action arose within the State.—*Bryan v. University Pub. Co.*, N. Y. Ct. App., Feb. 9, 1899; 19 N. E. Rep. 823.

129. WRITS—Service on Non-residents. — Code Colo. 1883, §§ 41, 45, authorizing service on non-residents by publication of summons, and making a personal service of summons on a non-resident out of the State equivalent to service by publication, do not authorize the rendering of a personal judgment on such service.—*Denny v. Ashley*, S. O. Colo., Jan. 12, 1899; 30 Pac. Rep. 261.

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CURRENT EVENTS.

It is to be hoped that in appointing a successor to the lamented Justice Stanley Matthews upon the supreme bench the president will be actuated, not by a desire to reward a politician for faithful party service, but rather to recognize profound legal ability, eminent scholarly attainments, incorruptible integrity and fearless honesty, the eminent lawyer and just judge. Two names are already favorably mentioned as worthy to fill the important vacancy, Judges Cooley and Gresham, and the appointment of either of these eminent jurists would give unqualified satisfaction both to members of the legal profession as well as to all who are interested in having the supreme law of the land justly and fearlessly interpreted. They possess in a rare degree the high qualifications which the exalted position requires, long, honorable and famous experience upon the bench, profound knowledge of jurisprudence, unswerving impartiality and untiring industry; and while it is difficult generally to find one who can meet these requirements, should either Judge Cooley or Judge Gresham be honored with the appointment there can be no mistake made in the selection.

It is a noticeable fact that while there are many distinguished lawyers who are both able and willing to serve their country on the supreme tribunal of the United States, one can suggest but few names of sufficient prominence and qualification for the vacancy now existing therein. The lawyer who devotes himself exclusively to the practice of law and takes no part in political affairs is scarcely known outside of the locality where he resides. It is seldom that he is engaged in a case that arouses public interest, and but few people hear of him. Most lawyers who have acquired a national reputation have had attention called to them by a participation in mat-

ters of public interest rather than by any brilliancy in the practice of their profession, and deserve the reputation of distinguished statesmen or politicians rather than eminent lawyers. It is to be regretted that our really great lawyers who deserve prominence from eminence and success in their profession alone are so little known, even by those who are otherwise well informed.

THE recent death of Sidney Bartlett, LL. D., of Boston, removed from the bar of this country probably the oldest practitioner as well as one of its most distinguished members. At the time of his death he had reached the advanced age of ninety years and continued in practice up to his last fatal illness. A few days before his death he was engaged in consultation with the directors of a railroad corporation of which he was general counsel. His extreme longevity furnishes a contradiction to the general notion that lawyers are short-lived.

J. W. DONOVAN, the eminent advocate, says: sense, reason, equity, wise selection of jury, kind and manner of witnesses and right conduct of counsel in urging his rights, will win a lawsuit. What is wise with a jury and what is unwise, men differ on; some urge too much; others too little; others never put the right thing in the right way. Law is a science. A good trial is a fine art. To win is the object; to lose is the dread. The sting of defeat heals slowly. The flush of victory brings business. The loss of a book account may be the loss of thousands. The loss of a case may ruin a home. The absence of a witness may mean a prison for a life-time. The power of a story may save a father to his children. The turn of a case is like the wind in winter, we know not its direction save as we feel it. What a science, what an art, what test of genius, what a forum for wisdom and eloquence, is a trial before a jury of twelve men with a nation for an audience!

NOTES OF RECENT DECISIONS.

A QUESTION of jurisdiction of the United States courts, under the act of congress of March 3, 1875, came before the Supreme Court of the United States in the case of *Morris v. Gilmer*, 9 S. C. Rep. 289. It was there held that the circuit court is bound to dismiss a suit depending for federal jurisdiction upon the non-residence of the plaintiff, when it is made to appear that he is not in fact a non-resident, and that, while the fact that a change of domicile is induced for the purpose of invoking federal jurisdiction does not affect the right, yet where the sole object in removing from one State to another is to be enabled to sue in the federal court, and the removal is without any present intention to remain permanently or for an indefinite time, but with a present intention to return as soon as the purposes of the suit are accomplished, there is no change of domicile. The court says:

The case presents no question of a federal nature, and the jurisdiction of the circuit court was invoked solely upon the ground that the plaintiff was a citizen of Tennessee, and the defendants citizens of Alabama. But if the plaintiff, who was a citizen of Alabama when the suit in the State court was determined, had not become, in fact, a citizen of Tennessee when the present suit was instituted, then, clearly, the controversy between him and the defendants was not one of which the circuit court could properly take cognizance; in which case it became the duty of that court to dismiss it. It is true that, by the words of the statute, this duty arose only when it appeared to the satisfaction of the court that the suit was not one within its jurisdiction. But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further, and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in *Railway Co. v. Swan*, 111 U. S. 379; *Bridge Co. v. Otoe Co.*, 120 U. S. 225; *Grace v. Insurance Co.*, 109 U. S. 278; *Blacklock v. Small*, 127 U. S. 96. These were cases in which the record did not affirmatively show the citizenship of the parties, the circuit court being without jurisdiction in either of them unless the parties were citizens of different States. But the above rule is equally applicable in a case in which the averment as to citizenship is sufficient, and such averment is shown, in some appropriate mode, to be untrue. While under the judiciary act of 1789 an issue as to the fact of citizenship could only be made by a plea in abatement, when the pleadings properly averred the citizenship of the parties, the act of 1875 imposes upon the circuit court the duty of dismissing a suit, if it appears at any time after it is brought, and before it is finally disposed of, that it does not really and substantially involve a con-

troversy of which it may properly take cognizance. *Williams v. Nottawa*, 104 U. S. 209; *Farmington v. Pillsbury*, 114 U. S. 188; *Little v. Giles*, 118 U. S. 506. And the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal. It is contended that the defendant precluded himself from raising the question of jurisdiction, by inviting the action of the court upon his plea of former adjudication, and by waiting until the court had ruled that plea to be insufficient in law. In support of this position *Hartog v. Memory*, 116 U. S. 588, is cited. We have already seen that this court must, upon its own motion, guard against any invasion of the jurisdiction of the circuit court of the United States as defined by law, where the want of jurisdiction appears from the record brought here on appeal or writ of error. At the present term it was held that whether the circuit court has or has not jurisdiction is a question which this court must examine and determine, even if the parties forbear to make it, or consent that the case be considered upon its merits. *Metcalf v. Watertown*, 128 U. S. 586. Nor does the case of *Hartog v. Memory* sustain the position taken by the defendant. In that case the citizenship of the parties was properly set out in the pleadings, and the cause was submitted to the jury without any question being raised as to want of jurisdiction, and without the attention of the court being drawn to certain statements incidentally made in the deposition of defendant against whom the verdict was rendered. After verdict the latter moved for a new trial, raising upon that motion, for the first time, the question of jurisdiction.

An interesting question involving the right of the Chicago board of trade to withhold telegraphic information was decided by the Supreme Court of Illinois in the case of *New York & Chicago Grain & Stock Exchange v. The Board of Trade of the City of Chicago*, 19 N. E. Rep. 855. There it was held that though the Chicago board of trade is a private corporation and the business transacted by it daily is of a private nature, yet, the board having for many years permitted and invited a telegraph company to transmit, during the sessions of the board, to all persons who choose to pay for the information, reports of the dealings of the board, fluctuations in prices, etc., and the information so obtained, having in consequence become of essential importance to the commercial world, such information has become impressed with a public trust, and the board cannot now treat it as purely private, and withhold it from all but a favored few. *Baker, J.*, after reviewing at length the object of the Chicago board of trade, its rules and customs, and mode of doing business, says:

This market news is a species of property, and if the statistics with reference to the individual business of

the members of the association, and the aggregate business of its members, had from the start been gathered and compiled at the expense of its members, and for their sole use, it may be it would have been strictly private property, held in trust by the board for the use and benefit of such members, and wholly free from any public interests therein. But the board did not so exercise its franchises, and so conduct its business, but admitted the telegraph companies to the floor of its exchange, and permitted and encouraged them, from day to day and year after year, to gather these statistics of the dealings on the board, and telegraph them immediately as they were made throughout the land, to whomsoever would pay for such information, until the business of the country had adapted itself to these means and appliances, and the point was reached when the quotations upon the board were puissant to determine the market values of the products of the country, and all persons dealing in such products could not without the knowledge and benefit of these immediate quotations intelligently and safely so deal. The facts that the board of trade is a private corporation, and that the dealings between its members are private business, such as is transacted between dry goods, grocery, and commission merchants, and that the statistics of these dealings collected as we have stated are private property, are not conclusive that such statistics are not charged with a public interest, and that there is no duty due the public in respect thereto. In the case of *Munn v. Illinois*, 94 U. S. 113, the Supreme Court of the United States recognized and followed the doctrine that when private property is devoted to a public use, and becomes affected with a public interest, it ceases to be *juris privati* only, and is subject to public regulation. Assuming these market quotations and reports are property, and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessary to all alike, common to all, and upon equal terms. The doctrine as applied to the matter of these quotations, would forbid that a monopoly should be made of them by furnishing them to some, and refusing them to others who are equally willing to pay for them and to be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them. The market information here involved is not collected by the board merely for the use of the members of the association. For many years it was gathered and disseminated by the telegraph companies, and sent to all alike who would pay for it, wholly regardless of any question of membership in the board. The change that has been made by section 20 of rule 4 in respect to this commercial news department seems to be more colorable than substantial, and appears to be intended merely to enable the board to make a monopoly of such news. At first the telegraph companies by their paid agents gathered the statistics and telegraphed them from the floors of the exchange. Now, the board appoints and pays the agents who collect the statistics, and transmit them to the central telegraph office of the Western Union Telegraph Com-

pany, from whence they are distributed to the approved correspondents; but nine-tenths of the expense of this service of collecting the market reports is refunded to the board by the telegraph company. The question here is not one of withholding altogether instantaneous quotations and information respecting the prices at which grain and provisions are being sold upon the market of the exchange, nor one of discriminating between its own members and such persons as are not members in giving such information. Before the board itself assumed to control the sending of this news, no discrimination was made in distributing it between those who were and those who were not members of the board, and since the change was made a very large proportion of the approved correspondents are not members, and the rule contemplates that persons other than members should be such correspondents. The question is, can the board so conduct its affairs for a long term of years as to create a standard market for agricultural products, and, acting in concert or combination with the telegraph companies, build up a great system for the instantaneous and continuous indication of that market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, and until by the usage and custom of merchants, thus advanced by the methods adopted by the board and telegraph companies, such instantaneous quotations become necessary to the successful and safe transaction of business, and until such system has become impressed and affected with a public interest, and then be allowed to discriminate between persons and parties, and, where all alike are willing to conform to reasonable rules and requirements, and pay for the information desired, say that one shall and another shall not have such information? If the board has such right, and these corporations are lawfully permitted so to do, then they have the power to create monopolies, and dictate who shall deal in the agricultural products of the country, and at will impoverish or enrich merchants, shippers, and producers. It is vain to say that the ordinary newspaper reports of the state of the market are all that are necessary to legitimate dealers in grain and provisions. The business of the country has outgrown such condition, and this very largely through the methods adopted and introduced by appellees themselves. The fact that 1,400 persons, firms, and corporations are in receipt of these instantaneous market reports, and are willing to pay therefor the large fees and charges demanded of them for the receipt of the same, is proof positive that a business advantage is gained by immediate knowledge of the condition of the market. The persistent efforts of the board of trade itself to control these market reports are an indication of their estimate of their value. There is no question involved in this case of gambling contracts, or of so called "bucket-shops." There is no evidence in the record tending to show that appellant is engaged in a gambling business, or dealing in puts and calls, and it is admitted that the business it is doing is not in violation of law. We think the case made by the bill of complaint and the proofs bring it within the rule announced by the Supreme Court of the United States in *Munn v. Illinois*, *supra*, and in our opinion it was error in the circuit court to dismiss the bill for want of equity, and error in the appellate court to affirm the decree of dismissal.

AN interesting question of principal and agent in the law of insurance was decided by

the Supreme Court of Appeals of West Virginia, in the case of *Deitz v. The Providence Washington Insurance Co.*, 8 S. E. Rep. 616. There, a husband took out a policy of insurance in his own name on property belonging to his wife. The policy contained a provision that if the insured is not the absolute owner of the property it must be so expressed in writing in the policy. The husband, when effecting the insurance, stated to the agent of the company that the property belonged to his wife. This was a suit on the policy by the husband for the use of the wife. The court in sustaining the action, says:

It is a well-settled rule of law that where a contract, not under seal, is made by an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. The rights and liabilities of a principal upon a written instrument executed by his agent do not depend upon the fact of the agency appearing on the instrument, but upon the facts (1) that the act is done in the exercise and (2) within the limits of the powers delegated to the agent, and these are necessarily open to inquiry by evidence. In *Browning v. Insurance Co.*, L. R. 5 P. C. 263, it was held that where an insurance broker takes out a policy of insurance in his own name upon his principal's goods, the latter may sue upon the policy in his own name. In cases of this kind, the liability of the principal, as well as the rights of the other party, depends upon the act done, and not merely the form in which it is executed. If the agent is clothed with the proper authority, his acts bind the principal, although done in his own name. The only difference is that, where the agent contracts in his own name for an undisclosed principal, who has employed him, he adds his own personal responsibility to that of his principal. As to the admissibility of parol evidence to qualify the written contract, there is as much objection to letting it in for the purpose of enabling the principal, not named in the contract itself, to sue, as for the purpose of rendering him liable to be sued. But the true rule, it is submitted, is that parol evidence is admissible for the purpose of introducing a new party, but never for discharging an apparent party to the contract. *Jones v. Littledale*, 6 Adol. & E. 486; *Sins v. Bond*, 5 Barn. & Adol. 393. It is the constant course to admit parol evidence to show whether the contracting party is agent or principal. *Wilson v. Hart*, 7 Taunt. 295. The agent's right to sue in his own name, where the instrument is in terms payable to him, is the same whether it be a promissory note, bill of exchange, check, bill of lading, policy of insurance, bond, and the like instances. 1 *Wait, Act. & Def.* 279, and cases cited. In *Colburn v. Phillips*, 13 Gray, 64, it was held: "An agent may sue on a written agreement made by him in his own name in behalf of his principal." *Rhoades v. Blackiston*, 106 Mass. 334. * * * But it is insisted for the defendant that the plaintiff by the contract of insurance represented that he was the owner of the property, and, as he had in fact no interest in the property, the contract is, by the terms of the policy, void. It is true that the policy is in the name of the plaintiff,

John K. Deitz, and insures the property as his; and it is also true that the policy provides that, if the property is held in trust, or be a leasehold or other interest not amounting to absolute or sole ownership, it must be so represented in the policy in writing; otherwise the insurance as to such property shall be void. But the statement of facts filed by the plaintiff alleges that the plaintiff effected the insurance as the agent of the wife, the said Sarah E. Deitz, and at the time informed the agent of the defendant that the property belonged to his wife. In *Hunt v. Insurance Co.*, 22 Fed. Rep. 563, it was held: "Where a company's policies provide that 'any interest in property insured not absolute, or that is less than a perfect title, must be especially represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void,' it is the duty of the agent who makes the contract in behalf of the company, if he knows that the property upon which the insurance is desired belong to the applicant's wife, to state that fact in the policy, and if he fails to do so the policy will not be invalid on that account." And in the same case it was further held that "a husband who has taken out insurance as his wife's agent, upon her property, in his own name, may sue in his own name for her benefit in case of loss." It is a general principle, well-settled by the authorities, that agents of an insurance company, authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the company in all they do in preparing the application, or in any representation they may make as to the character or effect of the statements therein contained; and when, either by his instruction or direct act, such agent makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicants, the error is chargeable to the company. This rule is not affected or changed by a stipulation inserted in the policy that the acts of such agent in making out the application shall be deemed the acts of the insured unless written in the application or expressed in the policy. *Kausal v. Assoc.*, 31 Minn. 17; *Woodbery v. Ins. Co.* 31 Conn. 517; *Travis v. Insurance Co.* 23 W. Va. 584.

THE question of the police power of a State, involving rights of railroad companies, came up in a new form before the Supreme Court of Alabama, in the case of *L. & N. R. R. Co. v. Baldwin*, 5 South. Rep. 311. There it was held that an act of the legislature of 1887, requiring all persons employed by railroad companies, in any capacity, calling for discrimination of color signals, to be examined by a State board of examiners as to their ability to distinguish colors, and making it a misdemeanor to accept or continue in such employment without a certificate from the examiners, is unconstitutional, as depriving persons of property without due process of law, in so far as it requires the fees for such examinations to be paid by the railroad companies. The court is divided on the question, *Clopton, J.*, dissenting in an

exhaustive opinion. The majority of the court say:

The statute under consideration attempts to impose on the railroad corporations, without their consent, and whether they will or not, the expense of the examination of certain classes of their employees, for the purpose of determining their fitness for the service. Is this not a mere legislative edict that one person (artificial) shall, without his consent, pay for services rendered to another? This is not "due process of law." Private property shall not be taken for private use. These are constitutional guaranties, and corporations are as much under their protection as natural persons are. The case of *Morgan v. Louisiana*, 118 U. S. 455, rightly interpreted, is not opposed to the views expressed above, and furnishes no warrant for the statute we are interpreting. The question in that case arose under the quarantine laws of Louisiana, enacted for the purpose of keeping out contagious diseases. To allow vessels to land in New Orleans, not having a bill of health free of contagious or infectious diseases, would be to greatly imperil the inhabitants of the city. The quarantine inspection or examination was required primarily for the safety of the city, but secondarily and largely for the benefit of the vessel. If found free from disease, she could at once proceed, complete her voyage, and come into port. The benefit of the inspection was thus largely the vessel's, and furnished a sufficient consideration to uphold the charge made against her. In the case of *Railway Co. v. Alabama*, 9 S. C. Rep. 28, the question we have been considering was not, and could not be, raised. Hence the remark of the eminent jurist who prepared the opinion in that case is not an authoritative adjudication. * * * The law under consideration, passes beyond the legitimate domain, of the police power, and reaches ground forbidden by the prohibitions of the constitution. It is not denied that the legislature has the power to regulate the business of common carriers engaged in running railroads in this State by a reasonable exercise of its police power, having in view the preservation of the public safety. *Smith v. State*, 35 Ala. 341; *Smith v. Alabama*, 124 U. S. 465; *McDonald v. State*, 81 Ala. 279. It may also, in the lawful exercise of this power, require the examination of railroad employees for color-blindness, or other defects of vision, as done in this case, and may require a certificate of personal qualification for the service in question. *Baldwin v. Kouns*, 81 Ala. 272. As to these propositions there is no difference of opinion among the members of the court. Such a certificate, however, is in the nature of a personal license to the employee. It is mainly and primarily for his benefit; as much so as the personal license or diploma of a lawyer, physician, druggist, or any other person engaged in any other employment would be. It follows his person, unless restricted, anywhere in the territory of the sovereignty granting it, and in whosoever employment the license may be engaged. It is only incidentally beneficial to the employer, so long as the employment may subsist. It is not the property of the employer, but of the employee. The debt incurred for the service rendered in making the examination is therefore the debt of the latter, not of the former. The law making power can enact no edict by which a legal liability for the debt of one person can be fastened on another without due process of legal proceedings, according to the rules and forms established for the protection of private rights. It cannot take the property or money of one person, and give it to another, by naked transfer, nor impose a liability on one person for the private benefit of an-

other; in the absence of some relation between the parties which brings the case within the sphere of the police power. There is a line where taxation may become spoliation. So laws, under the guise of police regulations, may reach the constitutional dead-line of property confiscation. It is impossible to forecast the logical results which may practically flow from the opposite conclusion. Farmers might as well be compelled to pay the licenses of commission merchants employed in sampling their cotton; druggists, for the diplomas of their clerks; the patrons of schools, for certificates of qualification required for teachers; patients, for the diplomas of doctors; or clients, for those of lawyers. No precedent known to us among the adjudged cases goes to this extent, or lays down any principle which, in our opinion, would support the constitutionality of the law under consideration, so far as it seeks to make the railroad companies liable for the expenses incurred in the examination of employees under the provisions of the act.

THE disputed question as to when the statute of limitations begins to run against a stockholder's liability for unpaid subscriptions to capital stock of a corporation was considered by the Supreme Court of Georgia in the case of *Glenn v. Howard*, 8 S. E. Rep. 636. The case was argued some time ago, and a decision held up in order to get a decision of the Supreme Court of the United States upon a similar question, but the latter has not yet been rendered. In this case, the company, whose officers were authorized to make calls for unpaid subscriptions, but who had failed to do so, made an assignment for the benefit of creditors, without empowering the assignee to do so. The court, some years thereafter, directed that a call be made upon the subscribers for their unpaid subscriptions. Defendant contended that the action was barred by the statute of limitations, and the court below sustained this claim. The supreme court reversed that decision, saying:

Under the facts alleged in the declaration, was the cause of action barred? The Supreme Court of Virginia, in a similar suit, involving the same question (*Vanderwerken v. Glenn*, 6 S. E. Rep. 806), held that the statute of limitations did not commence to run until after the call was made, under the decree above referred to. The Supreme Court of Maryland, when the question came before it, held to the same effect. *Glenn v. Williams*, 60 Md. 95. The Supreme Court of Alabama, in a case involving the same question (*Glenn v. Semple*, 80 Ala. 159), likewise held that the statute of limitations did not begin to run until this call was made. Here, then, are three courts of last resort of different States of the Union that have directly decided the question made in the present case. We are aware that there is a decision to the contrary by Judge Brewer, of the United States circuit court (*Glenn v. Dorsheimer*, Cir. Ct. Mo. 23 Fed. Rep. 695), in which it was held that where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of

its creditors, the liabilities of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately. And this is the only decision to the contrary that we have been able to find directly upon the question. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction—and I must say for myself that there is a great deal of reason in favor of the decision of Judge Brewer; but the weight of authority is unquestionably against the ruling of the court below in this case. Under the act incorporating this company, a call was to be made upon the stockholders for their unpaid subscriptions, whenever necessary, by the president and directors of the corporation. No such call was ever made, and in the deed of assignment no authority was given to the assignee to make a call; and it is a rule in chancery, well recognized and uncontroverted, that wherever the subscribers fail to pay up their stock, and the officers of the corporation will not make the call, a court of chancery will make it, at the instance of any creditor, as was done in this case. When the call was made under the decree in this case, it became a call as effectually as if it were made by the officers of the corporation, who were authorized by the charter to make it. Until this call was made, the statute of limitations did not begin to run. Cited for the plaintiff in error: *Glenn v. Foote*, 36 Fed. Rep. 824; *Glenn v. Semple*, 80 Ala. 159; *Glenn v. Williams*, 60 Md. 95; *Vanderwerken v. Glenn*, 6 S. E. Rep. 806. Cited for defendant in error: *Thomp. Liab. Stockh.* § 291; *Glenn v. Dorschelmer*, 23 Fed. Rep. 695; *Sawyer v. Hoag*, 17 Wall. 610; *Railroad Co. v. Thomas*, 2 Phila. 344; *Eppright v. Nickerson*, 78 Mo. 482; *Haton v. Dana*, 101 U. S. 214; *Upton v. Tribblecock*, 91 U. S. 46; *Sanger v. Upton*, *Id.* 56; *Webster v. Upton*, *Id.* 65; *Terry v. Anderson*, 95 U. S. 630; *Taylor v. Holmes*, 127 U. S. 493.

THE Supreme Court of California, in *Marriner v. Dennison*, 20 Pac. Rep. 386, decide that a complaint in an action for breach of a contract to convey real property, showing the contract to be for the conveyance of lots of certain numbers in defendant's subdivision of the M tract, but not alleging any extrinsic facts by which the lots may be identified, is bad. The description in such contract being insufficient, the memorandum of the contract is inadmissible in evidence. The court says:

The real estate is described in the agreement as lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract. In what city, county, State, or country the land is situated does not appear. If the instrument were one attempting to convey title to property its insufficiency would be apparent. But the rule as to the particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. *Stanley v. Green*, 12 Cal. 162; *Lick v. O'Donnell*, 3 Cal. 63; *Fry, Spec. Perf.* 159 et

seq.; *Torr v. Torr*, 20 Ind. 118; *Colerick v. Hooper*, 3 Ind. 316; *Baldwin v. Kerlin*, 46 Ind. 426; *Browne, St. Frauds*, § 385; *McConnell v. Brillhart*, 17 Ill. 360. But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus, if the description were "my" farm in Los Angeles county, an allegation in the complaint that I owned but one farm in said county, and where it was situated, would apply the description to the proper subject-matter, and render it certain. But if the description were "a" farm in Los Angeles county, it could not be rendered certain by the allegation of such extrinsic matter. *Browne, St. Frauds*, § 386; *Baldwin v. Kerlin*, 46 Ind. 426, 431. It is not sufficient to allege that by the imperfect description given in the contract the parties intended to convey certain property. *Browne, St. Frauds*; *Baldwin v. Kerlin*, *supra*; *Ryan v. Davis*, 6 Pac. Rep. 339; *Eggleston v. Wagner*, 46 Mich. 610; *Bowers v. Andrews*, 52 Miss. 596; *King v. Wood*, 7 Mo. 389; *Hudson v. King*, 2 Helsk. 560, 572; *Clark v. Chamberlin*, 112 Mass. 19; *Gigos v. Cochran*, 54 Ind. 593; *Newman v. Perrill*, 73 Ind. 153; *Ferris v. Irving*, 28 Cal. 645; *Richards v. Snider*, 3 Pac. Rep. 178. It is not enough, as we have said, to allege that by such incomplete description the parties intended to convey a certain tract of land. Such extrinsic facts must be alleged as will, in connection with such description, show that the particular piece of land was intended. If the facts alleged, together with the description set out, are not sufficient to identify the land, the contract must be held to be void for uncertainty. * * * Applying these well-established rules to the case before us, we are of the opinion that, properly aided by the allegation of extrinsic facts, the description in the contract might have been sufficient. If, for example, it had been alleged that the defendant was at the time of the contract the owner of lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract, situate in lot 10, block O, of the San Pasqual tract, in the county of Los Angeles, State of California, according to the map of said subdivision, on record in Book 12, page 29, of Miscellaneous Records in the office of the recorder of said county, and upon which map said lots are delineated; that said lots were the only lots of said numbers, of any subdivision of defendant in any tract of land known as the "Magee Tract;" that said lots were examined by the parties hereto, before making said contract, and were verbally agreed upon as the ones for which the said contract was to be executed, and were the lots and property referred to therein, and the said subdivision was the only one then owned by the defendant, or known or designated as the "Dennison Subdivision of the Magee Tract,"—we think the complaint would have been sufficient in this respect. But the complaint under consideration contains no such allegations, or any others tending to aid the imperfect description set out in the contract. It simply alleges that, by the description given, it was the intention of the parties that the tracts of land specifically described in the complaint should be conveyed. But we have shown that this is not enough. The allegation that the parties intended to convey certain property is the allegation of a mere conclusion. Such intention must appear, as we have said, from the description given, and such extrinsic facts as are alleged in aid of it. As the description, standing alone, is admittedly insufficient, and no facts in aid of it are alleged, the complaint must be held to be bad for that reason.

REMOVAL OF CAUSES UNDER THE ACT OF 1887.

On the 3d of March, 1887, congress passed an act to determine the jurisdiction of the circuit courts of the United States and to regulate the right of removing causes to them from the State courts. This right had already been made the subject of several statutes, and the law, as interpreted by numerous and well-considered judgments of the courts, had come to be regarded as definitely settled and easily understood. The new act, however, in attempting to remodel the whole scheme of the jurisdiction of the federal courts, has introduced the most radical changes in the subject of the removal of causes, and in consequence of an unfortunate lack of perspicuity, it renders necessary a re-consideration of the whole subject, in order to determine the rights of litigants, and throws upon the courts the ungrateful task of searching out the meaning of the legislators from a confused and perplexing congeries of statutory directions. Indeed, as first officially promulgated, the act was seen to abound in errors of grammar and orthography, even to the extent of making some of its sentences absolutely nonsensical. This was found to be due to a faulty enrollment of the bill, and on August 13, 1888, an act was passed "to correct the enrollment" of the act of 1887, whereby the latter statute was re-enacted in correct and (comparatively) intelligible language. This, however, does not go far enough to remove the grave doubts and questions which have arisen as to the meaning of some of its provisions and their proper application by the courts. It is proposed, in this article, to notice briefly the more important changes introduced by the act of 1887, as exemplified and explained by the decisions.

Policy of the Act.—In form, the act of 1887 is an amendment to the act of March 3, 1875, upon the same subject, and all the important provisions of the latter statute, so far as concerns the right of removal, are superseded by the substitution of new sections, so that practically the act of 1875 goes out of existence and that of 1887 takes its place. It is very apparent that the design of the act of 1887 is to restrict the right of removal within much narrower limits than before existed. It is

not by any means an enlarging statute, but its policy of restriction is manifested both by the additional barriers which it raises against removals and the increased stringency of the conditions imposed and the procedure prescribed.¹ Indeed, it is held that this intention is so clear that the act must be strictly construed against any one seeking to evade the additional requirements which it puts upon the right of removal.²

Statutes Repealed.—The statutes upon the subject of removal of causes which have been important and controlling, and of general application, are the act of 1789 (Judiciary Act) which was repealed by the act of 1875; the act of 1866, also repealed by that of 1875; the act of 1867 ("prejudice and local influence act"); and that of 1875. In regard to the prejudice and local influence act of 1867, it was held to remain in force and unrepealed by the statute of 1875.³ But it is much more difficult to determine whether it stands untouched by the enactment of 1887, or is superseded by the corresponding provisions of the last-named law. Without going into a discussion of the question here, it may be stated that the weight of authority, so far as yet given, decidedly inclines to the view that the provisions of the earlier act are inconsistent with those of the later and it is therefore superseded.⁴ If we accept this view, it follows that the act of 1887 stands as the only statute now in force on the subject of the removal of causes, except some minor provisions not of general applicability.⁵

What Suits Removable.—It may be stated in the most general way that the same actions

¹ Wolf v. Chisolm, 30 Fed. Rep. 681, where Wallace, J., said "it was the obvious purpose of the act of March 3, 1887, to restrict the right of removal of an action from a State court to the circuit court, as it then existed; the right is restricted as to the parties who can exercise it, as to the classes of actions in which it can be exercised, and as to the time at which an election to exercise the privilege must be made."

² Dwyer v. Peshall, 32 Fed. Rep. 497.

³ Hess v. Reynolds, 118 U. S. 78; Dillon on Removal of Causes, § 24b.

⁴ Whelan v. New York, etc. R. R., 35 Fed. Rep. 849; Southworth v. Reid, 38 Id. 451; Short v. Chicago, etc. R. R., 34 Id. 225. Compare Fisk v. Henarie, 32 Id. 417; S. C., 35 Id. 280; Hills v. Richmond & D. R. R., 33 Id. 81.

⁵ The act of 1887 expressly excepts from its repealing clause §§ 641, 642, 643, and 722, and title 24, of the Revised Statutes, and also the act of March 1, 1875. These relate to "civil rights," their protection and enforcement, and to suits against revenue officers.

are now removable as heretofore, except that the amount in controversy must exceed \$2,000, instead of \$500, that only a non-resident defendant can remove, instead of either party, that the time within which the privilege must be claimed is much restricted, and that the preliminary procedure is, in some cases, much altered. An ambiguity arises in § 2 of the act of 1887, in consequence of the fact that the right of removal is there limited to suits "of which circuit courts are given jurisdiction by the preceding section." The preceding section (§ 1 of the act) enumerates suits of a civil nature, at law or in equity, involving more than \$2,000, arising under the constitution, laws, or treaties of the United States, or in which the United States are plaintiffs, or between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between citizens of a State and foreign States, citizens, or subjects. "It has been thought by some," says Judge Wallace, "that this phrase restricts the right of removal to suits in which the particular circuit court to which a defendant seeks to resort has not only jurisdiction of the subject-matter but also jurisdiction over the person of the defendant. This is not a necessary, and does not seem to be a sensible, construction of the section. That phrase was apparently used to dispense with a recapitulation of the several conditions which determine the jurisdiction of the subject-matter in the first section. The word 'jurisdiction' refers to jurisdiction over the subject-matter, to the general jurisdiction of circuit courts, and means a jurisdiction which would enable any circuit court to entertain and determine the controversy if the parties were before it."⁶

Citizenship as Ground of Removal.—The first section of the act of 1887 provides that "no civil suit shall be brought before either of said courts [circuit or district] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." And a case decided soon after the passage of the law held that, under this section, the circuit court could not in any case take cognizance of a suit brought against a party in a district of which he was not an inhabitant, and that the second section

did not authorize the removal of a suit brought in a State court against a party not an inhabitant of the district; since the right of removal is limited to cases in which the "preceding" (first) section gives jurisdiction to the circuit courts.⁷ But it was plain that the learned judges, in this decision, overlooked the sentence in the act next following the one quoted above, viz: "But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant." And accordingly the decision cited above was disapproved in numerous cases,⁸ and was afterwards expressly overruled by the same court which had rendered it.⁹ It may now be regarded as practically settled that these two clauses taken together mean this: "When the jurisdiction depends upon the existence of a federal question, or upon grounds other than the citizenship of the parties, the defendant must be sued in the district of his domicile; but when the jurisdiction depends upon the citizenship of the parties, the suit may be brought in the district in which either the plaintiff or the defendant resides."¹⁰ It is to be noticed, however, that the right of removal, under this act, is restricted to *non-resident* defendants; and hence a defendant who resides in the State in which suit is brought cannot remove the cause, although the plaintiff be a resident of another State.¹¹

Suits by Assignees.—The first section of the act of 1887 also contains the following clause: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or

⁷ Yuba County v. Pioneer Gold Min. Co., 32 Fed. Rep. 183.

⁸ Fales v. Chicago, etc. R. R., 32 Fed. Rep. 678; Bank of Winona v. Avery, 34 Id. 81; Short v. Chicago, etc. R. R., Id. 225; Tiffany v. Wilce, Id. 290.

⁹ Wilson v. Western Union Tel. Co., 34 Fed. Rep. 561.

¹⁰ St. Louis, V. & T. H. R. R. v. Terre Haute & I. R. R., 33 Fed. Rep. 385; Gresham, J. See Halstead v. Manning, 34 Fed. Rep. 565.

¹¹ Weller v. Pace Tobacco Co., 32 Fed. Rep. 860. See further Cooley v. McArthur, 35 Id. 372; Gavin v. Vance, 33 Id. 84; Rawley v. Southern Pac. R. R., Id. 305; Loomis v. New York Gas Coal Co., Id. 353; Pitkin Co. Min. Co. v. Markell, Id. 386; Swayne v. Boylston Ins. Co., 35 Id. 1; Seddon v. Virginia, etc. Co., 36 Id. 6.

⁶ Vinal v. Continental Co., 34 Fed. Rep. 238.

of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." Under this clause it is understood that the federal court has "jurisdiction of actions by assignees—where the assignor was not competent to sue in that court—only in cases of foreign bills of exchange and negotiable securities payable to bearer and made by a corporation," the latter being "the class of securities made by corporations, railroad companies and the like, which are sold in open market and negotiable by delivery."¹² There was a similar prohibition against suits by assignees, where the assignor could not sue in the federal court, in the act of 1875. But since, from the wording of that act, this clause, relating to the original jurisdiction of the circuit courts, could not be read by implication into the following section, governing the removal of causes, the supreme court held that while an assignee could not bring an action originally in the circuit court unless the assignor could have done so, yet he could bring the action in a State court and thence remove it into the circuit court, if the other prerequisites existed.¹³ Now, however, under the act of 1887, this will no longer be possible, since, as we have seen, the second section of that act restricts the right of removal to cases of which the circuit court could take original cognizance by the first section.

Separable Controversies.—The third clause of the second section of the act of 1887 provides for the removal of a "separable controversy," on the ground of diverse citizenship,¹⁴ using precisely the same language as

appears in the second clause of the second section of the act of 1875, except that it restricts the right of removal to the defendant, instead of leaving it open to either party as before. And it is held that this clause applies to that class of cases only where there are two or more controversies involved in the same suit, one of which is wholly between citizens of different States; and under the act of 1887 the right of removal in the cases last mentioned is limited to one or more of the defendants actually interested in such separable controversy and does not extend to the plaintiffs therein.¹⁵ This decision merely follows the line of cases which established the construction of the corresponding clause in the act of 1875.¹⁶

Prejudice and Local Influence.—The most perplexing and difficult of the questions which have arisen under the act of 1887 are those relating to the proper construction and interpretation of the clauses regulating the removal of causes on the ground of "prejudice or local influence." Whether the Local Prejudice act of 1867 (Rev. Stat. § 639, subd. 3) is or is not repealed by the new statute—whether or not the right now depends upon the amount in controversy—what is the proper practice in effecting the removal—how it shall "be made to appear" to the circuit court that such prejudice or local influence exists—these are all points which stand urgently in need of a finally authoritative decision. The topic offers an inviting field for discussion, but as it has been treated in an able and interesting article from the pen of Judge Maxwell, in a recent number of this JOURNAL,¹⁷ I will content myself here with merely collecting the cases for the reader's benefit.¹⁸ There is, however, one

¹² *Rollins v. Chaffee Co.*, 84 Fed. Rep. 91. It was accordingly held that the court had no jurisdiction of an action by an assignee on a county warrant payable to the order of a person named therein and passing only by indorsement, in the absence of an averment that the assignor was qualified to sue in that court; but it had jurisdiction of an action by the holder on one payable to bearer, such being a negotiable security made by a corporation.

¹³ *Claffin v. Ins. Co.*, 110 U. S. 81; *Dillon on Removal of Causes*, § 53c.

¹⁴ "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

¹⁵ *Western Union Tel. Co. v. Brown*, 32 Fed. Rep. 337. See also *Anderson v. Appleton*, *Id.* 855; *Woodrum v. Clay*, 33 *Id.* 897.

¹⁶ *Barney v. Latham*, 103 U. S. 205; *Corbin v. Van Brunt*, 105 *Id.* 576; *Fraser v. Jennison*, 106 *Id.* 191; *Brooks v. Clark*, 119 *Id.* 502; *Ayres v. Wiswall*, 112 *Id.* 187; *Dillon on Removal of Causes*, § 25a.

¹⁷ 28 Cent. L. J., 109.

¹⁸ The principal decisions on the "local prejudice" clause of the act of 1887 are the following: *Fisk v. Henarie*, 32 Fed. Rep. 417; *Hills v. Richmond & D. R. R.*, 33 *Id.* 81; *Short v. Chicago, etc. R. R.*, 33 *Id.* 114; *S. C.*, 34 *Id.* 225; *County Court v. Balt. & Ohio R. R.*, 35 *Id.* 161; *Fisk v. Henarie*, 35 *Id.* 230; *Malone v. Richmond & D. R. R.*, 35 *Id.* 625; *Whelan v. New York, L. E. & W. R. R.*, 35 *Id.* 849; *Southworth v. Reid*, 36 *Id.* 451; *Shedd v. Fuller*, 36 *Id.* 609.

curious feature of the act of 1887 which deserves notice here, especially as it seems to be a momentary relapse from the policy of restriction and discouragement elsewhere so apparent in the statute. It is this: Whereas the act of 1867 (Rev. Stat. § 639, subd. 3) required that, in cases where there were several defendants, *all* must possess the requisite citizenship and all must join in a petition to remove on the ground of prejudice or local influence, now the act of 1887 extends the right to "any" defendant possessing the requisite citizenship; and the right of removal under this clause is not confined to cases where there is a separable controversy between the plaintiff and the defendant seeking the removal, as such cases are provided for by § 2, clause 3 of that act, and the proviso in clause 4, in relation to remanding as to resident defendants, where the parties can be separated, refers only to a remand after the suit as a whole has been removed by the non-resident defendant.¹⁹ Nor is this provision unconstitutional, although by virtue of the removal the circuit court obtains jurisdiction of the entire cause, including controversies between plaintiff and the resident defendants. It only gives effect to the constitutional provision respecting controversies between citizens of different States, and with that view the single federal ingredient, the citizenship of defendant in another State, is controlling.²⁰

Time of Removal.—Under the act of 1875, § 3, parties desiring to remove the cause were required to file the necessary petition "before or at the term at which said cause could be first tried and before the trial thereof." Now, under the act of 1887, the defendant must take this action "at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."²¹ It will be observed that this is an important restriction of the right, and that the defendant must now ex-

ercise his election, as to removing, at a much earlier stage of the cause than was before required. It is held that "by the true construction of the new act, a defendant must file his petition within the time in which, by the laws of the State or the rules of the State court, he is required to serve or file his *original* answer or plea, not within the time when he is required or may elect to file an amended or supplemental answer."²² So far as regards a petition for removal on the ground of prejudice and local influence, under the new act (which must be filed "at any time before the trial" of the cause), it has been held that the application is made in time if made while the case is pending for trial, although there may have been any number of mistrials or trials in which the verdict was set aside or the jury disagreed.²³

Jurisdictional Amount.—Under the act of 1875, the amount or value in controversy which was necessary to give original jurisdiction of the action to the federal court, or jurisdiction by way of removal from a State court, was \$500 "exclusive of costs," but the courts held that accrued interest might be included in making up that sum.²⁴ The requisite amount is now set at \$2,000 "exclusive of interest and costs." And further, by the statute, the amount in dispute must *exceed* the last named sum; and an action for the recovery of exactly \$2,000, with interest, is not removable.²⁵ But an action may be maintained in the circuit court where the plaintiff's claim exceeds the jurisdictional amount, although it is made up of distinct demands of less value individually than \$2,000, and although the plaintiff may have acquired such demands by assignment.²⁶ In

¹⁹ *Whelan v. New York, L. E. & W. R. R.*, 35 Fed. Rep. 849; *Fisk v. Henarie*, 32 *Id.* 417.

²⁰ *Whelan v. New York, L. E. & W. R. R.*, 35 Fed. Rep. 849.

²¹ Act of March 3, 1887, § 3. Except, however, in the case of a removal on the ground of local prejudice, when the petition may be filed "at any time before the trial" of the action.

²² *Wolf v. Chisolm*, 30 Fed. Rep. 881. See this clause further construed in *Dwyer v. Peshall*, 32 *Id.* 497; *Lookout Mountain R. R. v. Houston*, *Id.* 711; *McKeen v. Ives*, 35 *Id.* 801; *Garvin v. Vance*, 33 *Id.* 84; *Simonson v. Jordan*, 30 *Id.* 721.

²³ *Fisk v. Henarie*, 32 Fed. Rep. 417. This was also the construction which prevailed in regard to the similar language used in the act of 1867. See *Dillon on Removal of Causes*, § 60; *Vannevar v. Bryant*, 21 Wall. 41.

²⁴ *Dillon on Removal of Causes*, § 51.

²⁵ *Lazensky v. Supreme Lodge*, 32 Fed. Rep. 417.

²⁶ *Bernheim v. Birnbaum*, 30 Fed. Rep. 885. In an action for damages to property by a railroad company occupying a street, the *ad damnum* of the writ and declaration was laid at \$1,500, in ignorance of the act of congress of 1887 increasing the minimum limit of the jurisdiction to \$2,000; but, on motion to dismiss,

a recent decision Mr. Justice Harlan observes, "I think it is equally clear that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute exceeds \$2,000 exclusive of interest and costs."²⁷ This point is by no means clear of doubt. But upon a careful consideration of the whole context, it seems very probable that this was the real intention of the legislature, however blindly that purpose may have been expressed.

Appellate Jurisdiction of Supreme Court.—Under the act of 1875, the order of the circuit court dismissing or remanding the cause to the State court was reviewable by the United States Supreme Court on writ of error or appeal, as the case might be. Now, however, by the act of 1887, this clause is repealed and instead thereof it is provided that whenever the circuit court "shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."²⁸ And it is held that the proviso in § 6 of the act of 1887, concerning the jurisdiction over suits which had been removed from a State court prior to the passage of the act, relates only to the jurisdiction of the circuit courts, and does not confer upon the supreme court jurisdiction over an appeal from a judgment remanding a cause to the State court.²⁹

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the plaintiff asked leave to amend by increasing the *ad damnum*: *Held*, that the amendment should be allowed, since it did not satisfactorily appear from the nature of the case and the circumstances shown that the damages were not in fact larger than the original claim. It is only when the court can plainly see that its jurisdiction is being fraudulently invoked that it will deny the amendment or dismiss the cause. *Davis v. Kansas City, S. & M. R. R.*, 32 Fed. Rep. 863.

²⁷ *Malone v. Richmond & D. R. R.*, 35 Fed. Rep. 625.

²⁸ Act of March 3, 1887, § 2, cl. 6. See *Morey v. Lockhart*, 128 U. S. 56.

²⁹ *Wilkinson v. Nebraska*, 123 U. S. 286.

MUTUAL BENEFIT SOCIETY—CERTIFICATE PROVIDING PAYMENT TO MEMBER—ULTRA VIRES—ESTOPPEL.

ROCKHOLD V. CANTON MASONIC MUTUAL BENEFIT ASSOCIATION.

Supreme Court of Illinois, January 26, 1889.

A mutual benefit society, organized under a statute which provides that "associations and societies which are intended to benefit the widow, orphans, heirs and devisees of the deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies," and whose certificate filed with the secretary of State declared the purpose of the organization to be "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members," issued a certificate to a member which contained a clause agreeing to pay him, on his arriving at the age of seventy years, a sum equal to the number of members in his division: *Held* (1), that such certificate is valid as a certificate payable to the member's widow or children, upon his death, but void as a certificate payable to him after arriving at the age of seventy years; and (2) that the society, although it had, from time to time, received assessments from the member, under such certificate which were paid over to persons entitled, under like certificates, was not estopped from invoking the doctrine of *ultra vires*.

This is an agreed case decided in the circuit court in favor of plaintiff in error, Charles W. Rockhold, and judgment rendered for \$1,836. An appeal was taken to the appellate court, where the judgment was reversed, but not remanded. The case is in substance as follows: Defendant in error became incorporated March 30, 1874, under the general incorporation act, as a corporation not for pecuniary profit; the object of the incorporation being, as stated in its application, to give financial benefit to the widows, orphans, heirs, or devisees of deceased members. On April 9, 1874, it adopted a constitution, whereby it was provided that upon the death of a member, or upon his arriving at the age of seventy years, payment should be made of the benefits therein provided for. The membership was divided into divisions, and each member was required to pay a certain amount upon the death of a member of his division, or upon such member's arriving at the age of seventy years. More than a year after the adoption of this constitution, and while all certificates of membership contained this provision, plaintiff in error became a member of said society, received his certificate of membership, and paid his assessments under the same, without any change in the amount, until he had arrived at the age of seventy years. He then made proof of that fact, and demanded payment, which was refused. The contract provides that upon the happening of that event the board of directors shall pay to the member a sum equal to one dollar for every member of the class to which he be-

longed, but the payment is not made to depend upon the collection of the assessment; there being a surplus fund provided which was applicable to that purpose. Some time after plaintiff became a member a controversy sprang up between the society and the auditor of State, as to the legality of that provision of the constitution which provided for the payment of benefits to living members, whereupon the officers of the society ceased issuing certificates in that form; but, with the exception of that clause, all subsequent certificates were identical with that held by plaintiff. Certain efforts were also made to strike out that provision from the constitution and by-laws, but those efforts failed, except that it was transferred from the constitution to the by-laws. Plaintiff always objected to any such change, and insisted upon his rights under the original contract, and when the society refused to pay him this amicable suit was instituted to try his rights.

SCHOLFIELD, J., delivered the opinion of the court:

Two questions are presented by this record: First. Was the clause in the policy in suit, whereby defendant in error assumes to promise to pay to plaintiff in error "one dollar for each member of division A," etc., within the power vested in defendant in error by its charter, and therefore obligatory upon it when the policy was delivered? Second. If it was not within the power vested in defendant in error by its charter, and therefore not obligatory upon it when the policy was delivered, has the promise since become obligatory upon the defendant by subsequent acts of the parties? They will be considered in the order stated.

1. The familiar rule is, a corporation, public or private, possesses and can exercise no other powers than those specifically conferred in its charter, or such as are incidental or necessary to carry into effect the purpose for which the corporation was created. Among other corporations which may be organized under chapter 32, Rev. Stat. 1874, are corporations not for pecuniary profit. The provisions in that respect, pertinent here, are found in sections 29, 30, and 31. Section 29 provides that the certificate that shall be filed by the promoters of the corporation with the secretary of State shall state, among other things, "the particular business and objects for which it is formed." Section 30 provides that, upon filing this certificate, the secretary of State "shall issue a certificate of the organization of the corporation, society, or association, making a part thereof a copy of all papers filed in his office in and about the organization thereof, and duly authenticated under his hand and seal of State. * * * Upon complying with the foregoing conditions, the corporation, society, or association shall be deemed fully organized, and may proceed to business. * * *" Section 31 invests corporations thus created with the usual attributes and powers of corporations, and concludes thus: "Associations and societies which are intended to benefit

the widows, orphans, heirs, and devisees of the deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies." The organization of the defendant in error was in strict pursuance of these statutory provisions. The certificate filed by the promoters with the secretary of State declared the purpose for which the corporation is formed to be "to give financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members." This is the measure of the powers vested in the defendant in error. The certificate of the secretary of State could not, and it does not assume to, extend the corporate powers to any other purpose or object. The policy or certificate in suit, so far as material to be read in this connection, is as follows: "This certificate of membership witnesseth that the Canton Masonic Mutual Benevolent Society, in consideration of the representations made to it in the application for membership, and the sum of five dollars to it in hand paid by Charles W. Rockhold, and the sum of one and 80-100 dollars to be paid by the said Charles W. Rockhold within ten days after due notice has been served upon him of the death of a member of this society, or upon his arriving at seventy years of age, or after he has been a member in good standing for twenty-five consecutive years, each member shall be assessed and shall pay to the secretary of the society a sum according to the class of which he is a member, do promise and agree to and with the said Charles W. Rockhold, his heirs, executors, administrators, and assigns, well and truly to pay, or cause to be paid, to the said Charles W. Rockhold, or to his wife, if living, if not, to his children, or to his legal representatives, the sum of one dollar for each member of division A, within sixty days after due notice and satisfactory evidence that he is a beneficiary member, or of his death."

It is so manifest that the bare statement of the fact must be satisfactory that the promise to pay a sum of money to a person upon his arriving at a given age is not included within or incidental to a promise to pay a sum of money to his widow or his children or his legal representatives upon his death. They are, upon the contrary, as distinct and independent as undertakings can be. The former is a species of life insurance known as "endowment insurance" (Bliss, Ins. § 6, p. 7; Briggs v. McCullough, 36 Cal. 542); while the latter, under the provision of the statute quoted, is not to be deemed insurance. We are therefore of the opinion that the clause in question was *ultra vires* the defendant in error, and therefore was not obligatory upon it when the policy or certificate in suit was issued. State v. Association, 29 Ohio St. 399, and People v. Nelson, 46 N. Y. 477, are directly in point, and conclusive as to this question.

2. This court has held that, while the contract of a corporation remains wholly executory, the

corporation may interpose the plea of *ultra vires* as a defense to a suit for its enforcement; but where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefits of such performance, it cannot invoke the doctrine of *ultra vires* to defeat an action brought against it on such contract. *Bradley v. Ballard*, 55 Ill. 415; *Darst v. Gale*, 83 Ill. 136; *Association v. Blue*, 120 Ill. 121, 11 N. E. Rep. 331. And counsel for plaintiff in error correctly insist that this last quoted rule is conclusive of the present question. But it will be seen the present case is totally different from the cases cited. The question there was between the corporation and a third party, in regard to money received by the corporation which, in legal presumption, tended to increase the property of the corporation. Here the question is between the corporation and one of its constituent members, who is charged with full knowledge of the want of power in the corporation to make the particular contract. The assessments paid by the plaintiff were not paid to the defendant to be retained by it to increase its property, but to be paid out by it to other persons entitled thereto by virtue of beneficiary certificates or policies, and, since there is no evidence to the contrary, it is to be presumed this was done. No action, therefore, will lie by the plaintiff against the defendant to recover this money back. *Murphy v. Bidwell*, 52 Mich. 487, 18 N. E. Rep. 230.

The beneficiary certificate or policy is valid as a certificate or policy payable to the widow or children of the plaintiff upon his death, and void only as a certificate or policy payable to him after being a member in good standing for twenty-five years, or upon arriving at seventy years of age. *Bank v. Harrison*, 57 Mo. 503; *Bank v. Stevens*, 1 Ohio St. 235; *Vanatta v. Bank*, 9 Ohio St. 27; *Insurance Co v. Cadwell*, 3 Wend. 302; *Beach v. Bank*, *Id.* 583.

Whether plaintiff might have rescinded the contract, and recovered back the premium paid, is not important to inquire, since to have done so he must have acted promptly before the rights of third parties intervened. He has never offered to rescind the contract, but, upon the contrary, it is expressly agreed between the parties as follows: "That said plaintiff has since the time of receiving said certificate paid all assessments, Nos. 1 to 51, inclusive — such assessments amounting in the aggregate to \$165.60, the same being all assessments for which said plaintiff was liable by virtue of holding said certificate, and being a member of said society. But in no case has said defendant corporation exercised the power of paying, or collecting benefits to be paid, to living members of said society, and in no case has the plaintiff been required by said society to pay any such assessments; the defendant believing it had no power to make any such assessments." Moreover, on the 23d of November, 1881, a little more than five years before plaintiff in error became

seventy years of age, he was notified by the defendant in error that it had been instructed by the State auditor that it had no authority to insert the clause in question in the policy or certificate; and that, in consequence of such instruction, no more policies or certificates would issue with the clause in question. And it is agreed that of the 1,836 members of class A, to which plaintiff belongs, only 597 members held certificates or policies, at the date when plaintiff in error became seventy years of age, with the clause in question; and that the policies or certificates of the remaining 1,239 members were to be paid only to the widows, orphans, and heirs of deceased members; and so, instead of attempting to rescind the contract, he has acquiesced in and abided by it, with full knowledge of the extent of its validity.

It is true, as contended by plaintiff's counsel, that his rights under the contract could not be changed without his consent. But inasmuch as, at most, his rights were only to have the contract carried out as one to pay at his death, to his widow and orphans, or to rescind that contract, it is plain that his rights have not been changed or altered by any act of the corporation.

The judgment of the appellate court is affirmed.

NOTE.—*Mutual Benefit Society — Member as a Beneficiary.*—The articles of incorporation of a company, and the statutes under which it is formed constitute its charter, subject, of course, to the constitution and general laws of the State. These regulate the rights of its members and are in their nature fundamental contracts in form between the organizers, and, in practical effect, between the company and its members, which neither party is at liberty to violate.¹

This doctrine is familiar and amply sustained,² and applicable alike to all corporations or incorporated companies, whether for pecuniary and charitable purposes.³ The society or corporation and each member thereof, being thus bound and limited by the charter, cannot do what this instrument does not authorize, or what the authority under, or by virtue of which it is granted, does not permit.⁴ Ordinarily, relief associations or mutual benefit societies are not authorized to provide for the payment of stipulated sums of money to persons other than the members of the family or heirs of a deceased member.⁵ But their power in this respect, necessarily depends upon the construction of the laws under which they are organized; still it is usually held that they are limited to conferring the above benefits only, unless the particular society is expressly authorized to operate outside of this limit.

The court in the principal case rightly held that a certificate which promises to pay a sum of money to a member upon his arriving at a given age is not included within or incidental to a promise to pay a sum

¹ *Bergman v. St. Paul Mut., etc.*, 29 Minn. 375; *Morawitz on Corp.* §§ 6, 7, 316, 390.

² *Ang. & Ames on Corp.* §§ 111, 356.

³ *Bacon on Benefit Soc. & Life Ins.* §§ 47-49, 62.

⁴ *Rosenberger v. Washington Mut., etc.*, 87 Pa. St. 207.

⁵ *State v. Central Ohio Mut. Relief Assn.*, 29 Ohio St. 399; *People v. Nelson*, 46 N. Y. 477; *State v. Mut. Prot. Assn.*, 29 Ohio St. 19; *State v. Standard Life Assn.*, 38 Ohio St. 281; *Nat. Mut. Aid Assn. Case*, 43 Ohio St. 1; *Bacon's Benefit Societies and Life Ins.* § 55; *Mut. Benefit Assn. v. Hoyt* (Mich.), 13 Cent. L. J. 112.

of money to his widow or his children or his legal representatives upon his death. That the first undertaking is a species of insurance known as "endowment insurance," while the latter, under the Illinois statute, was not deemed insurance. Therefore, the clause of the certificate, agreeing to pay the member a certain sum upon his attaining a certain age, was *ultra vires*, the power to carry it out not having been conferred by the law under which the defendant company was organized.

May Society Invoke Defense of Ultra Vires?—But it was urged, in the principal case, that the defendant company was estopped from invoking the defense of *ultra vires*. As a general rule, stockholders and organizers of a corporation are estopped as against policy holders, from setting up the illegality or irregularity of the corporate organization.⁶ So, where the question is simply one of authority to contract, arising on a question of the illegality or irregularity of organization, or of powers conferred by the charter, or the laws by virtue of which the charter exists, a party who has had the benefit of the agreement will not be allowed in an action founded upon it to contest its validity. On the other hand, it has been held that either party to the contract may set up the want of power in the corporation to enter into the contract on the ground of public policy—the defense being regarded as that of the public.⁷ Like the rules respecting corporations are equally applicable to mutual benefit societies.⁸ Yet where the contract has been fully executed, as where the member dies, the society cannot invoke the doctrine of *ultra vires*.⁹ This principle is well illustrated in *Bloomington Mutual Life Benefit Assn. v. Blue*.¹⁰ Here the society, organized under the same laws under which the defendant company in the principal case was incorporated, issued a certificate of membership, payable to one Blue, not related in any way to the member, Bailey. The member died and Blue brought suit on the certificate. The plea of *ultra vires* was set up. The court said: "It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed that the contract involved is not absolutely prohibited by statute. All that can properly be claimed is that it was not expressly authorized by statute. The defendant voluntarily issued the policy, it received the premiums, and Bailey fully, so far as appears, performed all that his contract required him to do. So far as he is concerned the contract is an executed one. Now, upon the death of Bailey, when the defendant is called upon to perform its part of the contract can it refuse and defeat a recovery, by claiming that the contract is *ultra vires*. We think the law on this question is well settled, that such a defence cannot be made availing. Where the contract has been fully performed by the party contracting with the corporation, and the corporation has received benefit from such contract, it cannot invoke the doctrine of

ultra vires to defeat an action brought against it on such contract."

Certificate Void in Part Only.—Although a certificate in a mutual benefit society, contains provisions contrary to law, it does not follow that the certificate is wholly void. It may be good as a certificate payable to those whom the law designates may become beneficiaries, and invalid as to other provisions, as in the principal case, a provision to pay to the member a certain sum after he had been a member in good standing for twenty-five years, or upon his arriving at the age of seventy years. And this upon the principal, as stated by Lord Coke, that "where a man doth that which he is authorized to do and more, then it is good for that which is warranted, and void for the rest."

The doctrine has been thus stated by the Supreme Court of Missouri: "If power be given to a corporation to do an act in a particular way * * * and it adopt a different method of performance * * * the act is *ultra vires* and void. If, however, the departure apply, not to the method itself, but purely to extent or quantity in an authorized feature, then the act is good up to the limit of extent or quantity, and void as to the excess. The test inquiry is, whether part of the undertaking may be cut off, and what remains be in fulfillment of the law."¹¹

¹¹ Coke Litt. 288.

¹² *Farmers' & Traders' Bank v. Harrison*, 57 Mo. 508, 511, 512.

RECENT PUBLICATIONS.

BOOKS RECEIVED.

A DICTIONARY OF LAW, consisting of Judicial Definitions and Explanations of Words, Phrases, and Maxims, and an Exposition of the Principles of Law: Comprising a Dictionary and Compendium of American and English Jurisprudence. By Wm. C. Anderson, of Pennsylvania Bar. Chicago: T. H. Flood & Company, Law Publishers. 1889.

PRIVILEGED COMMUNICATIONS AS A BRANCH OF LEGAL EVIDENCE. By John Frelinghuysen Hageman, Counsellor at Law, Princeton, New Jersey. The trade supplied through Honeyman & Co., Publishers of the New Jersey Law Journal, Somerville, N. J. 1889.

LAWYERS' REPORTS, ANNOTATED. BOOK I All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Edmond H. Smith, Reporter. Burdett A. Rich, Editor in chief of the United States and General Digests, and the Several Reports and Judges of each court, Assistants in Selection. (1 L. R. A.) Rochester, N. Y.: The Lawyers' Co-operative Publishing Co. 1888.

THE CODE OF EVIDENCE of the State of New York. Reported complete by the Commissioners, Hon. David Dudley Field, Hon. William Rumsey, appointed pursuant to chapter 124 of the Laws of 1887. February 1889.

THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW. Compiled under the editorial supervision of John Houston Merrill, late editor of the American and English Railroad Cases and the American and English Corporation Cases. Volume VII. Northport, Long Island, N. Y.: Edward Thompson Co., Law Publishers. 1889.

In our last week's issue Volume VIII was mentioned

⁶ *McCarthy v. Lavasche*, 89 Ill. 270; *Association v. Ins. Co.*, 70 Ala. 121; *McDonnell v. Ala. Gold Life Ins. Co. (Ala.)*, 5 South. Rep. 120; *Aultman v. Waddle (Kan.)*, 19 Pac. Rep. 780.

⁷ *Niblack on Mut. Ben. Soc.* § 7. See *Matt v. R. C.*, etc. Society, 70 Iowa, 455; 30 N. W. Rep. 799.

⁸ *Bacon's Ben. Soc. & Life Ins.* § 265.

⁹ *Lamont v. Hotel Men's Mut. Ben. Assn.*, 30 Fed. Rep. 817; *Lamont v. Legion of Honor*, 31 Fed. Rep. 177; *Folmer's Appeal*, 87 Pa. St. 135. See *Rice v. N. E. Assn.*, etc., 5 N. Eng. Rep. 815; *Knights of Honor v. Nairn*, 60 Mich. 44.

¹⁰ 120 Ill. 121.

as having been received, which was an error. It was intended to say Vol. VII.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. IV San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1888.

QUERIES ANSWERED.

QUERY NO. 12.

[To be found in Vol. 28, Cent. L. J. p. 219.]

The daughter C having died before the testator her share under the will lapsed, and at the death of A went to his residuary legatee or his personal representatives. Williams on Executors, 1204; Tiedeman on Real Property, § 883; 4 Kent's Com. 541. If C had survived the testator, upon her death, E would be entitled to the \$2,000, being her only lineal descendant. G would have no right to any part of it. 1 Blackstone Com. 208. Tiedeman on Real Property, § 665. D. P.

QUERY NO. 13.

[To be found in Vol. 28, Cent. L. J., p. 219.]

The husband should have joined in the quitclaim deed; except in States in which the statute empowers a married woman to convey real estate by her own deed, she must be joined by her husband in the conveyance of her separate estate: Martin v. Colbern 88 Mo. 229. R. S. Mo. 1879, § 3293, provides that no conveyance of the real estate of a married woman shall be valid unless her husband joins in the deed.

JETSAM AND FLOTSAM.

A LAWYER having wearied the court by a long and dull argument, the judge suggested the expediency of his bringing it to a close.

"I shall speak as long as I please," was the angry retort.

"You have already spoken longer than you please," answered the judge.

"Do you mean to challenge the jury?" whispered a lawyer to his Irish client. "Yis, be jabbers! If they don't acquit me, I mean to challenge ivery spalpeen of them. I want you to give 'em all a hint of it, too."

AN Indiana colored lawyer, in trying to get his client out of custody, exclaimed: "Da is a law dat's called 'habbis carcass,' an' I'ze gwine to hab de carcass ob dat client ob mine, dea' or alive!"

AT a legal investigation of a liquor seizure, the judge asked an unwilling witness, "What was in the barrel that you had?" The reply was: "Well, your Honor, it was marked 'whisky' on one end of the barrel and 'Pat Duffy' on the other; so I cannot say whether it was whisky or Pat Duffy in the barrel, being as I am on my oath."

"PRAY, my lord," said a gentleman to a late respected and rather whimsical judge, "what is the difference between law and equity courts?" "Very little in the

end," replied his lordship; "they differ only as far as time is concerned. At common law you are done for at once; in equity you are not so easily disposed of. The former is a bullet, which is instantaneously and charmingly effective; the latter is an angler's hook, which plays with its victim before it kills it. The one is prussic acid; the other laudanum."

IN one of the earliest trials before a colored jury in Texas, the twelve gentlemen were told by the judge to retire and "find the verdict." They went into the jury-room, whence the opening and shutting of doors, and other sounds of unusual commotion were heard. At last the jury came back into the court, when the foreman announced: "We hab looked eberywhar, Jedge, for dat verdict—in de drawers and behind de doors; but it ain't nowhar in dat blessed room."

LAW PROFESSOR. What constitutes burglary? Student. There must be a breaking. Professor. Then, if a man enters your door and takes a ten dollar bill from your vest-pocket in the hall, would that be burglary? Student. Yes, sir; because that would break me.

A LONG-WINDED lawyer lately defended a criminal unsuccessfully, and during the trial the judge received the following note: "The prisoner humbly prays that the time occupied by the plea of the counsel for the defense be counted in his sentence."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

ALABAMA	11, 34, 49, 55, 62, 64, 78, 103, 127
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1. ACTION—Misjoinder of Causes—Parties.—A complaint by different firms who severally sold goods at different times to defendants, alleging that the goods were obtained by false representations, shows an improper joinder of parties plaintiff, and is bad on demurrer. — *Gray v. Rothschild, Sherman v. Same*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 847.

2. **ADMIRALTY—Appeal—Weight of Evidence.** — On appeal in admiralty to the circuit court, where there is no decided preponderance of evidence either way, the district judge will be followed. — *Levy v. The Melville*, U. S. C. O. (N. Y.), Dec. 31, 1898; 87 Fed. Rep. 271.

3. **ADMIRALTY—Jurisdiction—Contracts.** — A contract to stow or load a vessel is not a maritime contract, and not enforceable in admiralty. — *Danace v. The Magnolia*, U. S. C. O. (La.), Jan. 22, 1899; 87 Fed. Rep. 867.

4. **ADVERSE POSSESSION — By Lessee — Surrender of Possession.** — To rebut the presumption that a lessee is holding under the lessor, a surrender of possession, or something equivalent thereto, must be made to the lessor, and knowledge of the adverse claim brought home to him. — *Bedlow v. Dry-Dock Co.*, N. Y. Ct. App., Jan. 22, 1899; 19 N. E. Rep. 800.

5. **APPEAL — Allowance after Expiration of Legal Period.** — Held, under facts, that appellant was negligent and did not bring himself under Rev. St. Me. ch. 65, § 25, allowing an appeal, to a person who has failed to take an appeal, without fault on his part within time required by law. — *Chase v. Bates*, S. J. C. Me., Jan. 5, 1899; 16 Atl. Rep. 442.

6. **APPEAL — Want of Assignment of Errors — Affirmance.** — Where there is no bill of exceptions, nor assignment of errors in the record, judgment will be affirmed, under Rev. St. Tex. art. 1087, which provides that all errors not specified by an assignment of errors shall be considered by the supreme court as waived. — *Draper v. Hullen*, S. C. Tex., Nov. 30, 1898; 10 S. W. Rep. 487.

7. **APPEAL—Review — Assignment of Errors.** — An alleged error in the court below upon a question of pleading cannot be reviewed or corrected on an assignment of error as to the exclusion of evidence. — *Bewley v. Graves*, S. C. Oreg., Jan. 15, 1899; 20 Pac. Rep. 523.

8. **APPEAL—Presumptions.** — Where a cause is tried by a court without a jury, if there is sufficient evidence to sustain the judgment it will be presumed the court disregarded incompetent evidence. — *Batson Co. v. Lewis*, S. C. Ariz., Jan. 19, 1899; 20 Pac. Rep. 810.

9. **APPEAL—Review—Objections Waived.** — An objection to a juror for disqualification, if discovered during the trial, must be then brought to the notice of the court, or it will be waived. — *Blanton v. Mayes*, S. C. Tex., Jan. 15, 1899; 10 S. W. Rep. 452.

10. **APPEAL—Review—Weight of Evidence.** — Though the evidence may seem to preponderate in favor of defendant, yet, there being a substantial conflict, a verdict for plaintiff will not be disturbed, on appeal. — *Loudville, etc. E. Co. v. Adams*, Ky. Ct. App., Jan. 7, 1899; 10 S. W. Rep. 425.

11. **APPEARANCE—Effect—Waiver of Defective Service.** — A general appearance by a corporation is a waiver of a defect in the service made by leaving it with one who was no longer its officer or agent. — *Birmingham Flooring Mills v. Wilder*, S. C. Ala., Jan. 11, 1899; 5 South. Rep. 307.

12. **ARSON — Evidence.** — On a trial for arson, evidence was admissible of defendant's drinking liquor subsequent to the fire as bearing upon the question of guilt in tending to show what was his conduct when engaged in matters connected with the fire. — *People v. O'Neil*, N. Y. Ct. App., Jan. 29, 1899; 19 N. E. Rep. 796.

13. **ASSIGNMENT FOR BENEFIT OF CREDITORS — Power of Assignor to Contract.** — Any contract made by the assignor with relation to the property assigned before the settlement of the assignment cannot be enforced. — *Monteth v. Hogg*, S. C. Oreg., Jan. 15, 1899; 20 Pac. Rep. 327.

14. **ASSUMPSIT—Collection of Bill of Exchange—Bona Fide Purchaser.** — Where a bill of exchange, owned by H was sent to T for collection after its dishonor, W acting as the medium of transmission, T could not resist payment of the proceeds to H, on the ground that he had paid them to W, relying on his representation of ownership. — *Frey v. Thompson*, S. C. Nev., Feb. 15, 1899; Pac. Rep. 305.

15. **ATTACHMENT — Sale of Lands in Gross — Validity.** — It is error to direct a sale in gross of attached lands, which are separate tracts, and situated in different counties. The judgment should direct a sale by the tract, and only so much as necessary to satisfy the debt and costs. — *Starks v. Chead*, Ky. Ct. App., Jan. 22, 1899; 10 S. W. Rep. 419.

16. **ATTORNEY AND CLIENT—Attorney's Lien.** — Under Gen. St. Ky. § 15, ch. 5, where the demand arises out of contract and is placed in the hands of an attorney, to be collected by suit or otherwise, the attorney has a lien. — *Rowe v. Fogle*, Ky. Ct. App., Jan. 10, 1899; 10 S. W. Rep. 426.

17. **BAILMENT — For Benefit of Bailor.** — Bailments for the benefit of the bailor *depositum* or *mandatum*, are founded upon express contract, and require the assent of the vallee to make him responsible. — *Heatherington v. Richter*, W. Va. Ct. App., Dec. 14, 1898; 8 S. E. Rep. 609.

18. **BANKRUPTCY—Sums Against Assignee—Limitation.** — Rev. St. U. S. § 5057, providing that no suit shall be maintainable between an assignee in bankruptcy and a person claiming an adverse interest, unless brought within two years from the accrual of such cause of action, applies to a petition by the grantee of such an assignee to establish title under the "Burnt-Record Act," (Rev. St. Ill. 1874, ch. 118.) — *Gage v. Du Fay*, S. C. Ill., Jan. 25, 1899; 19 N. E. Rep. 878.

19. **BANKS AND BANKING—Collections — Acceptance of Check.** — The defendant bank sent a check, drawn by W, and deposited with it by plaintiff for collection, to the bank upon which it was drawn, and accepted a cashier's check for it, but the cashier's check was not paid, owing to the subsequent insolvency of the drawee: Held, that the defendant was liable to the plaintiff for the amount of the check. — *Fifth Nat. Bank v. Ashworth*, S. O. Penn., Jan. 7, 1899; 16 Atl. Rep. 596.

20. **BASTARDY—Fine— Payable to Officers of Court.** — Code Ga. § 4564, providing that the putative father of a bastard child, failing to pay for its support, should be indicted for misdemeanor, is amended by act March 20, 1898, making the penalty for the offense a fine of not more than \$1,000, imprisonment, and work in a chain-gang. — *Hardeman v. McManus*, S. C. Ga., Feb. 11, 1899; 9 S. E. Rep. 733.

21. **BENEVOLENT SOCIETIES — Rights of Subordinate Lodge.** — Where a subordinate lodge is incorporated under the State laws, its suspension by the grand lodge has no effect on its legal existence. — *Merrill Lodge No. 299, I. O. G. T. v. Ellsworth*, S. C. Cal., Jan. 23, 1899; 20 Pac. Rep. 399.

22. **BRIDGES—Assignment by State Board — Res Adjudicata.** — Though the State board is empowered to assess toll-bridges, its determination that a bridge is a toll-bridge is not conclusive. — *State v. Tillery v. H. & St. J. R. Co.*, S. C. Ms., Feb. 4, 1899; 10 S. W. Rep. 436.

23. **CHATTEL MORTGAGE — Equitable Assignment Pro Tanto.** — Defendant, a chattel mortgagee, sold one of the secured notes to complainant, and agreed to assign the mortgage to him *pro tanto*: Held, that complainant, by payment of the note, acquired to that extent an equitable interest in the mortgage, and was entitled in equity to recover of defendant the amount of such payment. — *Hobway v. Gilman*, S. J. O. Me., Jan. 8, 1899; 16 Atl. Rep. 543.

24. **CHATTEL MORTGAGES—Recording—Purchaser with Notice.** — One who purchases the mortgaged property with knowledge of the mortgage, cannot set up as against the mortgagee the fact that the mortgage is not made and recorded in accordance with the laws of Washington territory. — *Darland v. Lovins*, S. C. W. T., Jan. 29, 1899; 20 Pac. Rep. 309.

25. **COMPROMISE—Actions on Settlement.** — A party can maintain an action for the recovery of an unpaid balance of a sum agreed upon in settlement of a large sum. — *Leichsenring v. Allen*, S. C. Colo., Jan. 18, 1899; 20 Pac. Rep. 332.

26. **CONFLICT OF LAWS—Sale of Real Estate — Lex Rei Sitæ.** — The rights and obligations of the parties to a

sale executed in one State of real estate situated in another must be determined under the laws of the State in which the property is situated. — *Succession of Cassidy*, S. C. La., Jan. 9, 1899; 5 South. Rep. 292.

27. CONTINUANCE—Absence of Witness—Affidavit. — An affidavit for a continuance must show that issues will arise upon the trial upon which the testimony of the absent witness will be material. — *Hewes v. Andrews*, S. C. Colo., Jan. 18, 1899; 20 Pac. Rep. 338.

28. CONTRACTS—Construction—Sale. — *Held*, that the contract in question constituted a sale of all the articles mentioned therein and not a lease. — *Montooth v. Gamble*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 694.

29. CONTRACT—Option—Acceptance. — An offer to sell land at a stated price and within a certain time if accepted within the certain time is binding and can be enforced. — *Weaver v. Burr*, W. Va., Ct. App., Dec. 15, 1898; 8 S. E. Rep. 743.

30. COSTS—Security—Person—Foreign Republic. — The republic of Honduras is a "person," within the meaning of Code Civil Proc. N. Y. § 3268, providing that a plaintiff who is "a person residing without the State," or "a foreign corporation," may be required to give security for costs. — *Republic of Honduras v. Soto*, N. Y. Ct. App., Jan. 29, 1899; 19 N. E. Rep. 845.

31. CRIMINAL LAW—Continuance. — Where defendant and another were separately indicted for the same offense, defendant is not entitled to a continuance on an application that such other defendant be first tried under Code Crim. Proc. Tex. art. 669a. — *Standard v. State*, Tex. Ct. App., Nov. 21, 1898; 10 S. W. Rep. 442.

32. CRIMINAL LAW—Evidence—Opinion as to Guilt. — Testimony by a witness that when he first heard of the murder he said that defendant committed it is inadmissible. — *Woolfolk v. State*, S. C. Ga., Feb. 11, 1899; 8 S. E. Rep. 794.

33. CRIMINAL LAW—Evidence—Character. — Testimony that a witness had learned since defendant's arrest that his reputation before arrest was bad is inadmissible. — *People v. Fong Ching*, S. C. Cal., Jan. 28, 1899; 20 Pac. Rep. 886.

34. CRIMINAL LAW—Evidence—Dying Declarations. — A charge of the court that dying declarations were to be considered by the jury "just as though deceased had been sworn and put on the stand and testified as a witness to the words used in his dying declaration" was not erroneous. — *Kennedy v. State*, S. C. Ala., Dec. 18, 1898; 5 South. Rep. 806.

35. CRIMINAL LAW—Homicide—Evidence of Accomplishment. — *Held*, under facts, that there was sufficient evidence that witness was an accomplice in the crime charged, to make a refusal to charge upon the weight of accommodation, testimony error. — *Hines v. State*, Tex. Ct. App., Jan. 26, 1899; 10 S. W. Rep. 448.

36. CRIMINAL LAW—Instructions—Objections Waived. — Where a charge giving the abstract law of manslaughter is not objected to at the time, a conviction will not be set aside unless it appears or seems probable that defendant was injured. — *Miller v. State*, Tex. Ct. App., Jan. 19, 1899; 10 S. W. Rep. 445.

37. CRIMINAL LAW—New Trial—Newly-discovered Evidence. — A new trial will not be granted on account of newly-discovered evidence that the deceased was seen to raise a dagger to strike the defendant at the time of the homicide, where the defendant and another witness had testified to the same effect. — *People v. O'Brien*, S. C. Cal., Dec. 29, 1898; 20 Pac. Rep. 859.

38. CRIMINAL LAW—Trial—Instructions. — It is not error to charge that the jury are presumed to know the character of the witnesses, having been drawn from the vicinage for that reason. — *State v. Jacob*, S. C. S. Car., Feb. 12, 1899; 8 S. E. Rep. 696.

39. DAMAGES—Breach of Contract—Liquidated Damages. — Defendants agreed to pay, as liquidated damages, "five dollars per day for each day after the 29th day of June that this contract remains unfulfilled." *Held*, that plaintiffs had no right of action for any dam-

ages resulting from delay, beyond the stipulated five dollars per day. — *Welch v. McDonald*, Va. Ct. App., Nov. 22, 1898; 8 S. E. Rep. 711.

40. DEEDS—Construction—Nature of Estate Conveyed. — Under a deed of land to a married woman for her natural life, and after her death to her children or their representatives, and in case of her death or leaving no children or representatives of children, to her husband in fee, the husband takes a contingent remainder. — *Morris v. Proper*, S. C. Ga., Jan. 21, 1899; 8 S. E. Rep. 625.

41. DEPOSITIONS—Exceptions to Admission. — An exception to the admission of a deposition *de bene esse*, because it does not appear to have been taken in conformity with all the regulations of the act to provide for the taking of such depositions, approved Dec. 23, 1883, is too general. — *Bulwinkle v. Cramer*, S. C. S. Car., Feb. 14, 1899; 8 S. E. Rep. 639.

42. DESCENT AND DISTRIBUTION—Adjudication of Heirship—Continuance. — The fact that a petition has been filed, and citation issued thereon under Code Civil Proc. Cal. § 1664, is no ground for a continuance of proceedings by the executor of the estate for final distribution, begun on the day citation issued on said petition. — *In re Oxarari's Estate*, S. C. Cal., Jan. 12, 1899; 20 Pac. Rep. 867.

43. DRAINAGE—Assessment. — Under § 12, of Ind. drainage act of April 6, 1885: *Held*, that for repairs made upon a ditch under the act of 1883, a township trustee could make an assessment according to the provisions of such act after the passage of the act of 1885. — *Geiger v. Bradley*, S. C. Ind., Jan. 25, 1899; 19 N. E. Rep. 760.

44. DRAINAGE—Objections to Assessment—Waiver. — Under the Illinois drainage act of 1885, the objection that the commissioners failed to classify certain lands, and to indicate whether they were or were not benefited, is waived unless made before the commissioners. It cannot be raised on an application for judgment on an assessment. — *People ex rel. Barber v. Chapman*, S. C. Ill., Jan. 25, 1899; 19 N. E. Rep. 872.

45. EJECTMENT—Pleading—Cause of Action. — A complaint alleging that plaintiffs are the owners of, and entitled to the immediate possession of, a certain lot of land, described by metes and bounds, and that defendant has erected buildings which project several inches over and upon plaintiff's lot, states a good cause of action in ejectment under Code Civil Proc. N. Y. § 3343, subd. 20. — *Leprell v. Kleinschmidt*, N. Y. Ct. App., Feb. 8, 1899; 19 N. E. Rep. 812.

46. EMINENT DOMAIN—Payment—Restoration of Property. — Construction of Code Civil Proc. Cal. § 1253, as to restoration of property taken for the purpose of a reservoir. — *San Diego Co. v. Neale*, S. C. Cal. Dec. 31, 1898; 20 Pac. Rep. 390.

47. EQUITY—Alteration of Instruments. — Equity will not lend assistance in reforming an instrument to one who altered it for a fraudulent purpose. — *Respass v. Jones*, S. C. N. Car., Feb. 18, 1899; 8 S. E. Rep. 770.

48. EQUITY—Failure to Plead—Submission to Jurisdiction. — In equity, a defense of another action pending is never available unless pleaded, and the silence of the answer amounts to a submission of the issues to the judgment of the court. — *Hollister v. Stenart*, N. Y. Ct. App., Jan. 15, 1899; 19 N. E. Rep. 782.

49. EQUITY—Hearing on Bill and Unsworn Answer. — Where a hearing is on bill and unsworn answer the complainant is not entitled to relief unless so entitled on the admitted allegations of the bill. — *Reese v. Barker*, S. C. Ala., Jan. 17, 1899; 5 South. Rep. 305.

50. EQUITY—Jurisdiction—Specific Performance. — Equity will not enforce a contract for personal acts involving labor, skill and judgment for the breach of which the remedy at law is adequate. — *Campbell v. Rust*, Va. Ct. App., Feb. 9, 1899; 8 S. E. Rep. 664.

51. EQUITY—Rescission. — Where a deed conveying an undivided interest in land is executed in consideration of the grantees' oral promises and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantees does not con-

stitute a failure of consideration so as to entitle the grantor to rescind under Civil Code Cal. § 1689. — *Lawrence v. Gayetty*, S. O. Cal., Jan. 15, 1889; 20 Pac. Rep. 382.

52. EVIDENCE—Admissibility — Maps for Comparison. — In an action for price of a book which was to contain "a map of the city, showing parks, cemeteries," etc., a map of the city which a city engineer had testified was an accurate one, is admissible to determine whether the map in the book is accurate. — *Munsell v. Baldwin*, S. O. E. Conn., Oct. 12, 1888; 16 Atl. Rep. 546.

53. EXECUTORS AND ADMINISTRATORS—Assets. — In an action by an administrator to recover assets of the decedent, the evidence showed that the property in controversy did not belong to the decedent. — *Palmer v. Kingsford*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 815.

54. EXECUTORS AND ADMINISTRATORS — Sale of Decedent's Lands — Consent of Guardian. — Under Ind. statutes a sale of the land of a decedent of whom his insane widow is an heir, under decree of court, after the written consent of her guardian, is valid. — *Smock v. Reichwine*, S. O. Ind., Jan. 30, 1889; 19 N. E. Rep. 776.

55. EXECUTION—Validity—Issuance. — An execution issued on a judgment after the lapse of ten years from the date of the last execution is voidable only on proceedings by the execution defendant or third persons who have acquired rights prior to its issue. — *Leonard v. Brewer*, S. C. Ala., Jan. 11, 1889; 5 South. Rep. 306.

56. FISHERIES—Oyster beds—Adverse Possession. — When an oyster-bed has been designated under Gen. St. Conn. § 2348, to an individual in violation of § 2370, prohibiting the designation of oyster beds, the grantee can gain no rights in it by adverse possession, the title being in the State. — *Town of Clinton v. Bacon*, S. O. Err. Conn., June 26, 1888; 16 Atl. Rep. 648.

57. FRAUDULENT CONVEYANCE. — Defendant being indebted to the complainant conveyed certain property to his wife and after the conveyance he continued the business in his own name holding himself out as the owner. Held, that the conveyance was fraudulent as to complainant. — *First Nat. Bk. v. Loper*, N. J. Ct. Chan., Feb. 7, 1889; 15 Atl. Rep. 538.

58. FRAUDULENT CONVEYANCE—Action to Set Aside — Evidence. — In an action to set aside deed on the ground that the debtor was the real purchaser, his wife, in whose name the title was taken, cannot testify to statements of the husband to her of the reasons for so taking the title. — *Watson v. Young*, S. C. S. Car., Feb. 18, 1889; 8 S. E. Rep. 706.

59. FRAUDULENT CONVEYANCE—Consideration—Promissory Note. — A negotiable promissory note is a valuable consideration for a deed, especially where the insolvency of the maker is not shown. — *Weaver v. Nugent*, S. O. Tex., Dec. 11, 1888; 10 S. W. Rep. 453.

60. GIFTS—Donatio Causa Mortis—Delivery. — A gift of certain bonds by one a short time before his death will not be sustained, where they were not delivered, nor the means of obtaining them. — *Yancey v. Field*, Va. Ct. App., Feb. 14, 1889; 8 S. E. Rep. 721.

61. GIFTS—Inter Vivos—Evidence. — A son produced a check signed by his mother dated some months before her death, at a time when she was seventy-six years old and her brain was partly paralyzed. Held, that burden was on him to establish the gift. — *Parker's Admr. v. Parker's Admr.*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 537.

62. HUSBAND AND WIFE—Conveyances Between. — Before act Ala. Feb. 28, 1887, a conveyance by a husband directly to his wife was absolutely void at law. — *Maxwell v. Grace*, S. O. Ala., Jan. 15, 1889; 5 South. Rep. 320.

63. HUSBAND AND WIFE—Wife's Separate Estate. — A conveyance by a married woman of her separate estate is void even though her trustee did not join therein. — *Alexander v. Davis*, S. C. N. Car., Feb. 18, 1889; 8 S. E. Rep. 768.

64. HUSBAND AND WIFE—Wife's Separate Property — Clothing. — Ordinary and necessary clothing provided for a wife by the husband, in discharge of his

duty growing out of the marital relation, does not constitute a gift from the husband, within the meaning of Code Ala. § 2351, defining property which may become the wife's separate estate, and including property acquired by "gift from a contract with the husband." — *Richardson v. Louisville & N. R. Co.*, S. O. Ala., Jan. 14, 1889; 5 South. Rep. 308.

65. INDICTMENT—Return — Power of Solicitor General. — The solicitor general has no legal authority to return into court a special presentment or indictment found by the grand jury. — *Bowen v. State*, S. O. Ga., Feb. 11, 1889; 8 S. E. Rep. 736.

66. INSOLVENCY — Examination. — It is not within the discretion of the court to fix the time for the examination of a debtor arrested on execution. — *First Nat. Bk. v. Gogin*, S. J. O. Mass., Feb. 4, 1889; 19 N. E. Rep. 780.

67. INTOXICATING LIQUORS — Illegal Sales — Evidence. — Evidence in the case held sufficient to warrant a conviction for illegally maintaining a public bar. — *Commonwealth v. Powderly*, S. J. C. Mass., Feb. 8, 1889; 19 N. E. Rep. 781.

68. JUDGMENT—Collateral Attack—Insanity of Defendant. — A decree against an insane person is valid when collaterally attacked when the complainant brings his suit in ignorance of the defendant's insanity. — *Maloney v. Dewey*, S. O. Ill., Jan. 25, 1889; 19 N. E. Rep. 848.

69. JUDGMENT—Res Adjudicata. — If the record of a former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter once for all. — *Solly v. Clayton*, S. C. Colo., Dec. 3, 1888; 20 Pac. Rep. 351.

70. JUDICIAL SALES—Report of Commissioner. — A commissioner's report which does not show for what price the land sold, or that he offered to sell less than the whole tract to pay the debts for which it was liable, will be set aside. — *Haney v. McClure*, Ky. Ct. App., Jan. 17, 1889; 10 S. W. Rep. 427.

71. JUSTICE OF THE PEACE—Waiver. — Under Gen. St. Conn. § 676, authorizing parties by consent in writing to waive a disqualification of a justice of the peace, such waiver must be in writing, and is not effected by proceeding to trial without objection, even with knowledge of the disqualification. — *Keeler v. Stead*, S. C. Err. Conn., June 2, 1888; 16 Atl. Rep. 552.

72. LIBEL AND SLANDER — Charge of Attempt to Murder—Evidence — Evidence of pecuniary loss is unnecessary to a right of action for a libelous charge of attempt to commit murder. — *Republican Pub. Co. v. Miner*, S. O. Colo., Dec. 4, 1888; 20 Pac. Rep. 345.

73. LIMITATION OF ACTIONS — Running of Statute. — The statute of limitation applies to the presentation of claim against a decedent's estate to the orphans' court as well as to an action in a court of law. — *Appeal of Keyser*, S. O. Penn., Jan. 23, 1889; 16 Atl. Rep. 577.

74. MALICIOUS PROSECUTION—Want of Probable Cause — Evidence. — In an action for malicious prosecution, plaintiff's discharge by the criminal court is not evidence of want of probable cause. — *Thompson v. Rubber*, S. O. Err. Conn., Oct. 9, 1888; 16 Atl. Rep. 554.

75. MASTER AND SERVANT—Injury to Fireman — Negligence of Railroad Company—Evidence. — In an action against a railroad company for injuries to a fireman by the derailment of a locomotive, caused by an obstruction on the track, testimony of the engineer as to the necessity for track-walkers is inadmissible. — *Denver S. P. & P. R. Co. v. Wilson*, S. C. Colo., Dec. 3, 1888; 20 Pac. Rep. 340.

76. MINES AND MINING—Patents—Dismissal of Adverse Claim. — One whose adverse claim has been dismissed cannot contend that the patent is void because the receiver of the public land-office accepted the purchase price and gave his receipt while the suit was pending. — *Deno v. Griffin*, S. O. Nev., Feb. 8, 1889; 20 Pac. Rep. 368.

77. MORTGAGES—Foreclosure — Action to Set Aside. — A judgment in foreclosure, and the proceedings

thereunder, will not be set aside as void, where the mortgagor stood by and saw the property sold, and for nearly four years saw the property greatly increasing in value, and being sold from time to time to purchasers in good faith. — *Bryan v. Kales*, S. C. Ariz., Feb. 15, 1899; 20 Pac. Rep. 311.

78. MORTGAGES—Foreclosure—Parties. — In a suit to foreclose a mortgage, the trustee in whom is the legal title is an indispensable party, and the objection that he has been omitted is available at any time and in any form. — *Hambrick v. Russell*, S. C. Ala., Jan. 9, 1899; 5 South. Rep. 298.

79. MORTGAGES—Foreclosure—Redemption. — Under Mo. acts 1845, and 1855, declaring the personal representatives of a mortgagor after his death shall be defendants in a foreclosure, the grantee of a devise of the mortgagor is not a necessary party to a foreclosure suit after the mortgagor's death and is not entitled to redeem. — *Tierney v. Spivey*, S. C. Mo., Feb. 4, 1899; 10 S. W. Rep. 433.

80. MORTGAGES — Waiver of Homestead — Void for Usury. — A waiver by one executing a mortgage of the right to homestead and exemption, is of no effect if usury enters into the transaction. — *Small v. Hicks*, S. C. Ga., Jan. 23, 1899; 8 S. E. Rep. 623.

81. MUNICIPAL CORPORATION — Police Department — Dismissal of Officers. — The city council of Denver adopted a resolution honorably discharging eighteen policemen. At the same session a resolution was adopted to add to the police force twenty patrolmen: Held, that one who was discharged in pursuance of the first resolution, and was not subsequently employed under the resolution increasing the force, could not complain. — *Hudson v. City of Denver*, S. C. Colo., Jan. 18, 1899; 20 Pac. Rep. 329.

82. MUNICIPAL CORPORATIONS — Taxation — Natural Gas Pipes. — Gas pipes owned by a corporation to supply natural gas to consumers in Pittsburgh, as such are not taxable by the city either as land or capital stock, under act Pa. May 5, 1841. — *Appeal of Pittsburgh*, S. C. Penn., Jan. 7, 1899; 16 Atl. Rep. 621.

83. NEGLIGENCE—Tug Landing Tow. — Held, under facts that the tug was negligent in landing the canal boat and that the latter was not so weak as to require notice of that fact to the tug. — *O'Neil v. The North*, U. S. D. C. (N. Y.), Dec. 21, 1898; 37 Fed. Rep. 270.

84. NEW TRIAL—Discretion of Trial Court — Power of Supreme Court. — Colorado act of 1885, relating to new trials, does not deprive the supreme court of the power to reverse when the ground for the motion does not in fact exist, or is not a legal ground, or is the result of the applicant's own negligence. — *Chafford v. Denver S. P. & P. R. Co.*, S. C. Colo., Dec. 27, 1898; 20 Pac. Rep. 533.

85. PARTNERSHIP — Action Against Summons. — A partnership cannot be sued as such. The names of its members must be set out in the complaint and summons. — *Dunham v. Schindler*, S. C. Oreg., Jan. 15, 1899; 20 Pac. Rep. 526.

86. PARTNERSHIP — Action on Sealed Note—Ratification. — In an action against one member of a firm on a sealed note executed by his partner in the firm name, a charge that it was necessary that he should know its character before ratification could be made, is proper. — *Hull v. Young*, S. C. S. Car., Feb. 9, 1899; 8 S. E. Rep. 685.

87. PARTNERSHIP—Share in Profits. — A person may be liable as partner though by the articles of partnership he is to receive no share of the profits. — *Reab v. Pool*, S. U. S. Car., Feb. 15, 1899; 8 S. E. Rep. 703.

88. PATENTS—License. — A license which authorizes the making of the patented article for a fixed period is a vested right and is not revocable. — *Scott v. Robertson*, S. C. Ill., Jan. 25, 1899; 19 N. E. Rep. 861.

89. PAYMENT—Presumption—Laches. — Held, under facts, that it would be inequitable to enforce a twenty-two year old judgment lien against the estate of the judgment debtor. — *Scott's Adm'r. v. Isaacs*, Va. Ct. App., Jan. 31, 1899; 8 S. E. Rep. 678.

90. PHYSICIANS AND SURGEONS — Suitable Graduate — The words "suitable graduate in medicine," as used in act Cal. § 25, subd. 5, mean a person legally licensed to practice medicine under the laws of the State, and are not confined to college graduates. — *People ex rel. v. Eichelroth*, S. C. Cal., Jan. 19, 1899; 20 Pac. Rep. 361.

91. PLEADING—Ambiguity — Bar of Limitations. — A complaint is not demurrable for ambiguity and uncertainty because it might appear on the proofs that some part of the damages claimed was barred by limitation. — *Doe v. Sanger*, S. C. Cal., Jan. 25, 1899; 20 Pac. Rep. 366.

92. PLEADING—Negligence—Amendment. — If plaintiff sees that the evidence does not prove the charge of negligence made in his petition he may amend to meet the evidence. — *Hill v. Callahan*, S. C. Ga., Feb. 11, 1899; 8 S. E. Rep. 730.

93. PRACTICE IN CIVIL CASES—Rule to Tax Costs—Interlocutory Order. — A rule to tax costs, and judgment thereon, are interlocutory, and form parts of the original proceedings. — *State ex rel. Cunningham v. Lazarus*, S. C. La., May 23, 1898; 5 South. Rep. 239.

94. PRINCIPAL AND SURETY — Liability of Surety — Estoppel. — The sureties in an official bond are estopped from denying the appointment of the principal to the office, where such appointment is recited in the bond, and due execution of the bond is admitted. — *People v. Huson*, S. C. Cal., Jan. 25, 1899; 20 Pac. Rep. 369.

95. PUBLIC LANDS—Death of Patentee—Issue of Patent. — A patent issued in the name of a deceased person, on a survey made after his death, is valid, under Gen. St. Ky. art. 1, ch. 50, providing that, when a patent is issued to a person who is dead at the time, the heirs of the patentee shall hold as if the patent had been issued to them. — *Cox v. Previtt*, Ky. Ct. App., Jan. 19, 1899; 10 S. W. Rep. 432.

96. PUBLIC LANDS — Rights of Pre-emptor to Question Patent. — A pre-emptor is so far in privity with the United States, under whose laws he has settled on the land, that he may attack a patent of said land. — *Foss v. Hinkell*, S. C. Cal., Jan. 23, 1899; 20 Pac. Rep. 363.

97. PUBLIC LANDS—Title From State — Filing Oaveat — Code Civil Proc. Ky. § 473, providing that, if any person obtains a survey of land to which another claims a better right, such other may enter a caveat to prevent the issuing of a grant until the right be determined, applies only to vacant lands. — *Alexander v. Noland*, Ky. Ct. App., Jan. 17, 1899; 10 S. W. Rep. 423.

98. RAILROAD COMPANIES—Failure to Stop at Station—Measure of Damages. — An instruction that the jury should "award damages in their discretion, not exceeding in all five thousand dollars," etc., is proper as an instruction on punitive damages. — *L. & N. E. Co. v. Ballard*, Ky. Ct. App., Jan. 22, 1899; 10 S. W. Rep. 429.

99. RAILROAD COMPANIES—Injury to Person on Track. — The plaintiff's decedent was killed on the track at a considerable distance from a crossing in the country: Held, that company was not liable as it had exclusive use of track where killing occurred. — *John's Adm'r. v. Louisville R. R. Co.*, Ky. Ct. App., Jan. 26, 1899; 10 S. W. Rep. 417.

100. RAILWAY COMPANIES—Negligence. — It is negligence to attempt to board a train moving at the rate of six miles an hour and one cannot recover for injuries so received. — *Hunter v. C. & S. F. R. Co.*, N. Y. Ct. App., Feb. 2, 1899; 19 N. E. Rep. 820.

101. RECEIVERS — Liability for Taxes. — A receiver of property of a decedant's estate, which is in litigation, may be required to list and pay the taxes upon it. — *Spalding v. Commonwealth*, Ky. Ct. App., Jan. 17, 1899; 10 S. W. Rep. 420.

102. REFERENCE—In Action at Law. — When counterclaims to an action to recover on promissory notes are stricken out, leaving the action only an ordinary one at law, no reference to a master should be made. — *Lastner v. Sullivan*, S. C. S. Car., Feb. 8, 1899; 8 S. E. Rep. 689.

103. SET-OFF AND COUNTER-CLAIM — Order Accepted

but not Paid. — Where an order given for a debt and accepted by the drawee is not paid, and is surrendered to the maker, who gives his note in lieu thereof, the drawee cannot set-off such order in an action against him by the maker. — *Taylor Mfg. Co. v. Key*, 8 C. Ala., Jan. 10, 1889; 5 South. Rep. 308.

104. SPECIFIC PERFORMANCE—Contract—Construction. — In an action for the specific performance of a promise to convey: *Held*, that the plaintiff had substantially performed his part of the contract and the performance would be decreed. — *Gray v. Suspension Co.*, 8 C. Ill., Jan. 25, 1889; 19 N. E. Rep. 874.

105. STATUTES—Change of Degree of Offense— Punishment. — Where the punishment for an offense is not altered in kind, but the degree is diminished, the punishment prescribed by the new act must be imposed on conviction for an offense committed before its enactment. — *State v. Cooler*, 8 C. S. Car., Feb. 8, 1889; 8 S. E. Rep. 692.

106. STREET RAILROADS—Change of Motor Power. — Plaintiff was incorporated under Laws N. Y. 1850, ch. 140, § 28, subd. 7: *Held*, that such statute did not give plaintiff the right to change its motive power to a subterranean cable. — *People v. Third Ave. R. Co.*, N. Y. Ct. App., Feb. 8, 1889; 19 N. E. Rep. 831.

107. TAXATION—Debts Owned by Non residents. — From a treasurer's return not showing that any of the evidence of debt are held by non-residents, it will be implied that they are all held by residents. — *Commonwealth v. Chester*, S. O. Penn., Feb. 4, 1889; 16 Atl. Rep. 561.

108. TAXATION—Legislative Powers. — The legislature has power to fix the face value of corporate obligations, as their value for taxing purposes. — *Commonwealth v. Del. Canal Co.*, S. O. Penn., Feb. 4, 1889; 16 Atl. Rep. 584.

109. TAXATION—Levy by County Court—Validity. — Under Rev. St. Mo. 1879, §§ 6798, 6801, authorizing the county court to levy certain taxes without an order of the circuit court, and prohibiting it from levying any other tax except by such order, a tax not of the former class, levied without such order, is void. — *State ex rel. Orleans v. Wabash, St. L. & P. Ry. Co.*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 434.

110. TAXATION — Private Corporations — Building on Public Square. — *Held*, under facts, that the interest of plaintiff in a building was the property of a private corporation and liable to county taxation under act Pa. April 15, 1834, requiring all houses, etc., to be assessed. — *Allegheny Co. v. Market*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 619.

111. TOWNS — Liability of Township Trustee — Action Against. — When a township trustee, without authority, has laid out a road and the county commissioner has voted to said trustee the whole amount expended, to be applied by him to reimburse said road fund, and he has actually made that application, the township cannot sue on his bond for the cost of said bridge, on the ground that the bridge is so badly constructed as to be useless. — *State ex rel. Marks v. Vogel*, S. C. Ind., Jan. 30, 1889; 19 N. E. Rep. 773.

112. TRADE-MARKS — "Iron Bitters." — The words "Iron Bitters" being indicative of the composition of the article so called, cannot be claimed as a trade mark. — *Brown Chemical Co. v. Stearns*, U. S. C. C. (Mich.), Jan. 7, 1889; 37 Fed. Rep. 360.

113. TRESPASS—Malicious Trespass—Statutes. — Act March 30, 1880, Penn., defining malicious trespass, giving justices of the peace final jurisdiction therein is repealed by act June 8, 1881, in so far as it differs from latter act. — *Hoffman v. Commonwealth*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 609.

114. TRESPASS—Pleading—Estoppel. — Defense of estoppel may be raised in trespass to try title under a plea of not guilty. — *Dooley v. Montgomery*, S. C. Tex., Jan. 15, 1889; 10 S. W. Rep. 451.

115. TRUSTS — Enforcement — Jurisdiction in Equity. — Under Const. Ill. art. 6, § 12, providing that "circuit courts shall have original jurisdiction of all cases in law or equity," the legislature cannot take away juris-

diction of a case involving the enforcement of a trust. — *Howell v. Moores*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 863.

116. TRUST — Evidence to Establish — Conveyance to Son. — Where a father purchases land, and has it conveyed to his son, the presumption is that the purchase was intended to be an advancement or gift to the son, and no trust results in favor of the father. — *McClintock v. Loiseau*, W. Va. Ct. App., Dec. 8, 1888; 8 S. E. Rep. 612.

117. TRUSTS — Sale of Minor's Interest. — A trust-estate in which minors are the beneficiaries cannot be legally sold on the petition of the trustees, unless the minors are made parties by a representative properly appointed. — *East Rome Town Co. v. Coltham*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rep. 737.

118. TRUSTS—Witness—Competency. — S conveyed land to a trustee, to the use of S for life, then to his wife for life, remainder to their children living at the death of the wife in fee. In a suit by two of the children to establish a trust in the land itself, after the mother's death, plaintiffs are not competent to testify to declarations of the mother tending to show recognition of the trust. — *McDeritt v. Frantz*, Va. Ct. App., Feb. 8, 1889; 8 S. E. Rep. 642.

119. VENDOR AND VENDEE — Action for Fraud—Failure of Title. — Where a vendee of land is sued for the purchase money he can defend on ground of failure of title only by showing a complete failure or a failure of such title of the vendors represented they had at time of sale. — *Fisher v. Dow*, S. C. Tex., Jan. 18, 1889; 10 S. W. Rep. 455.

120. WILLS—Construction. — A devised land for the use of B and C; at the death of B to be divided between C and three other grandchildren. If C died without heirs, hers share to go to the three grandchildren: *Held*, a suit in partition after the death of C without heirs, while B still lived was prematurely brought. — *Swanson v. Calhoun*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rep. 734.

121. WILLS—Construction—Estate Conveyed. — A testator in his will gives a number of legacies to each of his children except his son S, each bequest ending with words "and no more" lastly a devise to S of all his realty, omitting the clause "and no more." *Held*, S took a fee. — *Doe v. Patton*, Del. C. Err. App., Jan. 16, 1889; 16 Atl. Rep. 558.

122. WILLS—Construction—Perpetuities. — Where by terms of will the vesting of the remainders might be postponed for more than twenty-one years after the death of the life-tenants, the rule against representatives was violated and the remainders were therefore void. — *Appeal of Coggins*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 579.

123. WILLS — Construction — Trusts for Support of Child — Construction of a will as to provision for support of child. — *Blouin v. Phaneuf*, S. J. O. Me., Jan. 5, 1889; 16 Atl. Rep. 540.

124. WILLS — Decision as to Legatees — Final Order. — In an action to determine which of three corporations is the legatee meant in a will, an order awarding the legacy to the executors as part of the residuary fund and determining that neither claimant is entitled thereto, is not a final distribution from which an appeal can be taken by one of the claimants. — *In re Cement's Estate*, S. C. Cal., Jan. 17, 1889; 20 Pac. Rep. 302.

125. WILLS — Rule in Shelly's Case. — The rule in Shelly's case applies notwithstanding the expressed intention of the testator that the ancestor should have only a life estate. — *Van Olinda v. Carpenter*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 868.

126. WILLS — Testamentary Capacity — Burden of Proof. — The burden of proof as to testamentary capacity is on the proponent. — *Tucker v. Sandridge*, Va. Ct. App., Dec. 13, 1888; 8 S. E. Rep. 650.

127. WITNESSES—Competency. — In an action of ejectment where plaintiff claimed not to have notice of defendant's unrecorded deed: *Held*, that the grantor of defendant was competent to testify that he had informed the plaintiff of the conveyance to the defendant. — *Fitzgerald v. Williamson*, S. C. Ala., Jan. 14, 1889; 5 South. Rep. 309.

The Central Law Journal.

ST. LOUIS, APRIL 5, 1889.

CURRENT EVENTS.

AN Austrian journal has recently made a compilation of the number and character of "trusts" existing in the different countries of the world. It appears therefrom that Germany leads in the extent and power of its trusts and the United States comes next in order, though not far behind. England follows though there is included in the list of English syndicates many which do not belong within the category of trusts proper. We learn also that ten trusts have extended their operations beyond the territories of the countries in which they originated and have thus assumed an international character. Trusts are found to exist in all European countries and in parts of Asia and Japan. It is evident, from the statistics collected by the Austrian journal, that the trust question is one in which the whole world is interested, and that the conditions leading to their formation, exist to a greater or less degree in every part of the world.

Without reference to the arguments which may be urged in favor of or against this modern combination of capital, the conviction that it is dangerous, is becoming widespread and finding expression in the journals of almost every country in which the question is agitated.

At present, public opinion, in this country seems to be passive, awaiting the decision of the final courts of New York on the case indirectly aimed at the sugar trust, recently decided adversely to it, by Judge Barrett of the Supreme Court. Should that opinion be sustained by the Court of Appeals, it will be a serious blow to trusts in their present shape, and require, at least, a reconstruction of their plans. A case however, more directly aimed at trusts is one that has not yet come prominently before the public. It is a suit in the nature of *quo warranto* by the State of New York against what is known as the sugar trust claiming that it is exercising the privileges of a corporation without having been

legally incorporated. A similar suit is also pending in the courts of Louisiana against the cotton seed oil trust.

Whatever the outcome of this litigation, legislation will soon be in order and demanded, by which the advantages of trust organizations may be secured while abuses are checked and dangerous powers restricted.

INTELLIGENCE comes from Indiana of the enactment of a new ballot law by the legislature of that State. The bill just passed and signed by the Governor seems to be carefully drawn and wise in its provisions. It provides for the printing and distributing of all ballots by the State, for independent nominations by means of nomination papers, for an absolutely secret ballot and for the use of no ballots save those supplied by the State. In short it is as complete an application of the Australian ballot system as has been formulated in this country and differs but little from the Massachusetts law. This is the first State this year to do more than propose enactments, though Missouri is fast shaping one, though the New York legislature has been long engaged in the consideration of what is known as the Saxon bill, and measures designed to effect improvement in the system of voting are before the legislatures of many of the States.

The masses of the people who are not politicians and who are concerned about elections simply as a means of securing honest and efficient government are interested in a reform of the ballot and should in every way impress upon their representatives the importance of such legislation.

AN interesting article on railroad legislation is contributed to the North American Review for March, by Henry Clews, Esq. For a layman he manifests a remarkable familiarity with railroad law and appears as much at home therein as on the subject of railroad securities, which is peculiarly his own. We cannot do better than quote the following from a long article bristling with good points.

The chief trouble about the railroad legislation that we have hitherto had has been its demagogic character. The railroads represent, more than anything else, the

fabulously-rich capitalists of this country. Every railroad company, in fact, is a combination of capitalists, and to every legislative body an object of popular attack because of the approbation of the large majority of voters who are comparatively poor. The incentive is very strong, therefore, on the part of so-called statesmen in State politics, to ingratiate themselves with the many by the advocacy of measures which appeal most strongly and directly to popular prejudices. The theory with people in general, who think anything about railroad affairs, but who do not make a special or a scientific study of the subject, is that rates for passengers and freights should be kept within a range so as to return only enough for fixed charges and fair interest on bonds. They are taught to believe that the stocks of all the railroad companies were never paid for by the wealthy original owners, that the railroads have been built with the proceeds of the bonds, and that the stock is nothing but water. Hence they conclude that the earnings should not return more than 4 to 5 per cent. on the actual capital invested. They contend that the legislation by which the companies received their charters was largely obtained by unfair or fraudulent means. It is presumed, however, that legislatures have been reformed since most of the charters now in existence were acquired, and for this reason the present worthy representatives are disposed to take away what was improperly granted by their predecessors. A fair sample of this species of legislative reform and injustice has taken place in Iowa of late, and its execution is grinding down some of the western properties to a non-dividend level, which ultimately throws the railroads subject to it into the hands of receivers. Some people carp at the legal decisions enforcing the laws in these cases, as in the recent rulings of Judge Brewer. This, of course, arises both from ignorance of the law and from want of capacity to distinguish accurately between the law itself and the declaration of its execution. There are no grounds for the inference that Judge Brewer's decisions have been in any degree strained to favor the Granger element. I believe his exposition of the law will be found in accordance with the spirit of the legislation, if tested by the interpretation of the highest tribunal. It is, therefore, beside the question and merely juggling with words and phrases, to talk of error of judgment on the part of the court in this case. It may also satisfy people who are hurt, to have a tangible object like Judge Brewer, upon whom they can vent their wrath, since an intangible object, like a defunct legislature, cannot be attacked; it is like trying to clutch the ghostly dagger in the play.

We are pleased to see one, at least, among those, doubtless affected unfavorably by Judge Brewer's Iowa decisions, who has the frankness and temerity to uphold them and who does not resort to the usual custom of an unsuccessful litigant viz: go to the nearest tavern and swear at the court.

NOTES OF RECENT DECISIONS.

UNDER what circumstances, machinery attached to the realty will be considered as personal property, as against a prior mortgage of the realty, is laid down by the Supreme Court of Indiana in *Binkley v. Forkner* 19 N. E. Rep. 753. There a party purchased land for the purpose of locating a factory. He executed to the vendor notes for part of the purchase money secured by mortgage upon the real estate. He, at the same time, ordered machinery. While the latter was on board the cars, being transported to the site of the factory, the purchaser gave a chattel mortgage for its purchase price and orally agreed that it should be treated as personal property. It was thereafter set in a building on the land purchased and was actually bolted to the foundation, etc., on the realty. It is contended on the one hand that notwithstanding the annexation of the machinery to the real estate, it retained the character of personalty in consequence of the prior chattel mortgage and the contemporaneous oral agreement. On the other hand it is said that the character of the machinery as personal property came to an end when it was annexed to the land and that of realty became inevitably fixed upon it. The court in sustaining the first proposition says:

The question thus presented has been the subject of much discussion, and the result deducible from the reported cases is not in every respect harmonious, or of so definite and precise a character as could be desired. Very much depends upon the relation which the persons between whom the question arises sustain towards each other—whether it be that of personal representative and heirs of a deceased person, landlord and tenant, vendor and vendee, mortgagor and mortgagee, or some other which may give a peculiar character to the case. While some rules of general application have been formulated, in the very nature of the subject each case must in some degree be controlled by the varying circumstances peculiar to it. The united application of three requisites is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. *Teaff v. Hewitt*, 1 Ohio St. 530; *Potter v. Cromwell*, 40 N. Y. 296; *Ewell, Fxt.* 21; *Tyler, Fxt.* 114; *McCrea v. Bank*, 66 N. Y. 469. According to the elementary rule of the common law, whatever is annexed to the freehold becomes, in legal contemplation, a part of it, and is thereafter subject to the same incidents and conditions as the soil itself. But the diversity of trade and the development of

manufactories required that the strict rules of the common law be measurably relaxed, and it may now be said that the nature of the articles, and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article which may or may not be a fixture becomes part of the realty by being annexed to the freehold. The purpose or intention of the parties, the effect and mode of annexation, and the public policy in relation thereto, are all to be considered. When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property, although it is annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intention of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation. *Taylor v. Watkins*, 62 Ind. 511; *Yater v. Mullen*, 24 Ind. 277. But when chattels are of such a character as to retain their identity and distinctive characteristics after the annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, or destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement. *Rogers v. Cox*, 98 Ind. 157; *Price v. Malott*, 85 Ind. 268; *Hendy v. Dinkerhoff*, 57 Cal. 3; *Haven v. Emery*, 38 N. H. 66; *Ewell, Fitts*, 66; *Malott v. Price*, 109 Ind. 22, 9 N. E. Rep. 718. Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed to or placed in a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold. *Eaves v. Estes*, 10 Kan. 314; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 877; *Campbell v. Roddy*, 14 Atl. Rep. 279; *Henkle v. Dillon*, 17 Pac. Rep. Except where the rights of innocent purchasers are involved, it is the policy of the law to uphold such contracts in the interest of trade. The execution of a chattel mortgage by the owner of land, upon machinery which he afterwards places in a building thereon, is regarded as an unequivocal declaration of his intention that the act of annexation shall not change or take away the character of the machinery as personalty until the debt secured by the mortgage has been fully paid. *Tift v. Horton*, *supra*. A provision in a chattel mortgage that upon default of payment of the mortgage debt the mortgagee may take possession of the mortgaged chattels, and sell the same, if anything beyond the mortgage itself was needed, is equivalent to an express agreement that the property shall continue to be regarded as personalty.

THE power of a court of equity to enjoin the infringement of an invention before the patent has been issued came before the United States Circuit Court of Michigan, in the case of *Rein v. Clayton*, 37 Fed. Rep. 354. There application for a patent had

been made and was pending in the patent office. The court, in denying the injunction asked for, says:

The question has been directly decided in but a single case, viz., *Butler v. Ball*, 28 Fed. Rep. 754; and it is upon this case alone that plaintiffs rely for the maintenance of this suit. The learned judge, who delivered the opinion in this case, does not discuss the question upon principle, but cites two authorities as settling it in favor of the jurisdiction. The first case (*Evans v. Weiss*, 2 Wash. C. C. 342) was an action at law against a person who had made use of plaintiff's invention for some years prior to the passage of a special act granting him a patent for such invention, and the question was whether he was liable as an infringer, for using the improvement after he had received notice of the granting of plaintiff's patent; and the court held that he was, notwithstanding a proviso in the special act that "no person who shall have used the said improvements, or erected the same for use, before the issuing of said patent, shall be liable therefor." In delivering the opinion Mr. Justice Washington observed "that the right to the patent belongs to him who is the first inventor, even before the patent is granted; and therefore any person who, knowing that another if the first inventor, yet doubting whether that other will ever apply for a patent, proceeds to construct a machine, of which it may afterwards appear he is not the first inventor, acts at his peril, and with a full knowledge of the law that, by relation back to the first invention, a subsequent patent may cut him out of the use of the machine thus erected." It is entirely clear that in saying that the right to the patent belongs to the first inventor, even before the patent is granted, he refers only to the plaintiff's property in his invention, and his right to a patent therefor, and not to his right to enjoin an infringer before the patent is issued. The real question was whether the defendant, who had purchased the patented article before the patent was issued, and was then using it, had the right to continue to use it after the patent was granted, and it was held that he had not. The principle of this case was subsequently affirmed by the supreme court in *Evans v. Jordan*, 9 Cranch, 190. In the other case, also (*Jones v. Sewall*, 6 Fish. Pat. Cas. 343), suit was brought upon letters patent, and in opening his opinion Mr. Justice Clifford made the incidental remark that inventions lawfully secured by letters patent are the property of the inventors, and as much entitled to legal protection as any other species of property. "They are indeed property, even before they are patented, and continue to be such, even without that protection, until the inventor abandons the same to the public, unless he suffers the patented product to be in public use or on sale, with his consent and allowance, for more than two years before he files his application." He is evidently speaking here of the right of an inventor to a patent in case he makes his application within two years after his device has been made public; and this right is a species of property which remains unimpaired during the continuance of the two years. But there is no intimation here that the inventor may apply for an injunction before his right is lawfully secured by letters patent; indeed, the intimation is the other way. He is evidently speaking of the same right of property to which Mr. Justice Hunt alludes in *Manufacturing Co. v. Vulcanite Co.*, 13 Blatchf. 376, 383: "So far as the plaintiff's own use or manufacture is concerned, it needs no act of congress to enable it to make, use, and vend the article, and it obtains no

such right from congress. The benefit of the patent law is that the plaintiff may prevent others from making, using, or vending its invention. To itself, to its own right to make, use, or vend, no right or authority is added by those statutes." We think that neither of these cases is authority for the proposition laid down in the case of *Butler v. Ball*. Let us now examine the question upon principle. At common law there was no special property in an invention, because the policy of the law was opposed to this as to all other monopolies. *Walk. Pat. § 159*. Indeed, the inventive genius of the English-speaking people did not begin to manifest itself to any considerable extent before the middle of the last century, and it is only within the past sixty years that the business of the patent-office has been considered of any great importance. Patents for inventions were at first treated as a royal prerogative, and granted as a matter of favor, and never as a legal right. They were in fact a branch of that extensive system of monopolies which became so odious during the reign of Elizabeth and her successors, the Stuarts. In the reign of James I. a statute known as the "statute of monopolies" was passed, declaring all monopolies contrary to law, and void, except as to patents, not exceeding the grant of fourteen years, to authors of new inventions, and some others not material to be noticed here. This was the earliest recognition of the right of an inventor to a monopoly of the manufacture, sale, and use of his invention. It still remained, however, a royal prerogative, which was granted or refused at the pleasure of the crown. This statute was followed by others, securing to the inventor a monopoly, as a matter of right, and providing the proper machinery for procuring and enforcing it. In this country patents have been recognized as existing only by virtue of positive law. The constitution of the United States conferred upon congress the power "to promote the progress of science and useful art by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The adoption of the constitution was followed the next year by the first federal statute upon the subject, which became the foundation of the patent law of this country. That the right of an inventor to a monopoly is purely a feature of the statute was recognized by the supreme court in *Brown v. Duchesne*, 19 How. 188; *Gayler v. Wilder*, 10 How. 477. And in the recent unreported case of *Marsh v. Nichols*, 9 S. C. Rep. 168, 15 Fed. Rep. 914, appealed from this court, in which the point decided was that a patent not signed by the secretary of the interior is absolutely void, it is said: "The invention is the product of the inventor's brain, and, if made known, would be made subject to the use of any one, if that use were not secured to him. Such security is afforded by the act of congress, when his priority of invention is established by the officers of the patent-office, and the patent is issued. The patent is the evidence of his exclusive right to his use of the invention. It therefore may be said to create a property interest in that invention. Until the patent is issued, there is no property right in it; that is, no such right as the inventor can enforce. Until then there is no power over its use, which is one of the elements of a right of property in anything capable of ownership." A similar observation was made by Judge Shepley in *Machine Co. v. Tool Co.*, 4 Fish. Pat. Cas. 284, 294. "An inventor," says he, "has no right to his invention at common law. He has no right of property in it originally. The right which he derives is the creature of statute and of grant."

AGREEMENTS TO SUPPORT IN CONSIDERATION FOR A CONVEYANCE OR MORTGAGE OF LAND.

§ 1. *Introduction*.—Probably as difficult questions to settle as come before our courts are those arising on agreements to support others, either for a money consideration or in consideration of a conveyance of real estate, or the like. They are difficult, because indefinite, and because of the close household and family relations they require for their performance and the many little petty annoyances either party to them may be compelled to endure, and for which courts cannot afford any redress. They entail often upon the parties many of those incidents arising only out of the marital relation, and for a violation of which no court can afford redress—incidents that both the husband and wife must bear if they desire to maintain the ordinary relationship of married life.

§ 2. *Contracts, how Evidenced*.—These contracts are often evidenced by agreements inserted in deeds, in the nature of conditions subsequent, and their considerations are the gift or sale of the lands conveyed;¹ or an outside agreement, as a bond, in writing,² or a mortgage,³ either given upon the land conveyed, or upon land not conveyed, where the consideration for the agreement is other than the conveyance, by sale or gift, of real estate. So it is often inserted in a will devising real estate, or perhaps in one giving a legacy, that the devisee takes it subject to the condition of supporting a person named.⁴ But a conveyance of real estate cannot be defeated, or have attached to it a parol condition or defeasance; for to allow such to be done would be allowing a parol contract to defeat a written one.

§ 3. *The Party to be Supported*.—The condition in the deed, or that contained in a separate instrument, may be to support the

¹ *Bethlehem v. Annis*, 40 N. H. 34; s. c., 77 Am. Dec. 700; *Soper v. Guernsey*, 71 Pa. St. 219.

² *Robinson v. Robinson*, 9 Gray, 447; s. c., 69 Am. Dec. 301; *Thompson v. Thompson*, 9 Ind. 323; s. c., 68 Am. Dec. 638.

³ *Hoyt v. Bradley*, 27 Me. 242; *Austin v. Austin*, 9 Vt. 420; *Borst v. Crommie*, 19 Hun, 209.

⁴ *Hlat v. Williams*, 72 Mo. 214; s. c., 37 Am. Rep. 438.

grantor⁵ or his wife,⁶ or both,⁷ or a third person,⁸ as an infant.⁹

§ 4. *Whether Deed or Mortgage.*—There are early definitions of mortgages in which it is said that no conditional conveyance is a mortgage except one given for the security of a loan of money, or one made as a security for any debt.¹⁰ There are others that include "the performance of some other obligation,"¹¹ as "a security for the performance or non-performance of any act or thing."¹² But in relation to the kind of contracts now under discussion it has been held that the rules of law relating to mortgages have but a very little, if any, application to them.¹³ "Wherever the condition, when broken, gives rise to no claim for damages whatever, or to a claim for unliquidated damages, the deed is not to be regarded as a mortgage in equity, but as a conditional deed at common law. It has the incidents of a mortgage only to a limited extent, and the party, if relieved by a court of equity from forfeiture resulting from the non-performance of the condition, will not be relieved as in case of a mortgage. It is not, however, intended to say that the same principle of justice, which has led courts of equity to establish the system of relief from forfeiture in the case of mortgages, will not entitle a party to analogous relief in case where the design of the parties is to make a conveyance by way of security."¹⁴ So where a father conveyed real estate, and took a reconveyance, conditioned for the faithful performance of covenants to support, it was

termed something more than a mortgage; for if, upon a breach of the condition to support, the father took possession, the son could not claim, at the death of his father, that the title vested in him, notwithstanding he had failed to perform his covenants, while, if it were purely a mortgage, he could. It was essential, it was said, to so hold; for otherwise the son could refuse to perform the contract, and at his father's death get the land for nothing, no one having a right to sue except the father, and the contract being personal to him, a right of action thereon did not pass to his representative.¹⁵ But many of the cases regard such an instrument, when in the form of a deed, to be a conveyance with a condition subsequent. Thus, where a father conveyed a farm to his son for the nominal consideration of one dollar; and contemporaneously with the conveyance took back from him a bond, wherein, after reciting the fact of the conveyance, he bound himself, in consideration thereof, to cultivate the land and deliver a certain share of the crops to the grantor during his life, it was held that the son took the land upon a condition subsequent that he would in all things substantially comply with his covenant.¹⁶ So where a mortgage was given back "to secure the payment, when the same becomes due, of taking care of the said Henry G. Richter during the balance of his natural life, including boarding, lodging and washing," accompanied by other personal obligations, a like holding was made and the same construction given to the two instruments.¹⁷

§ 5. *Consideration.*—In an early case it was held that where the only consideration of a deed of bargain and sale was that the grantee should support the grantor for his natural life, the deed was without consideration and void; for the reason that the deed, not being executed by the grantee, there was no agreement on his part to support the grantor, and the deed, thus being merely conditional, gave an option to the grantee to support the grantor, or to suffer it to become void by withdrawing his support.¹⁸ But this

⁵ *Eastman v. Batchelder*, 36 N. H. 131; s. c., 72 Am. Dec. 295.

⁶ *Copeland v. Copeland*, 89 Ind. 29.

⁷ *Copeland v. Copeland*, *supra*.

⁸ *Blossom v. Ball*, 82 Ind. 115.

⁹ *Cross v. Carson*, 8 Blackf. 138; s. c., 44 Am. Dec. 742. A conveyance to a trustee, the property to be applied to the grantor's support and maintenance during life, and at his death to be divided among certain named persons, is a deed and not a will, and cannot be revoked. It takes effect at once. *McGuire v. Bank of Mobile*, 42 Ala. 599.

¹⁰ *Hall v. Byrne*, 2 Ill., p. 142; *Loyd v. Currin*, 8 Humph., p. 464; *Weiner v. Heintz*, 17 Ill. p., 261; *Copeland v. Bartlett*, 6 M., Gr. & S., p. 26.

¹¹ *Young v. Miller*, 6 Gray, p. 153; *Hebron v. Center Harbor*, 11 N. H., p. 574.

¹² *Flagg v. Mann*, 2 Sumner, p. 533; *Mitchell v. Burnham*, 44 Me., p. 299; *Shields v. Lozeau*, 5 Vr., p. 502; *Kyger v. Kiley*, 2 Neb., p. 23; *Montgomery v. Bruere*, 1 South, p. 288.

¹³ *Bethlehem v. Annis*, 40 N. H. 34; s. c., 77 Am. Dec. 700.

¹⁴ *Id.*

¹⁵ *Soper v. Guernsey*, 71 Pa. St. 219.

¹⁶ *Leach v. Leach*, 4 Ind. 628.

¹⁷ *Richter v. Richter*, 111 Ind. 456; *Copeland v. Copeland*, 89 Ind. 29; *Wilson v. Wilson*, 86 Ind. 472; *Lindsay v. Lindsey*, 45 Ind. 532; *Risley v. McNiece*, 71 Ind. 434.

¹⁸ *Jackson v. Florence*, 16 Johns. 47.

view has been repudiated; and it is now universally held that the grantee, by accepting the deed and entering into possession under it, becomes bound by the agreement providing for the grantor's support, and the provision for support becomes equivalent to a life annuity.¹⁹ In one case it was held that an obligation may be valid on an advancement of money by a father to a son.²⁰ So the person for whose benefit a contract is made, although not a party to it, may enforce it, without in any way having signed it.²¹

§ 6. *Foreclosure of Mortgage.*—For a breach of the condition where an instrument in the nature of a mortgage is given to secure its performance, there may be a foreclosure; and where such an instrument was given to secure the support of the grantee and his wife during their lives, the administrator was allowed to foreclose it for a breach of condition occurring both before and after the grantee's death, although his widow did not join.²² But those who furnish support at the grantor or mortgagor's request cannot foreclose the mortgage in order to secure their pay; for they must look to him personally, and cannot resort to the grantee or mortgagee's estate.²³ An agreement to support two is a several engagement, and upon breach as to one that one may foreclose alone, without joining the other.²⁴ The amount of the recovery is for the damages actually sustained; future damages cannot be recovered; for it is impossible to tell in advance what damages may result from a failure to perform the condition.²⁵ Upon a breach of the condition the mortgagee may maintain an action for the possession of the premises; and if to support father and mother, he alone may bring the action.²⁶ If an amount is fixed in the mortgage or bond in the nature of a penalty, the amount of the recovery will be only for the damage actually sustained, unless it is stipulated that the sum named shall

be regarded as liquidated damages for any default, when the amount recoverable is the sum named.²⁷

§ 7. *Redemption.*—From a breach of the condition in such an instance, there may be redemption.²⁸

§ 8. *Arbitration.*—In a bond secured by mortgage was a stipulation "that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted" to three persons named, "and their decision shall be final," and this was held not to bar a right of recovery for damages sustained, on the ground that a party cannot bar himself by contract from resorting to courts for relief.²⁹

§ 9. *Remedy for Breach of Condition Subsequent.*—If the agreement to support is contained in a deed as a condition subsequent, then a breach of that condition will entitle the grantor to enter, as in any other condition subsequent, and reclaim possession, upon a failure to comply with a demand of performance.³⁰ A demand of performance is essential.³¹ The effect of the demand and entry is to defeat the estate.³² But until entry is made the estate does not revert.³³ It must also be shown that there was a failure to perform.³⁴ "Neglect to perform the condition does not, *ipso facto*, defeat the estate, but only exposes it to be defeated and determined at the election of the grantor, and, in case of his death, his heirs, to be signified by some act equivalent to re-entry at the common law. There must be a demand, on the part of the persons entitled to insist upon its performance, whether the condition consists in the payment of money, or the performance

¹⁹ *Bresnahan v. Bresnahan*, 46 Wis. 385.

²⁰ *Bryant v. Erskine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34; s. c., 77 Am. Dec. 700; *Rewell v. Jewett*, 69 Me. 293.

²¹ *Hill v. More*, 40 Me. 515.

²² *Lindsey v. Lindsey*, 45 Ind. 552; *Doe v. Cassidy*, 9 Ind. 63; s. c., 18 Ind. 289; *Leach v. Leach*, 4 Ind. 623; *Bradstreet v. Clark*, 21 Pick. 389; *Ludlow v. N. Y.*, etc. R. R. Co., 12 Barb. 440.

²³ *Lindsey v. Lindsey*, *supra*; *Scott v. Stipe*, 12 Ind. 74.

²⁴ *Lindsey v. Lindsey*, *supra*; *Cross v. Carson*, 8 Blackf. 173; s. c., 44 Am. Dec. 742; *Schuff v. Ransom*, 79 Ind. 458; *Cory v. Cory*, 86 Ind. 567.

²⁵ *Thompson v. Thompson*, 9 Ind. 323; s. c., 68 Am. Dec. 638; *Bethlehem v. Annis*, 40 N. H. 34; s. c., 77 Am. Dec. 700; *Boone v. Tipton*, 15 Ind. 270; *Jackson v. Topping*, 1 Wend. 383; s. c., 19 Am. Dec. 515; *Lindsey v. Lindsey*, *supra*; *Risley v. McNiece*, 71 Ind. 434; *Cory v. Cory*, 86 Ind. 567.

²⁶ *Schuff v. Ransom*, 79 Ind. 458; *Cory v. Cory*, 86 Ind. 567.

¹⁹ *Hutchinson v. Hutchinson*, 46 Me. 154; *Shoutz v. Brown*, 27 Pa. St. 123; *Spalding v. Hallenbeck*, 30 Barb. 292; *Exum v. Cauty*, 34 Miss. 533; *Henderson v. Hunton*, 26 Gratt. 626.

²⁰ *Leedy v. Cumbaker*, 13 Ind. 523.

²¹ *Blossom v. Ball*, 32 Ind. 115.

²² *Marsh v. Austin*, 1 Allen, 235.

²³ *Daniels v. Eisenlord*, 10 Mich. 454.

²⁴ *Tucker v. Tucker*, 24 Mich. 423; s. c., 35 Mich. 365.

²⁵ *Id.*

²⁶ *Gilson v. Gilson*, 2 Allen, 115. See *Lanfair v. Lanfair*, 18 Pick. 290.

of some other act, and a refusal on the part of the person in whom the title is vested." ³⁵ In Wisconsin, where a deed was given to a son and a bond or contract taken back conditioned for the support of the father (the grantor) for life, as a consideration for the deed; on failure to comply with the terms of such contract, it was held that a court of equity had the power to rescind both the deed and contract. ³⁶

§ 10. *Actual Entry not Necessary.*—An actual entry on the land is not necessary; "a demand of possession is equivalent to an entry on the premises." ³⁷ This is quite manifest in those cases holding that ejectment lies after condition broken upon a failure to deliver possession when demanded, to recover possession of the premises. ³⁸

§ 11. *Who may Demand Possession or Rescission.*—Upon forfeiture the estate returns to the grantor, ³⁹ or to his heirs. ⁴⁰ If the condition is to support the husband and wife during their lives, the wife may demand dower in the land, for a breach committed after the husband's death. ⁴¹ The grantor (or his heir) cannot convey the land until after entry upon it by reason of the condition broken. ⁴² Nor can his contingent estate therein be sold before forfeiture, nor before entry. ⁴³ If a mortgage is taken, conditioned for support, the administrator or executor of the mortgagee may maintain an action to foreclose it, without joining the widow who was also a beneficiary under the mortgage. ⁴⁴

§ 12. *Demand of Performance.*—A demand of performance of the contract must be made before there can be a forfeiture; the demand must be made "on the part of the persons entitled to insist upon its perform-

³⁵ Cory v. Cory, 86 Ind. 567; Hershman v. Hershman, 63 Ind. 451.

³⁶ Bogle v. Bogle, 41 Wis. 209; Bresnahan v. Bresnahan, 46 Wis. 385; Leach v. Leach, 4 Ind. 628.

³⁷ Clark v. Holton, 57 Ind. 564; Richter v. Richter, 111 Ind. 456; Cory v. Cory, 86 Ind. 567.

³⁸ Bogle v. Bogle, 41 Wis. 209; Horner v. Railway Co., 33 Wis. 163; Soper v. Guernsey, 71 Pa. St. 219.

³⁹ Hershman v. Hershman, 63 Ind. 451; Scott v. Stipe, 12 Ind. 74.

⁴⁰ Scott v. Stipe, 12 Ind. 74; Jackson v. Topping, 1 Wend. 388; s. c., 19 Am. Dec. 515; Cory v. Cory, 86 Ind. 567; Cross v. Carson, 8 Blackf. 138; s. c., 44 Am. Dec. 742.

⁴¹ Hefner v. Yount, 8 Blackf. 455.

⁴² Boone v. Tipton, 15 Ind. 270; Jackson v. Topping, 1 Wend. 388; s. c., 19 Am. Dec. 515.

⁴³ Leach v. Leach, 10 Ind. 271. The land does not go to the administrator. Hathaway v. Payne, 34 N. Y. 92.

⁴⁴ Marsh v. Austin, 1 Allen, 285.

ance, whether the condition consists in the payment of money, or the performance of some other act." ⁴⁵ Neglect to perform the condition does not of itself determine the estate, but only exposes it to be defeated and determined at the election of the grantor, and in case of his death, at the election of his heirs. ⁴⁶ A stranger cannot demand a performance of the condition, nor enter if it is broken. ⁴⁷ Until there has been a failure to perform no demand for performance, nor an entry for failure to do so, can be successfully made. ⁴⁸

§ 13. *Demand of Performance Excused.*—The conduct of the grantee or mortgagee may be such as to excuse the making of a demand of performance. Thus, where a father, eighty-two years of age, feeble and childish, conveyed his farm and personal property to his son, on condition that he would sell the personal property and pay his (the father's) debts, and support him for life; and after selling such property and paying the debts, three months after possession of the farm, at the mere bidding of his father, left him to the care of others; it was held that the son had abandoned the contract, and as the father was in possession, no entry was necessary, for remaining in possession after condition broken by the grantee was equivalent to a re-entry for breach of the condition; and having made a fruitless demand for a reconveyance, suit to quiet title lay in favor of the father. "Knowing the age and condition of his father at the time he took the conveyance, it was the duty of the son to remain and execute his agreement, unless it became impossible to do so. The facts found leave the impression that the son availed himself of the earliest opportunity to find an excuse for leaving. Having abandoned his father without more of an effort to execute the agreement than appears to have been made, he may not now say that the grantor has rendered it impossible for him to perform the conditions by 'ordering him to leave.'" Again: "The grantee having abandoned the land without

⁴⁵ Cory v. Cory, 86 Ind. 567; Lindsey v. Lindsey, 45 Ind. 552; Risley v. McNiece, 71 Ind. 434; Bradstreet v. Clark, 21 Pick. 389; Schuff v. Ransom, 79 Ind. 458.

⁴⁶ Cory v. Cory, 86 Ind. 567.

⁴⁷ Cross v. Carson, 8 Blackf. 138; s. c., 44 Am. Dec. 742.

⁴⁸ Flanders v. Lamphear, 9 N. H. 201; Rhoades v. Parker, 10 N. H. 83.

sufficient excuse, and without offering to perform a continuous and fixed duty which rested upon him, no demand for performance was necessary in order to entitle the grantor to re-enter. Abandoning the land under the circumstances, must be regarded as equivalent to such a renunciation of the contract as authorized the grantor to enter and treat the arrangement as at an end."⁴⁹

§ 14. *Relief from Forfeiture*.—From a forfeiture of the condition for maintenance, a court of equity may grant relief when the forfeiture has been accidental or unintentional, and not attended with irreparable injury. The right to it rests in the sound discretion of the court. "We must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection, than in ordinary cases of collateral duties. And although we are not prepared to say that it must appear that, in all cases, the failure arises from surprise, or accident, or mistake, we certainly should not grant relief when the omission was wilful and wanton, or attended with suffering or serious inconveniences to the grantee, or there was any good ground to apprehend a recurrence of the failure to perform. * * . The case might occur where the refusal to afford daily support would be wanton or wicked; indeed, where it might proceed from murderous intentions even; and it is even supposeable that the treatment of those who were the objects of the services should be such as to subject the grantor to indictment for manslaughter, or murder even, and possibly to ignominious punishment and to death. To afford relief in such a case, for the benefit of the heirs, would be to make the court almost partakers in the offense. And the case, upon the other hand, is entirely supposable, and of not infrequent occurrence, where, through mere inadvertance, a technical breach may have occurred in the non-performance of some unimportant particular, in kind or degree, where, through perhaps mere difference in construction, or error in judgment, one may have suffered a forfeiture of an estate at law of thousand of dollars in value, where the collateral service was not of a dollar's value, and attended with no serious inconvenience to the grantee. Not to afford relief in such

a case would be a discredit to the enlightened jurisprudence of the English nation and those American States which have attempted to follow the same model."⁵⁰

§ 15. *Lien*.—It has been held that an obligation to support the grantor for life cannot be made the subject of a vendor's implied lien.⁵¹ But where a grant was made and a mortgage, at the same time, taken back conditioned to support the grantor, it was said that it created a lien on the land for his support.⁵²

§ 16. *Divorce—Lien*.—Where a husband conveyed land to his children, his wife joining with him and thereby releasing her inchoate interest, with a condition subsequent for a support of himself and wife "during each of" their lives, which was accepted by the grantees; and after the conveyance, the grantors were divorced, for the fault of the wife, it was held that she was still entitled to a support and had a right of entry, upon forfeiture, although that right was reserved only to the husband, and also had a lien on the land granted. "The condition was a condition subsequent, and, if broken, the right of entry, both by law and by the deed, was secured to John Copeland. But this was not the only remedy. The incumbrance or charge upon the land for the support of the grantors, and each of them gave them severally a lien, by the enforcement of which, in the proper action against the land, the purposes of the conveyance as to the grantors could be subserved. Both of these remedies existed in John Copeland; he could waive the right of entry for condition broken and enforce his lien by obtaining a decree for the sale of the land. But the right of thus enforcing her lien was the only remedy for the appellee. While the marriage relation existed, the recovery of the land and resumption of title by the husband, for a breach of the condition of the deed, would have resulted in a complete remedy for the appellee, for in such case her inchoate right

⁴⁹ *Henry v. Tupper*, 29 Vt. 358, 375.

⁵¹ *Arlin v. Brown*, 44 N. H. 102. See *Chase v. Peck*, 21 N. Y. 581; *McKillop v. McKillop*, 8 Barb. 552; *Brawley v. Cawtron*, 8 Leigh, 522; *Hiscock v. Norton*, 42 Mich. 320.

⁵² *Richter v. Richter*, 111 Ind. 456; *Blossom v. Ball*, 32 Ind. 115. Where the son was "to provide for, maintain," etc., it was held that there was no lien on the land, but only a personal liability. *Taylor v. Lanier*, 3 Murphy (N. C.), 98; s. c., 9 Am. Dec. 599.

* *Richter v. Richter*, 111 Ind. 456.

of title would have reinvested in her. But since the relation of husband and wife has ceased a resumption of possession by her late husband for condition broken would be no remedy for her, and unless her lien upon the land for her support survived the dissolution of the marriage and may still be enforced by her, she is without a remedy. We believe that the lien and the remedy for the enforcement continued to exist in her. * * The charge thereby becomes her separate property or chose in action, and the subsequent divorce of her husband from her did not and could not, without her consent, affect her rights."⁵³

§ 17. *Not Personally Liable*.—The acceptance of a devise of land upon condition of paying specific legacies, renders the devisee personally liable, in addition to the lien they are upon the land devised.⁵⁴ But the usual condition for support, unless there is an express stipulation providing for it outside the lien that it is upon the land, does not impose a personal liability upon the grantee or devisee.⁵⁵

§ 18. *Accounting*.—A court of equity on setting aside a conveyance, because of a forfeiture of the condition, will decree an accounting. The grantee will be allowed for the money he paid for the conveyance, for the improvements made, and all rest paid; and will be charged with the rents (including any portion cleared by him) from the time he went into possession, where the contract is to pay a certain rent.⁵⁶ The fact of the improvements cannot be used as a bar to the action.⁵⁷ Where it was found that the personal property received by the grantee, and disposed of by him, and the use of the farm conveyed, exceeded the amount of the indebtedness he was to pay for the grantor, and the support furnished, and all money or other things paid to or for him, it was held that the

grantor was entitled to an accounting to ascertain such excess, and to a judgment therefor when ascertained.⁵⁸

§ 19. *A Substantial Performance Sufficient*.—A substantial compliance with the terms of the contract or condition is sufficient, taking into consideration the condition of the grantor.⁵⁹ But in the case of a father and son, the use by the latter to the former of a course of unfilial treatment and cold neglect, coupled with vulgar and profane use of language towards him, is not a compliance with the condition, although plenty of food and clothing is provided by the son.⁶⁰ "Conveyances of property by aged and infirm people to their children, in consideration of promised support and maintenance, are somewhat peculiar in their character and incidents, and must sometimes be dealt with by the courts on principles not applicable to ordinary conveyances. A person incapacitated by the infirmities of age for active pursuits naturally feels a strong desire to place the fruits of his industry and enterprise where they will secure him during the remnant of his life a suitable and proper maintenance, without further care or labor on his part. One thus situated also naturally prefers to convey his property to his child for that purpose, and that his child, and not a stranger, should assume the obligation to maintain him. Paternal affection thus prompts him, and he relies upon the filial affection of his child for the faithful and cheerful performance of the obligation. And thus it is that when an aged and infirm father conveys his property to his son in consideration that the son shall care for and maintain him during the remainder of his life, elements enter into the transaction peculiar to such cases. Such a transaction on the part of the father is prompted often by necessity, always by affection for and trust in the son to whom he has transferred his means of support. Besides, the age and infirmity of the father may unfit him in a degree properly to protect his own interests, and may render him subject to imposition. Hence it is that we seldom find in such transactions evidence of that deliberation and careful regard to self-interest on the part of the father, which usually characterize ordinary business transactions of the same magnitude. Because of

⁵³ *Copeland v. Copeland*, 89 Ind. 29. This case contains an exhaustive discussion of the question. That a wife cannot claim dower as against the mortgage conditioned for her husband and her support. See *Hinds v. Ballou*, 44 N. H. 620.

⁵⁴ *Burch v. Burch*, 52 Ind. 136; *Lindsey v. Lindsey*, 45 Ind. 552; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Tanner v. Van Bibber*, 2 Duv. (Ky.) 550.

⁵⁵ *Copeland v. Copeland*, 89 Ind. 29; *Wilson v. Wilson*, 38 Cal. 18; s. c., 61 Am. Dec. 227. *Contra*, see note 52.

⁵⁶ *Leach v. Leach*, 4 Ind. 628; *Hershman v. Hershman*, 63 Ind. 451; *Delong v. Delong*, 56 Wis. 514.

⁵⁷ *Wilson v. Wilson*, 86 Ind. 472.

⁵⁸ *Bresnahan v. Bresnahan*, 46 Wis. 385.

⁵⁹ *Spaulding v. Hallenbeck*, 39 Barb. 79.

these and other considerations peculiar to a case like this, it is the duty of the son, and he should regard it as his highest privilege, fully to perform his agreement. This is not only a moral and religious duty, but it is a duty of which a court of equity will take cognizance, and grant proper relief for its non-performance."⁶¹

§ 20. *Waiver of Performance.*—The beneficiary may waive a performance by the grantee, by refusing to receive the support.⁶² If the grantee does all the beneficiary will permit him to do, although short of the condition, he is released from a farther performance.⁶³ If the beneficiary waives a performance and dies his heir cannot take any advantage of it, nor any one else.⁶⁴ In determining whether there has been a waiver, the condition of the grantor will be considered; and if he is not in a mental condition to waive the condition, although his acts may amount to that, it will be so held.⁶⁵ If a judgment for damage because of a breach is obtained, there can be no claim of waiver made until it is satisfied in full.⁶⁶

§ 21. *Possession of Land.*—In case of a conveyance and taking back a mortgage conditioned for support, if nothing is said as to who is to occupy the land, the mortgagor retains possession; for it is essential to enable him to perform the condition.⁶⁷ If the mortgage be followed by a lease of the same premises for life given by the mortgagor to the mortgagee, the lease is construed as merely giving the mortgagee the use and possession of the premises.⁶⁸

§ 22. *Beneficiary's Residence.*—If there be no place specified, the mortgagee or

⁶⁰ Rowell v. Jewett, 69 Me. 300.

⁶¹ Bogle v. Bogle, 41 Wis. 209; see Leach v. Leach, 4 Ind. 628.

⁶² Boone v. Tipton, 15 Ind. 270; Petro v. Cassiday, 9 Ind. 289.

⁶³ Rush v. Rush, 40 Ind. 83; Lindsey v. Lindsey, 45 Ind. 552.

⁶⁴ Petro v. Cassiday, 18 Ind. 289; Clark v. Barton, 51 Ind. 163; Risley v. McNiece, 71 Ind. 434; Boone v. Tipton, 15 Ind. 270.

⁶⁵ Richter v. Richter, 111 Ind. 456. See section 18 for a fuller report of this case.

⁶⁶ Leach v. Leach, 9 Ind. 271; Sanborn v. Woodman, 5 Cush. 56; Jackson v. Topping, 1 Wend. 388; s. c., 19 Am. Dec. 515.

⁶⁷ Flanders v. Lamphear, 9 N. H. 201; Rhoades v. Parker, 10 N. H. 83; Dearborn v. Dearborn, 9 N. H. 117; Brown v. Leach, 85 Me. 39; Bryant v. Erskine, 55 Me. 153.

⁶⁸ Powers v. Patten, 71 Me. 583. See Stout v. Dunning, 72 Ind. 343.

grantor (the beneficiary) may live where'er he list, creating no needless expense.⁶⁹ The grantee or mortgagor cannot insist that he is to furnish the support only at the residence on the premises granted or mortgaged.⁷⁰ If it is provided that the grantor is to live on the premises, and that the grantor may also occupy them, the latter cannot insist that the former must eat at the table with him; and such grantor is entitled to have his meals furnished at a separate table in a separate room. A failure to do so is a breach of the condition.⁷¹ So it is said that the condition of the mortgage is broken by a refusal to pay for the mortgagee's board at a suitable place, even though no special demand for such support is made for the mortgagor.⁷² A condition to provide a home in the house on the premises does not require the mortgagor to supply food, clothing or fuel; and the fact that he does so for a while does not render him liable thereafter for them; but if the house burn down or so fall into decay as not to be worth repairing, he must still provide the home on such premises, even though he himself has moved away.⁷³ A mortgage by a son to his mother was conditioned "to provide a horse for said Margery to ride to meeting and elsewhere, when necessary; find her firewood for one fire, to be drawn and cut at the door, fit for use; give her a good cow, and keep said cow for her during the natural life of her, the said Margery." It was held that the destruction of the house in which the mother lived with the son did not exempt him from performing the condition, and that he was bound to furnish the wood at such a place as she made her home, within a reasonable and convenient distance; and if the mortgagee was obliged to sell the cow in consequence of its not being properly kept, it was not necessary, in order to charge him with the cost of keeping a cow for the time subsequent to the sale, for the mortgagee to purchase a cow and tender her to the mortgagor to be kept.⁷⁴ In proving a breach of a contract to support, it is not sufficient to

⁶⁹ Wilder v. Whittemore, 15 Mass. 262; Thayer v. Richards, 19 Pick. 398; Copeland v. Copeland, 89 Ind. 29; Flanders v. Lamphear, 9 N. H. 201; Rowell v. Jewett, 69 Me. 293; Borst v. Crommie, 19 Hun, 209.

⁷⁰ Rowell v. Jewett, 69 Me. 293.

⁷¹ Hubbard v. Hubbard, 12 Allen, 586.

⁷² Pettee v. Case, 2 Allen, 546.

⁷³ Gibson v. Taylor, 6 Gray, 310.

⁷⁴ Fiske v. Fiske, 20 Pick. 499.

show that the beneficiary left the house of the obligor and elsewhere resided for several years, no request being made by him for a fulfilment of the agreement, nor any manifestation to the obligor being made of an intention or desire to hold him to the performance.⁷⁵

§ 23. *Same — Continued.* — If the agreement is to support at a given house, or on the real estate conveyed or mortgaged, then support elsewhere cannot be insisted upon, unless the conduct of the obligor is such that a person of reasonable endurance cannot be expected to tolerate it, and this is true even though the beneficiary is a minor and he is taken away by his guardian.⁷⁶ Where the obligation was "to provide for and maintain" the beneficiary, but the agreement was silent as to where he should reside and receive the support, it bound the obligor to provide for and maintain the beneficiary in a suitable manner, not, however, requiring that he should take him to his own house to reside, nor that the beneficiary should necessarily go there to receive his support or be deprived of it. "A provision for his support in a suitable family, where he would be properly nursed and cared for by those not obnoxious to him, would comply with the agreement. And so, if the appellant made such provision at his own house, and if it was a suitable and proper place for him to reside, and he could have lived there in harmony and would there have received the proper care and attention and had all his wants supplied, it was his duty to make that his home; and if he refused to do so, without cause, and voluntarily went elsewhere to live, the appellant would not be liable for his board and personal care during such absence. It would be otherwise, however, as to his clothing and necessary expenses for medical services when sick."⁷⁷ Where the contract of a son was to maintain his mother "on" the real estate conveyed, it was held that he was bound to provide her with maintenance "on" the land conveyed by her to him, and not elsewhere.⁷⁸ Where a brother and sister conveyed the land they

were living upon, and took back a mortgage conditioned that the mortgagor provide for them "both in sickness and in health, good and proper food, medicine and clothing, with proper and kind care and nursing, during their natural lives, together with fuel for each of them prepared and housed for their fires, and suitable board, and care for a horse for their own use; and the said Charles [the brother] is to have, use and occupy the westerly front room of the house below, and the southeasterly chamber, for his own separate use during his natural life; and the said Julia [the sister] to have, use and occupy the southwesterly front room of the house (when built) for her own and separate use during his natural life," it was held, by a divided court, the addition having been built, by the grantee, to the house, according to his agreement, at considerable expense, and he being under an obligation not to dispose of the house during the lives of the sister and brother, that they were not entitled to support elsewhere than in the house.⁷⁹ Where by a will the testator's wife was to have her living "off of the farm," and it was specified that the devisee "is to let my wife have the house in which I now live, while she lives; he is also to furnish her with everything that is necessary while she lives," it was held that the testator contemplated, upon his death, that she would continue to reside in the house, and there receive her support, yet if she refused to reside there, and preferred to reside elsewhere, the duty of the devisee was to pay her whatever sum of money it was worth to support her on the farm and no more.⁸⁰

§ 24. *Alternative Condition.* — Where a mortgage was conditioned to pay a certain sum or to support the mortgagee, it was held that the mortgagor has his election which alternative he would take; and if he elected to furnish support, he was entitled to the possession of the premises, in order to be enabled to comply with the condition he had chosen to perform. Having made the election, he could not revoke it; and such election was binding upon the mortgagee, who having received a part performance of the one could not insist upon a complete performance of the

⁷⁵ *Jenkins v. Stetson*, 9 Allen, 128.

⁷⁶ *Green v. Green*, 32 Ind. 278.

⁷⁷ *Blossom v. Ball*, 32 Ind. 115. See *Leach v. Leach*, 4 Ind. 628.

⁷⁸ *Graham v. Castor*, 55 Ind. 559. See *Craven v. Bleakney*, 9 Watts, 19; *Wusthoff v. Dracourt*, 3 Watts, 245.

⁷⁹ *Dewelley v. Dewelley*, 143 Mass. 509; s. c., 10 N. E. Rep. 468.

⁸⁰ *Tope v. Tope*, 18 Ohio, 520; *Korne v. Korne*, 3 S. W. Rep. 17.

other condition.⁸¹ The election having been made, the mortgage became surety for the performance of the condition.⁸² Where a mortgage was conditioned to secure the payment of \$500 in five years, "to be paid in furnishing the mortgagee," during that period, "a good and sufficient home and support," it was held that the mortgagor did not have his election to pay in money.⁸³

§ 25. *Who may Perform.*—A contract to support is a contract for personal services; it cannot be performed by another, unless the person receiving the support consents to receive it; and if the person who is to furnish the support die, then his heirs, executors or administrators must keep it, and while the condition is in force, the administrator cannot dispose of the property to pay debts of the deceased.⁸⁴ Nor can the person who is to receive the personal service assign the obligation and security to another, so as to enable that person to enforce it, unless, perhaps, where there has been an actual breach and an entry for condition broken before assignment.⁸⁵ The creditors of the obligor cannot sell the land conveyed, nor take the possession of it from him.⁸⁶ But he may mortgage the land, if the mortgage does not defeat the condition.⁸⁷

⁸¹ *Bryant v. Erskine*, 55 Me. 153.

⁸² See *Furbish v. Sears*, 2 Cliff. 454.

⁸³ *Hawkins v. Clermont*, 15 Mich. 511. See *Evans v. Norris*, 6 Mich. 369.

⁸⁴ *Eastman v. Batchelder*, 36 N. H. 141; s. c., 72 Am. Dec. 295; *Bethlehem v. Annis*, 40 N. H. 34; s. c., 77 Am. Dec. 700.

⁸⁵ *Bryant v. Erskine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34; s. c., 77 Am. Dec. 700; *Dewelle v. Dewelle*, 143 Mass. 509; s. c., 10 N. E. Rep. 468. See *Hopper v. Olds*, 42 N. J. Eq. 120; s. c., 7 Atl. Rep. 349, for a case of unusual circumstances.

⁸⁶ *Eastman v. Batchelder*, 36 N. H. 141; s. c., 72 Am. Dec. 295.

⁸⁷ *Id.* Right of entry in case condition should be broken at a future time is not an assignable interest. *Bethlehem v. Annis*, 40 N. H. 34; s. c., 77 Am. Dec. 700. Where a father agreed to will a son a certain farm if he would support him and his wife, it was held that if the son carried out the contract it was a binding agreement, and an invalid devise of the farm to the son did not defeat his right to it. *Hiatt v. Williams*, 73 Mo. 214; s. c., 37 Am. Rep. 438, citing *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101. A father desiring to live with his daughter, and have her husband manage his livery business, transferred to her an insurance certificate and one-half interest in his livery stock, the daughter agreeing to pay \$1,000, which was to be applied on a mortgage given by the father, and to manage the business; the earnings, after paying all expenses, to be applied on the mortgage, and after that was paid, to be equally divided. The daughter's husband was to have the

management of the father's interest in the business. At the same time the father executed to the daughter a deed for a one-half interest in certain lands, including the stable, on the condition that she should suitably provide for him, the deed to be void on her failure to do so. The profits of the lands conveyed were reserved to the father during his life by the agreement. The daughter and her husband had but \$1,000 when the agreement was made, and they acted in good faith and performed their agreement. It was held that they had the exclusive right to the sole control and management of the business so long as there was no forfeiture or intervening equity, and that the father was entitled only to an accounting, and could not maintain an action to dissolve a copartnership alleged to exist by reason of their agreement. *Haggarty v. White*, 34 N. W. Rep. 92; s. c., 69 Wis. 317.

W. W. THORNTON.

INSURANCE — WARRANTIES — PLEADING — NECESSARY ALLEGATIONS ON A POLICY OF INSURANCE.

COWAN V. PHOENIX INS. CO.

Supreme Court of California, January 29, 1889.

1. *Insurance—Warranties—Pleading.*—In counting on a policy of insurance the petition need not allege performance of warranties *in presenti* or affirmative warranties, but the rule is otherwise in the case of promissory warranties.

2. *Same—Necessary Allegations on a Policy of Insurance.*—The terms of an insurance policy provided that the amount of loss or damage shall be estimated according to the actual cash value of the property at the time of the loss, and be paid sixty days after proofs of the same, required by the company, shall have been made by the assured, and received at the office in Chicago: *Held*, that the complaint was bad on demurrer, for want of allegation, that proofs were furnished sixty days before the institution of the action.

THORNTON, J., delivered the opinion of the court:

Action on policy of fire insurance, on which plaintiff recovered judgment. Defendant appeals.

It is argued that the complaint is defective in that it does not set forth the application of the assured, which is declared to form a part of the policy. It appears clearly from the complaint that there was an application, which was made a part of the policy. The contents of it are not stated in the complaint. But it is stated in the complaint, by appending the policy to and making it part of it, that there was an application, and that that application should be considered a warranty by the assured. This stipulation of the contract is a solemn engagement by the assured that the representations made, in the application at the time they were made, and when the policy became a contract, were true and correct. There are two classes of conditions usually inserted in policies—the first pointing to the time of the contract; the second, to things which may occur, or which may have to be performed, at a time subsequent. In the former case the stipulation is

called an "affirmative warranty," and in the latter a "promissory warranty." 1 Marsh. Ins. 578; Ann. Ins. § 145; Insurance Co. v. Cotheal, 7 Wend. 72. Affirmative warranties are sometimes called "warranties *in present*." 1 Wood, Ins. 444. A breach of an affirmative warranty consists in the falsehood of the affirmation, when made, of a promissory warranty, which is in its nature executory. of the non-performance of the stipulation. De Hahn v. Hartley, 1 Term R. 343. A stipulation that "a watchman shall be kept on the premises nights" is a promissory warranty. 1 Woods, Ins. §§ 179, 186. So, also, that, during the risk the premises shall be used as an hotel is a promissory warranty that it shall be so used. An engagement that so many buckets of water shall be kept by the assured on any floor of a building is also a promissory warranty. 1 Wood, Ins. § 187.

Instances of promissory or executory warranties may be found in *Murdock v. Insurance Co.*, 2 N. Y. 210, and *Bobbitt v. Insurance Co.*, 66 N. C. 70.

In pleading performance of conditions precedent in a contract, it is not necessary, under the law of this State, to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part. Code Civil Proc. § 457.

In counting on a policy of insurance, we cannot see that there is any necessity of averring performance by the insured of anything warranted to be true when the policy is issued, for the reason that there is nothing to be performed. When the assured has warranted a thing to exist, or a representation to be true, at a time when a policy becomes consummated as a contract, he has done all that he can do. The warranty is agreed to by him, and there is an end of all he can do or perform. Under the section of the Code of Civil Procedure above referred to, he is only required to aver performance of the conditions on his part to be performed, and, where there is nothing in the representation or statement to be performed by the plaintiff, there is no necessity of setting forth such representation or statement. Clearly, when nothing is required to be performed by him, such an averment by him would be useless and without meaning; whereas in the case of a promissory warranty, the assured has warranted that he will do something during the existence of the risk, and therefore an averment of such stipulation and of its performance is required. As is said in 2 Wood, Ins. 1136: "It can readily be determined of what matters performance should be averred by ascertaining what, under the policy, the assured has stipulated to do, and what he must do in order to recover, and he must aver performance of all such conditions; as where he stipulates to erect a chimney, to keep a watchman, to put in a force-pump, to keep water in certain quantities and in certain places, or any other matter or thing which the insurer has contracted to do." In same connection this author, on same page, says: "But, as to all other matters which are in the nature of exceptions, or which

are merely prohibitory, and provide that the assured shall not do certain things, the plaintiff need not make any special averments, as they are merely matters of defense, which, if relied upon by the insurer, must be pleaded and proved by him; and, if nothing is said in the declaration as to whether such conditions have been broken or not, the declaration will not be defective." These statements of Mr. Wood are sustained by cases cited by him, and are on principle correct.

An application is generally nothing more than a representation made by a party when he applies for insurance of his property. These statements or representations relate to the descriptive character and value of the property of which insurance is sought, and how such property is used. When the application is made a part of the policy given out and a warranty, the warranties in it are of the kind styled "affirmative" or "*in present*." They constitute a contract that the representations made in the application are true. Of such engagements or contracts there is nothing to be done or performed by the insured, and therefore the statements need not be set forth in a complaint on the policy or any averment of the performance of them. A plaintiff is not called on to aver or prove the truth of such representations in his complaint. It was so held in the case of *Herron v. Insurance Co.*, 28 Ill. 233, upon a demurrer to a complaint, where the same objection was made to it as in the case before us, and the ruling of the court below sustaining the demurrer was reversed.

It is said that something material, or which may be material, to plaintiff's right to recover, has been left out of the complaint. In reply to this, we say it does not appear that anything material in the application, or which may be material to plaintiff's case, has been left out. The application is not before us, and we cannot say what is in it. Therefore we cannot say that anything material is omitted from the complaint. As to the contention that there may be something material in the application which is omitted from the complaint, in addition to what is said above, we will further say that a demurrer to a complaint should not be sustained because there may be possibly something in an application affecting plaintiff's right to recover which is not averred in the complaint. Certainly we should not reverse a ruling of the court below overruling a demurrer on a perhaps. Error should clearly appear to justify such a course.

In ruling against the defendant on the point above discussed, we desire to say, further, that we cannot see how it can receive any detriment from the lack of the suggested allegation. The policy states that the application is filed with the defendant, and in his answer defendant can set it out and aver non-performance of anything required by it to be performed.

The second objection to the complaint is that it does not appear that the proof of loss was furnished to the defendant sixty days before the commencement of this action. This question was

presented to this court in *Doyle v. Insurance Co.*, 44 Cal. 264, and it was there held that a complaint with a similar allegation was fatally defective.

The provisions of the policy in regard to proof of loss are as follows: "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same required by the company shall have been made by the assured, and received at the office in Chicago, and the loss shall have been ascertained and proved in accordance with terms and provisions of this policy, unless the property be replaced, or the company shall have given notice of their intention to rebuild or repair the damaged premises. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular and specific account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also the actual cash value of the property, and their interest therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss; when and how the fire originated; and shall produce a certificate under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property described to the amount which such magistrate or notary public shall certify."

This last paragraph quoted is from subdivision 9 of policy. There are other provisions in this subdivision which need not be quoted, bearing on the subject of the proofs of loss.

The respondent's counsel, referring to the language of the first paragraph just above quoted as to proofs of loss, asks: "Now, how is the loss to be ascertained and found in accordance with the terms and provisions of this policy?" He then proceeds to say that the mode prescribed by the policy for ascertainment is the arbitration clause of the policy, which is in these words. "The amount of said value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured; or, failing to agree, the same shall then, at the written request of either party, be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to select a third; and the award of any two of them in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this

company, nor any other question, except only the amount of such loss or damage."

We cannot discern that the proofs of loss or damage are dispensed with or waived by the provision. The stipulation in the policy that the amount of loss or damage may be determined by arbitration only takes effect when the parties have failed to agree, and there is no allegation in the complaint that they have failed to agree. If an arbitration is required by the policy to ascertain and determine the amount of loss or damage, still it is clear from the clause first quoted, in regard to proofs of loss, that the loss is not payable until sixty days after the proofs have been made and received at the office in Chicago.

If arbitration is resorted to for the ascertainment and proof of the amount of loss, and the award is not made until the period of sixty days above stated has elapsed, still the amount of loss is not payable until such award is made. The resort to arbitration may prolong the day of payment beyond sixty days, but cannot shorten that period. This is clear from the words used in the clause first above quoted, which provides that the loss shall not be paid until sixty days after the proofs shall have been received at the office in Chicago, and shall have been ascertained and found in accordance with the terms and provisions of the policy, *i. e.*, by arbitration, when resort is had to it, if the contention of the plaintiff is to be sustained. We think it clear that the resort to arbitration, as said above, may prolong the day of payment beyond the sixty day period, but cannot bring it within the sixty days.

We are of opinion that the objection to the complaint just above discussed is well taken, and that the demurrer to it should have been sustained.

We deem it unnecessary to pass on the other point made by the defendant, in regard to the verdict, as there is no probability of its arising on a new trial.

For the reasons above given the judgment is reversed, and the cause remanded for a new trial, with direction to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend.

NOTE.—Judge Leonard, one of the ablest judges who ever occupied a place on the bench of Missouri, has thus defined warranties in the law of insurance: "A warranty, in the law of insurance, is a written stipulation in the policy applicable either to matters, present or future; in the former case it is called an affirmative and in the latter a promissory warranty, these warranties are made effectual by treating them as conditions precedent, upon the truth or fulfillment of which the entire contract depends."¹ At the common law it was necessary to plead conditions precedent, and show the manner of their performance.² cases which, like this, seemingly are at variance with the accepted law, are likewise distinct. The case annotated at first blush seems at variance with the settled rules of law as held by other courts, but the case has distinguishing features, for the court says that, by reason of the code of the State the pleader

¹ *Hutchinson v. Insurance Co.*, 21 Mo. 97.

² *Chitty's Pldg.* p. 237.

is only required to aver performance of things required of him to be performed. Other gushable, as where it was held that the application, though called a warranty, was no part of the contract; or, as in another, that it was a representation;³ so this case may be further distinguished, it holds the statements in the application to be warranties "*in presenti*," and need not be averred. It will be observed that in each of these cases the question is raised on the reference in the policy to the application. The rule of the common law continues to be the sound rule of pleading, namely, that conditions precedent must be set out and their performance pleaded.⁴ Where the application is made a part of the policy, as where the question is asked, "is there a watchman in the mill during the night?" and the reply was "there is a watchman nights," it was held to be a continuing warranty, and a failure to allege it made the petition demurrable.⁵ So, also, where a stipulation in a policy required that notice of loss be given forthwith upon occurrence of loss;⁶ a petition was likewise held radically defective where a provision of the policy called for a full and particular account, in writing, stating the nature of the assured's interest therein, though this provision was a by-law of the company, not incorporated in the policy, but merely referred to as part of the contract, and though the proof of the loss was alleged to have been duly made;⁷ and again, where immediate notice was required to be given in writing, stating whether any, and what insurance had been made on said property, giving copies of the written portions of all policies thereon.⁸ From the cases it clearly appears that the defect may be made by demurrer or by motion in arrest, as it is a fatal defect and not cured by verdict. Proof, though properly made, and forwarded, will not be competent unless the proper ground for its introduction has been laid by proper averment.⁹ Though a declaration sets out specifically the terms of the policy, if a compliance be not averred specifically of all conditions precedent, the pleading is defective and is not cured by a general averment that plaintiff performed all things required of him by the contract.¹⁰

The payment agreed to be made is conditional, and before recovery may be had a substantial compliance with those conditions must be shown.¹¹ The test as to what are necessary allegations in a given case is to be determined by the pleader by a reference to the terms of the policy on which he proposes to bring suit.¹² But there are what are termed exceptions, which are negative are prohibitive in their character, requiring that defendant shall refrain from certain things or acts; these need not be averred, being exceptions to the rule requiring the pleading of warranties in the petition; in order that defendant may avail himself of them he must plead them in the answer, bring properly matter of defense.¹³ Respecting war-

rancies *in presenti* a change of use of the property insured does not invalidate contracts unless risk is thereby materially increased.¹⁴ Affirmative warranties must be literally true, and promissory warranties must be strictly performed.¹⁵ BENJ. J. KLENE.

¹⁴ United States Ins. Co. v. Kimberly, 34 Md. 324; Billings v. Ins. Co., 20 Conn. 139; Jenkins v. Ins. Co., 2 Denio, 75; Smith v. Ins. Co., 52 N. Y. 397.

¹⁵ Hutchinson v. Ins. Co., 21 Mo. 97.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACTION — Joinder of Causes. — Under the Code system, a simple contract creditor may in the same action recover a judgment for the indebtedness, and have set aside a fraudulent conveyance by the debtor to a co defendant. — *Shirley v. Waco R. Co.*, S. O. Tex., Jan. 22, 1899; 10 S. W. Rep. 543.

2. ADMIRALTY—Jurisdiction — Contracts. — A contract by which a master of a vessel agreed to carry charcoal to the place of destination, sell the same and account for proceeds is not a maritime contract and the admiralty court has no jurisdiction. — *Krohn v. The Julia*, U. S. C. C. (La.), Jan. 19, 1899; 37 Fed. Rep. 369.

3. ADVERSE POSSESSION—Actual and Continuous. — Adverse possession, to be available, must have been continuous for the statutory period, Rev. St. Tex. art. 3196, defining adverse possession to be an actual and visible appropriation, commenced and continuous under claim of right, etc. — *Holstein v. Adams*, S. C. Tex., Jan. 23, 1899; 10 S. W. Rep. 560.

4. ANIMALS—Injuries by Dogs — Presumption. — Dogs kept upon a farm are presumed not to be vicious and the owner is not liable for their vicious acts unless he had knowledge of their vicious habits. — *Shaw v. Craft*, U. S. C. C. (Ohio), Dec. 1898; 37 Fed. Rep. 317.

5. APPEAL — Appealable Order — Appointment of Receiver. — A writ of error to an order denying a motion to vacate the appointment of and to discharge a receiver, and to require him to pay over the funds in his hands, will not lie before the final disposition of the

³ Throop v. Ins. Co., 19 Mich. 423; Herron v. Ins. Co., 28 Ill. 338.

⁴ Glendale Mfg. Co. v. Ins. Co., 21 Conn. 19; Rockford v. Ins. Co., 65 Ill. 415; Edgerly v. Ins. Co., 43 Iowa, 587.

⁵ Glendale Mfg. Co. v. Ins. Co., 21 Conn. 19; Bobbett v. Ins. Co., 66 N. Car. 70.

⁶ Inman v. Ins. Co., 12 Wend. 460.

⁷ Johnston v. Ins. Co., 112 Mass. 49; Dolbier v. Ins. Co., 67 Me. 180.

⁸ 2 Gray, 290.

⁹ Edgerly v. Ins. Co., 43 Iowa, 587.

¹⁰ Wood on Insurance, p. 1185, and cases cited in note 3; Perry v. Ins. Co., 8 Fed. Rep. 643.

¹¹ Perry v. Ins. Co., *supra*.

¹² Woolen Co. v. Ins. Co., 21 Conn. 19.

¹³ Hunt v. Ins. Co., 2 Duer, 491; Westfall v. Ins. Co., 2 Duer, 490; Lounsberry v. Ins. Co., 8 Conn. 459.

action.—*Boyd v. Cook*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 479.

6. APPEAL—Appealable Orders—Vacating Order of Arrest.—The supreme court is without jurisdiction to review a ruling of the district court, refusing to vacate an order of arrest before the final judgment in the action has been rendered.—*Burch v. Adams*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 478.

7. APPEAL—Assignment of Error—Sufficiency.—An assignment of error, simply stating that the judgment is contrary to the law and evidence of the case, is too indefinite to be noticed.—*Houston v. Blythe*, S. C. Tex., Nov. 13, 1888; 10 S. W. Rep. 520.

8. APPEAL—Review—Objections not Made Below.—Exceptions to the introduction of evidence, not made a ground of complaint in the motion for new trial, cannot be considered on appeal.—*City of St. Louis v. Excelsior Co.*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 477.

9. APPEAL—Review—Objections not Made Below.—In action by the State to collect excess in commissions, no objection having been made in the court below, that it was improper to impose penalties for delinquencies in the payment of the excess, it will not be considered on appeal.—*Wilson v. State, to use of St. Francis Co.*, S. C. Ark., Feb. 9, 1889; 10 S. W. Rep. 491.

10. APPEAL—Review—Questions of Fact.—In cases at law questions of fact cannot be brought under review however erroneously found by the trial court.—*Müller v. Monk*, S. C. S. Car., Feb. 6, 1889; 8 S. E. Rep. 638.

11. APPEAL—Review—Res Adjudicata.—The decision of this court becomes the law of the case, and, upon a second appeal, is binding upon the court and the parties, and from which the court is not at liberty to depart.—*Applegate v. Dowell*, S. C. Oreg., Jan. 16, 1889; 20 Pac. Rep. 429.

12. APPEAL—Review—Special Finding.—Under Code Ala. 1886, §§ 2745-2745, providing that the parties in ejectment may submit the issue of fact to the court, and, "if there is a special finding of facts the supreme court must, on appeal, determine whether the facts are sufficient to support the judgment," the supreme court cannot review the sufficiency of the evidence to support a judgment, in the absence of a special finding entered on the minutes.—*Quillman v. Gurley*, S. C. Ala. Jan. 31, 1889; 5 South. Rep. 345.

13. APPEAL—Review—Weight of Evidence.—Where controverted questions of fact are submitted to a jury upon conflicting evidence their verdict thereon is conclusive.—*Juncos v. Stunkle*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 475.

14. APPEAL—Review—Weight of Evidence.—The report of commissioners in condemnation proceedings will not be set aside on the evidence, unless the court is clearly satisfied that they have erred in the principles upon which they have made their appraisal.—*City of St. Louis v. Lemigan*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 476.

15. ARMY AND NAVY—Enlistment of Minors.—Under Rev. St. U. S. § 1117, the enlistment of a minor without the written consent of his parents is invalid and the invalidity may be claimed by him either before or after his majority.—*In re Chapman*, U. S. C. C. Ga., Jan. 23, 1889; 37 Fed. Rep. 327.

16. ASSIGNMENT—Contract for Sale of Lands—Warranty of Title.—An assignment by the holder of a contract of sale of land, of all the assignor's "right, title, and interest" in the land, without covenants of warranty, transfers only such interest as the assignor had, and does not make him liable for a failure of title.—*Griel v. Lomax*, S. C. Ala., Jan. 14, 1889; 5 South. Rep. 325.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS—Assignee's Bond—Liability of Sureties.—Under insolvent act Cal. 1880, § 15, providing that any creditor aggrieved may sue on the bond of the assignee of an insolvent debtor, the sureties on such a bond are not liable for the wrongful seizure by him without legal process of property not belonging to the estate of the

insolvent.—*Best v. Johnson*, S. C. Cal., Jan. 30, 1889; 20 Pac. Rep. 415.

18. ASSUMPSIT—Gratuitous Performance of Services.—No recovery can be had for services gratuitously rendered.—*Stadel v. Stadel*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 475.

19. ATTACHMENT—Affidavit—Knowledge of Affidavit.—Under Code Civil Proc. Cal. § 538, an affidavit for attachment is not defective because the affidavit does not state whether his averments are based on knowledge or on information and belief.—*Simpson v. McCarthy*, S. C. Cal., Jan. 29, 1889; 20 Pac. Rep. 406.

20. BAIL—Forfeiture of Recognizance—Judgment.—A judgment upon a forfeited recognizance will be approved, when it appears that it was given for the appearance of a person charged with a crime, that he was legally in custody, that he was released because the recognizance was given, and that he failed to appear.—*Norton v. State*, S. C. Kan., Jan. 9, 1889; 20 Pac. Rep. 422.

21. BOND—Pleading—Proof of Execution.—Under Code Ala. § 2769, in an action on the official bond of a constable where the bond is set forth in the complaint and purports to have been executed by defendants, it is admissible in evidence though executed without statutory authority.—*Bryan v. Kelly*, S. C. Ala., Jan. 31, 1889; 5 South. Rep. 346.

22. BOUNDARIES—Fences—Erection by Trespasser.—The fact that a trespasser built a fence between two tracts of land will not support an implied agreement between the owner to recognize such fence as a boundary line.—*McKay v. Hyde Park*, U. S. C. C. (Ill.), Dec. 17, 1888; 37 Fed. Rep. 369.

23. BRIDGES—Defects—Liability for Stock Injured.—A stray horse which has broken from an inclosure and is running at large is not within Code Ala. 1886, § 1456, which requires that bridges shall be safe for the passage of travelers and other persons.—*Lee Co. v. Yarbrough*, S. C. Ala., Jan. 23, 1889; 5 South. Rep. 341.

24. CHATTEL MORTGAGES—Description.—A mortgage describing the mortgaged property as "eight bales of cotton, weighing 500 lbs. each, of the crop" which the mortgagor should raise in a designated locality, is not void for uncertainty of the specified weight.—*Watson v. Pugh*, S. C. Ark., Feb. 16, 1889; 10 S. W. Rep. 494.

25. CHATTEL MORTGAGE—Right of Possession.—An invalid mortgage cannot be made the basis of a claim of possession of the mortgaged property by the mortgagee, though it in terms gives him such possession.—*Butler v. Plate*, S. C. Iowa, Jan. 24, 1889; 41 N. W. Rep. 474.

26. CONSTITUTIONAL LAW—Title of Act—Warehouse Act.—A section in the warehouse act of Ill., 1871, prescribing a penalty for the issuance of fraudulent receipts is not void because the subject-matter is not embraced in the title of the act.—*Sykes v. People*, S. C. Ill., Jan. 25, 1889; 41 N. W. Rep. 703.

27. CONTRACTS—Construction—Joint Liability.—Where two parties jointly contract an indebtedness to a third party, and they treat it as a joint affair, a court of equity, in a suit between the parties to adjust their respective rights on account of debts, will regard it as a joint obligation, and will not determine that the party for whose benefit it was created was a principal debtor, and that the other, was a mere surety for him.—*Vincent v. Logsdon*, S. C. Oreg., Jan. 16, 1889; 20 Pac. Rep. 459.

28. CONTRACTS—Construction—Time of Performance.—In the absence of a fixed time for the performance of the agreement, a reasonable time would be presumed to have been intended by the parties.—*McCartney v. Glassford*, S. C. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 423.

29. CORPORATIONS—Director and Creditor.—A stockholder and even a director may become a creditor of a corporation where the action is not tainted with fraud.—*Borland v. Haven*, U. S. C. C. (Cal.), Dec. 17, 1888; 37 Fed. Rep. 334.

30. COUNTIES—Allowance of Claim—Evidence.—Where a board of county commissioners have allowed

§625 to a claimant, the record thereof in the office of the county clerk is competent evidence tending to show such allowance, and the receipt of the same. — *Mosteller v. Mosteller*, S. O. Kan., Feb. 9, 1899; 20 Pac. Rep. 464.

31. COUNTIES—Tax-Collector—Lien. — The lien created by Code Ala. 1876, § 408, on the property of a tax-collector extends to property acquired by him after the execution of his bond. — *Baker v. Schewaler*, S. O. Ala., Jan. 15, 1899; 5 South. Rep. 323.

32. CRIMINAL LAW—Appeal—Review. — Where, in a criminal case, no exceptions were taken except to the instructions, and they fully instructed the jury as to the offense, the verdict will be sustained. — *Stricklin v. Commonwealth*, Ky. Ct. App., Jan. 24, 1899; 10 S. W. Rep. 465.

33. CRIMINAL LAW—Control of Jury — Constitutional Law. — Acts Tenn. 1897, ch. 158, providing for separation of the jury in certain cases, is an unconstitutional delegation of the legislative power to suspend the general law, which requires juries to be kept together in felony cases. — *King v. State*, S. O. Tenn., Feb. 9, 1899; 10 S. W. Rep. 509.

34. CUSTOMS DUTIES—Forfeiture. — When property afloat is feloniously taken from the owner and is then brought ashore and seized by the officers of customs, it will not be forfeited as against the true owner. — *United States v. 280 Bags of Kaintt*, U. S. D. C. (S. Car.), Jan. 24, 1899; 37 Fed. Rep. 326.

35. DEED—Acknowledgment—Signature of Notary. — Acknowledgment of deed taken by notary public but not signed by him is insufficient to make the record of the deed evidence undue of its execution under Rev. St. Ill. 1874, ch. 80, § 25. — *Clark v. Wilson*, S. O. Ill., Jan. 25, 1899; 19 N. E. Rep. 860.

36. DEED—Constructions—Reservations. — In an action to recover lands conveyed by a certain deed: *Held*, that references in the deed to former conveyances was sufficiently specific to exclude from the grant the portions referred to. — *Midgett v. Whorton*, S. O. N. Car., Feb. 18, 1899; 8 S. E. Rep. 778.

37. DEMURRAGE—Liability of Freight. — On a suit for demurrage, a freighter who undertakes to load a vessel is bound to reasonable diligence in loading. — *Melloy v. Lehigh Coal Co.*, U. S. D. C. (N. Y.), Dec. 26, 1898; 37 Fed. Rep. 377.

38. DISCOVERY—Constitutional Law—Trial by Jury. — Code Ala. 1896, § 3545, authorizing a creditor who has no lien or judgment to file a bill in chancery for the discovery of assets of the debtor liable to the payment of his debts, does not violate Const. Ala. art. 1, § 13, preserving the right of trial by jury. — *Montgomery & F. Ry. Co. v. McKensie*, S. O. Ala., Jan. 9, 1899; 5 South. Rep. 322.

39. DOWER—Allotment—Evidence. — In an action for dower: *Held*, that evidence of certain statements made by the widow that she had no interest in the land was not sufficient to estop her from claiming dower. — *Davis v. Cornelius*, Ky. Ct. App., Feb. 5, 1899; 10 S. W. Rep. 471.

40. ELECTIONS AND VOTERS—Ballot. — Hill's Code § 2607, has shifted the duty of selecting suitable ballot paper from the individual voter to the secretary of State. — *State v. Wolf*, S. O. Oreg., Dec. 5, 1898; 20 Pac. Rep. 316.

41. ELECTIONS AND VOTERS—Contest—Rejection of Votes. — A vote must be presumed to be legal, until the contrary is shown. — *Moss v. Patterson*, S. O. Kan., Jan. 5, 1899; 20 Pac. Rep. 464.

42. EMINENT DOMAIN—Payments into Court—Conflicting Claims. — A railroad company which has instituted condemnation proceedings against three persons to take land, and paid the money therefor into court, is not estopped from disputing, in a collateral action, the title of one of such persons. — *Ely v. Norfolk South E. Co.*, S. O. N. Car., Feb. 18, 1899; 8 S. E. Rep. 779.

43. EQUITY—Fraudulent Conveyance—Parties. — In an action to have a fraudulent grantee declared a trustee for complainants, the fraudulent grantor is a necessary party defendant. — *Hays v. Humphreys*, U. S. O. C. (Mo.), Jan. 14, 1899; 37 Fed. Rep. 333.

44. EQUITY—Jurisdiction—Adequate Remedy at Law. — A complaint in an action on a judgment which seeks only a money judgment does not state an action cognizable in equity though it alleged that defendant was estopped to plead a discharge in bankruptcy. — *Wabeles v. Davis*, U. S. O. C. (N. Y.), Jan. 21, 1899; 37 Fed. Rep. 280.

45. EQUITY—Lien—Parties. — Land subject to the charge of an annuity was sold to A by C. In an action to enforce the lien of the annuity against the land C is not a necessary party to the suit. — *Major v. McKim*, Va. Ct. App., Feb. 7, 1899; 8 S. E. Rep. 715.

46. EQUITY—Rescission—Fraud. — The court will not decree a rescission of a fully executed contract for fraud, where the evidence is vague and unsatisfactory. It is not sufficient that the grantor made a bad bargain. — *Kern v. Middleton*, S. C. Penn., Feb. 4, 1899; 16 Atl. Rep. 640.

47. EQUITY PLEADINGS—Supplemental Answer—Leave to File. — Leave to file a supplemental answer should be granted where the defense proposed to be set up is an agreement by which defendant would be discharged from liability. — *Thames v. Ins. Co. v. Cont. Ins. Co.*, U. S. O. C. (N. Y.), Jan. 30, 1899; 37 Fed. Rep. 256.

48. ESTATES—Nature of Estate—Title by Purchase. — A wife, who by marriage contract, is to have a life-estate, from the death of her husband, in a tract of land, with a dwelling-house thereon, is not entitled, on a loss occurring after his death, to the proceeds of a fire policy on the house, issued to the husband, and to be void "in case any change shall take place in title, except by succession by reason of the death of the assured." — *Charles v. Clayton*, S. O. Tenn., Feb. 22, 1899; 10 S. W. Rep. 505.

49. EVIDENCE—Proof of Handwriting. — The value to be given to the opinion of a witness as to authorship of handwriting is to be determined by the circumstances under which he has acquired his knowledge of it. — *United States v. Gleason*, U. S. D. C. (S. Car.), Jan. 15, 1899; 37 Fed. Rep. 331.

50. EXECUTION—Levy—Claim by Wife. — Where the property is seized under process against the husband which the wife claims by conveyance from him, she cannot defend on such title in a trial at law of the right of property. — *Bush v. Henry*, S. O. Ala., Feb. 6, 1899; 5 South. Rep. 321.

51. EXECUTION—Property Subject to—Judgments. — Under Code Civil Proc. Cal. § 542, subd. 5, and § 668, providing that property incapable of manual delivery may be taken on execution the same as upon writs of attachment, a judgment cannot be levied on as a debt and sold under execution. — *Latham v. Blake*, S. O. Cal., Dec. 29, 1898; 20 Pac. Rep. 417.

52. EXECUTORS AND ADMINISTRATORS—Accounting—Limitations of Actions. — There being no statutory limitation of the time within which an administrator may be cited to an account of his trust, the lapse of more than sixteen years since the appointment of an administrator c. t. a., will not bar a motion for an account by the legatees. — *Main v. Browne*, S. O. Tex., Jan. 22, 1899; 10 S. W. Rep. 571.

53. EXECUTORS AND ADMINISTRATORS—Action—Pleading. — Necessary averments in complaint in action by administrator *de bonis non* against the estate of deceased administrator, to recover a sum collected by defendant's intestate, as such administrator. — *Donaldson v. Lucas*, S. C. Ind., Jan. 29, 1899; 19 N. E. Rep. 768.

54. EXECUTORS AND ADMINISTRATORS—Payment of Legacy—Right of Action. — When an executor pays over a pecuniary legacy given for life, with remainder over, his assent extends as well to the remainder as to the life estate, and he cannot bring an action for its recovery. — *McCoy v. Guirkin*, S. C. N. Car., Feb. 18, 1899; 8 S. E. Rep. 776.

55. EXECUTORS AND ADMINISTRATORS—Sale of Decedent's Land—Application. — Under Code Ala. 1896, § 2106, an application by an administrator to sell lands of his decedent which averred that L and N claim to be the

lawful heirs of said decedent and that they are the only heirs to the best of his belief is *prima facie* evidence sufficient as to names of the heirs.—*Townsend v. Steele*, S. C. Ala., Feb. 5, 1889; 5 South. Rep. 351.

56. EXECUTORS AND ADMINISTRATORS—Sale of Decedent's Land—Delivery of Deed.—An administrator having sold real estate belonging to the estate, said sale having been confirmed, and a deed executed, and left in the hands of an ex-probate judge, the purchaser at said sale, was entitled to the deed on the payment of the purchase money.—*Cockles v. McCurdy*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 470.

57. FEDERAL JURISDICTION—Appearance—Waiver.—The privilege which act Cong. March 3, 1887, § 1, accords to a defendant, that he shall be sued only in the district of which he is an inhabitant, is waived by answering to the merits.—*Morris v. Atlas Co.*, U. S. C. O. (N. Y.), Jan. 29, 1889; 37 Fed. Rep. 279.

58. FENCES—In Common.—Where two owners of adjoining farms have the same inclosed by uniting the outside line fences, and there is no partition fence between their farms, their farms, in law, are fenced in common.—*Markin v. Priddy*, S. C. Kan. Feb. 9, 1889; 20 Pac. Rep. 474.

59. FRAUDS—Statute of—Agreement to Pay Debt of Another.—Where the defendant obtained the use of property by an agreement to pay a balance unpaid by its lessor, the contract is not a guaranty within the statute of frauds.—*Humphreys v. St. L. etc. R. R. Co.*, U. S. C. O. (N. Y.), Jan. 24, 1889; 37 Fed. Rep. 307.

60. HABEAS CORPUS—Hearing and Determination.—Where a defendant entered a plea of guilty to an indictment, and the court assessed his punishment, but on the next day caused the indictment quashed, and the cause held for the action of the grand jury, no inquiry can be had under the writ of *habeas corpus*, as to whether or not the court erred in its action.—*In re Barnett*, S. C. Ark., Feb. 9, 1889; 10 S. W. Rep. 492.

61. HOMESTEAD—Application.—Under Code Ga. § 2008, a petition by widow and minor children to have a homestead set off in property left by the husband need not state that there are debts against the husband.—*Deyton v. Bell*, S. C. Ga., Jan. 21, 1889; 8 S. E. Rep. 620.

62. HUSBAND AND WIFE—Community Property—Prize in Lottery.—Money received as a prize on a lottery ticket purchased with the separate money of the wife is community property; Rev. St. Tex. art. 2862, providing that property acquired by wife during marriage, except that acquired by gift, devise, or descent, shall be deemed the common property of both.—*Dixon v. Sanderson*, S. C. Tex., Dec. 21, 1888; 10 S. W. Rep. 535.

63. HUSBAND AND WIFE—Conveyances Between—Community Property.—A voluntary conveyance by a husband to his wife of community property vests the property in the wife separately.—*Lewis v. Simon*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 554.

64. HUSBAND AND WIFE—Separate Estate—Parties.—Under Code Ala., 1886, §§ 2341-2351, the husband is not a necessary party to a bill to foreclose a vendor's lien on land sold to a married woman as her statutory separate estate.—*Ramage v. Towles*, S. C. Ala., Jan. 31, 1889; 5 South. Rep. 342.

65. HUSBAND AND WIFE—Wife's Separate Estate—Right to Devise.—Where a husband and wife occupy a piece of land as their homestead, she owning the same, she can, by will, devise a one-half interest in the land to a third person, who, after her death, can take the interest attempted to be devised.—*Vining v. Wills*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 232.

66. INFANCY—Action by Minor—Affidavit by Guardian.—The father of a minor, who is his next friend in an action, can, as his natural guardian, make an affidavit in replevin for his son.—*Wilson v. McNe-Chas*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 468.

67. INJUNCTION—Certificate of Indebtedness—Parties.—Where an action is brought to compel the auditor to issue two certificates of indebtedness, one to plaintiff and one to L, and L is made a party defendant, but

no service is made, and no appearance is entered, by him: *Held*, that the court has no authority to render a final judgment in the action until L is properly summoned or enters an appearance in said action.—*McCarthy v. Marsh*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 474.

68. INJUNCTION—Interference with Vested Rights—Dismissal.—The complainant was the owner of the right to sell cigars in a hotel, and the defendant, having rented space in the hotel office, had subleased to F allowing him the privilege of selling cigars, etc.: *Held*, that an interlocutory injunction restraining the defendant from interfering with the easement of the complainant was properly dissolved, on the answer of the defendant that he had no interest in the business of F.—*Clay v. Powell*, S. C. Ala., Jan. 16, 1889; 5 South. Rep. 330.

69. JUDGMENT—Collateral Attack—Revival of Action.—Though more than the three regular terms of court allowed by law for the revival of causes against the personal representatives of deceased defendants elapse after the suggestion of the death of a defendant, a judgment rendered against his executor is not therefore void, so as to be liable to collateral attack.—*Postlethwaite v. Ghieslin*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 482.

70. JUDGMENT—Setting Aside Default—New Trial.—Where the counsel for defendant was compelled to leave the city on the day of the trial, and gave his answer to an attorney, to file and the latter was sick during the week when the case was heard, a judgment by default against defendant was properly set aside, and a new trial granted.—*Reinks v. Morse*, Ky. Ct. App., Jan. 31, 1889; 10 S. W. Rep. 468.

71. JUDGMENT—Vacating—Discretion of Court.—Where, owing to a misunderstanding between a defendant and her attorney, the real defense is not interposed, and she does not discover the fact until after judgment has been rendered against her, it is no abuse of discretion to set aside the judgment.—*Dixon v. Lyne*, Ky. Ct. App., Jan. 31, 1889; 10 S. W. Rep. 469.

72. JURY—Province of Court and Jury.—A new trial will always be granted where the judge interferes with the lawful province of the jury to the prejudice of the party complaining.—*Hettchecker v. Fitzhugh*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 466.

73. LANDLORD AND TENANT—Enforcement of Lien—Demand of Rent.—Under Code Ala. 1876, § 3472, an affidavit which fails to aver demand of the rent is fatally defective in an action to enforce a lien for rent.—*Robinson v. Hall*, S. C. Ala., Feb. 5, 1889; 5 South. Rep. 350.

74. LANDLORD AND TENANT—Unlawful Detainer.—In an action for unlawful detainer, the landlord may show that a subsequent lease by him to a third party under which the tenant claims is void for fraud.—*Dickson v. Lehn*, U. S. C. O. (Mo.), Jan. 30, 1889; 37 Fed. Rep. 519.

75. LIMITATION OF ACTIONS—Adverse Possession.—One who holds land under a tenant for life acquires no title by prescription as against those entitled in remainder, if they bring suit within seven years after the death of the tenant for life.—*Bagley v. Kennedy*, S. C. Ga., Feb. 11, 1889; 8 S. E. Rep. 742.

76. LIMITATION OF ACTIONS—Running of the Statute.—Land was conveyed to a husband in trust for his wife for life, with remainder to her children, which the husband and wife conveyed in fee to defendant's grantors: *Held*, that the grantors took but a life estate and the statute of limitations did not begin to run against the children until the death of the wife.—*Gudgell v. Tydings*, Ky. Ct. App., Jan. 22, 1889; 10 S. W. Rep. 466.

77. LIBEL AND SLANDER—Libel Per Se—Imputing Crime.—Under Code Ala. § 2726, and § 5795, a publication stating that C, a shipping clerk, collected a bill due his employer, and secreted it till he was discovered, is a libel per se.—*Iron Age Pub. Co. v. Cradup*, S. C. Ala., Jan. 16, 1889; 5 South. Rep. 332.

78. MANDAMUS—Against State Auditor—Issue of Cer

tificate of Indebtedness. — A peremptory writ of *mandamus* will not issue against the auditor of State to compel him to issue a certificate of indebtedness, under the provisions of ch. 190, Sess. Laws 1887, where it is shown that one M claims an interest in said certificate adverse to that of the plaintiff. — *Livingston v. McCarthy*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 480.

79. **MANDAMUS**—To County Judge—Issuance of Liquor License. — Under Gen. St. Ky. ch. 106, art 4, § 1, providing that the privilege to sell spirituous liquors shall not be implied in a license to keep a tavern, unless the county court, "shall deem it expedient so to do," *mandamus*, will not lie to compel a county judge to grant a license to sell liquor. — *Heblück v. Judge of Hancock County Court*, Ky. Ct. App., Feb. 14, 1889; 10 S. W. Rep. 465.

90. **MARINE INSURANCE**—Total Loss—Sale. — In an action on a policy of insurance for loss of ship which was stranded and sold: *Held*, under facts that the master was justified in making the sale and the insurer is liable for a total loss, though the vessel was afterwards saved. — *Hall v. Ocean Ins. Co.*, U. S. C. C. (Me.), Jan. 12, 1889; 37 Fed. Rep. 371.

81. **MARITIME LIENS**—Wages. — The lien of seamen for wages takes priority over claims of the United States for penalties incurred by the vessel to carry sufficient life preservers as required by statute. — *The Jennie Hays*, U. S. D. C. (Iowa), Jan. 18, 1889; 37 Fed. Rep. 373.

82. **MECHANIC'S LIENS**—Personal Liability—Misjoinder of Causes. — Under the California practice, in an action to foreclose a material-man's lien against the owner of the structure in which the material was used, there is no misjoinder of causes because a personal liability is also sought to be enforced against the contractor to whom the material was furnished. — *Giant Powder Co. v. Flume Co.*, S. C. Cal., Jan. 29, 1889; 20 Pac. Rep. 419.

83. **MORTGAGES**—Foreclosure — Estoppel. — A defendant to a bill to foreclose a mortgage containing covenants of seizin and specific warranty cannot set up a prior and paramount equitable title in himself. — *McNanness v. Paxon*, U. S. C. C. (Mo.), Jan. 14, 1889; 37 Fed. Rep. 296.

84. **NEGLIGENCE** — Collision. — *Held*, under facts that the collision was caused by the negligence of the defendant boat and was liable for the damages done. — *Call v. The Schlaefer*, U. S. D. C. (N. Y.), Jan. 7, 1889; 37 Fed. Rep. 382.

85. **NEGLIGENCE**—Overflowing Lands—Evidence. — In an action for negligently causing an overflow of plaintiff's lands, by means of which sand was deposited thereon, evidence of the cost of removing sand is admissible. — *Trinity & S. Ry. v. Schofield*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 575.

86. **NEGLIGENCE** — Pleading — Knowledge of Defect. — Complaint in action for negligence and consequent injury on account of unsafe bridge must allege that deceased did not know the unsafe condition of the bridge. — *Louisville N. A. & C. Ry. v. Sanford*, S. C. Ind., Jan. 30, 1889; 19 N. E. Rep. 770.

87. **NEGLIGENCE**—Towage. — In an action to recover value of a barge which was sunk, although the towboat was not negligent it can only recover the reasonable value of towage to the place where the sinking occurred and not the contract price. — *McCormick v. Jarrett*, U. S. D. C. (Mo.), Jan. 15, 1889; 37 Fed. Rep. 380.

88. **NEGOTIABLE INSTRUMENTS** — Suit Against Indorser — Judgment Against Maker. — After the holder of a note has assigned all his interest in a judgment recovered thereon against the maker, he cannot sue the indorser. — *Moorman v. Wood*, S. C. Ind., Jan. 29, 1889; 19 N. E. Rep. 739.

89. **NOTICE**—Recording. — One who purchases without notice of any prior conveyance obtains a good title though the prior conveyance was subsequently recorded. — *Tabor v. Sullivan*, S. C. Colo., Jan. 10, 1889; 20 Pac. Rep. 457.

90. **NUISANCE**—Abatement—Compensation. — The title to lands taken by the city of Boston under act

Mass. June 1, 1867, vests in the city though no compensation has ever been made to the owner. — *Sweet v. Reckel*, U. S. C. C. (Mass.), Jan. 26, 1889; 37 Fed. Rep. 523.

91. **PATENTS**—Injunction. — Equity has no jurisdiction to enjoin the infringement of an invention before a patent has been issued, notwithstanding an application for the same has been made and is still pending in the patent office. — *Rein v. Clayton*, U. S. C. C. (Mich.), Jan. 12, 1889; 37 Fed. Rep. 334.

92. **PATENTS**—Validity — A misstatement of citizenship innocently made in an application for letters patent does not invalidate them. — *Tondue v. Chambers*, U. S. C. C. (Penn.), Jan. 10, 1889; 37 Fed. Rep. 333.

93. **PARTIES** — Admission on application. — Under Code Civil Proc. N. Y. § 452, a subsequent purchaser and his grantees of land against which is sought to be specifically enforced an alleged agreement by the former owner to execute a mortgage thereon are properly let in as defendants. — *Ladd v. Stevenson*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 842.

94. **PARTNERSHIP**—Construction of Agreement. — In a suit to recover balance on partnership account: *Held*, that the articles of partnership were not open to the construction that defendant's skill was put in against complainants' capital so as to relieve him from liability to complainant for half the loss. — *Hellebush v. Coughlin*, U. S. C. C. (Ohio), Jan. 26, 1889; 37 Fed. Rep. 294.

95. **PARTNERSHIP**—Contract—Construction. — Construction of an agreement as to whether it constituted a partnership between the parties or simply an agreement by one of the parties to indemnify the others against loss. — *Klosterman v. Hayes*, S. C. Oreg., Jan. 29, 1889; 20 Pac. Rep. 426.

96. **PENSION**—False Affidavit. — Rev. St. U. S. § 5479, applies to the offense of using a genuine but false instrument knowing it to be false with intent to defraud the government. — *United States v. Goady*, U. S. D. C. (S. Car.), Jan. 12, 1889; 37 Fed. Rep. 332.

97. **PHYSICIANS AND SURGEONS**—License Suit for Fees. — A physician not having the necessary license to practice cannot recover for professional services rendered. — *Puckett v. Alexander*, S. C. S. Car., Feb. 13, 1889; 8 S. E. Rep. 767.

98. **PLEADING**—Negligence—Waiver by Answer. — Where a petition in an action against a railroad fails to state whether the deceased was a passenger at the time of the injury, the defect is waived if defendant by its answer puts that question directly in issue. — *Wagner v. Mo. Pac. R. Co.*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 466.

99. **PRINCIPAL AND SURETY**—Release of Surety. — A promise by a payee to a surety to look alone to the principal for payment does not release the surety. — *Auchampaugh v. Schmidt*, S. C. Iowa, Jan. 24, 1889; 41 N. W. Rep. 472.

100. **PUBLIC LANDS** — Homestead Entry — Power to Mortgage. — Section 4, of the act of congress granting homesteads to actual settlers on public lands (Rev. St. U. S. § 2296,) does not prevent the settler from making a valid mortgage upon the land after receiving his certificate of entry, but before he receives a patent. — *Boggon v. Reid*, S. C. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 425.

101. **QUIETING TITLE**—Possession. — In an action to quiet title to land, an issue as to plaintiff's possession of the land at the commencement of the action is immaterial. — *Pearson v. Creed*, S. C. Cal., Jan. 22, 1889; 20 Pac. Rep. 361.

102. **QUO WARRANTO**—Costs. — In *quo warranto* proceedings to try title to office, the relator having been the successful party in an election contest suit between the same parties, is entitled to a judgment for costs. — *Moss v. Patterson*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 457.

103. **RAILROAD COMPANIES**—Defective Platform — Evidence. — In an action for personal injuries, where it appears that plaintiff, a boy of fourteen was sent to the depot with a passenger, and while there, by reason of the defective condition of the platform, was injured, evidence that he had been in the habit of jumping on

the cars when they stopped, is inadmissible. — *Louisville & N. R. Co. v. Berry*, Ky. Ct. App., Feb. 7, 1889; 8 S. E. Rep. 472.

104. RAILROAD COMPANIES—Municipal Aid—Excessive Issue of Bonds. — Where a county's issue of bonds to a railroad is in excess of its constitution limit of indebtedness, equity has no power to scale down the issue to the limit. — *Hedges v. Dixon County*, U. S. C. C. (Neb.), Jan. 1889; 37 Fed. Rep. 304.

105. RECEIVERS—Appointment on Pleading. — A receiver will not be appointed on the coming in of the answer when such appointment is the principal question in the case but action will be deferred to the hearing. — *Union Ins. Co., v. Union Plaster Co.*, U. S. C. C. (Mich.), Jan. 29, 1889; 37 Fed. Rep. 286.

106. REPLEVIN—Redelivery Bond — Defenses. — In an action against the sureties on the redelivery bond in replevin: *Held*, that no defense can be set up which could with reasonable diligence have been set up or interposed in the replevin action. — *Boyd v. Huffaker*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 459.

107. SHERIFFS AND CONSTABLES—False Returns — Liability. — An officer returned a writ "not served." *Held*, that evidence showed the return to be true and the officer was not liable for making a false return. — *Lawrence v. Buxton*, S. O. N. Car., Feb. 18, 1889; 8 S. E. Rep. 774.

108. SHIPPING—Carriage of Goods. — Clause in bill of lading "vessel not accountable for the number of pieces or weight" does not absolve the carrier from making delivery of all the iron he received. — *Easton v. Newmark*, U. S. C. C. (N. Y.), Oct. 3, 1888; 37 Fed. Rep. 375.

109. STATE OFFICERS—Secretary of State— Compensation on Board of Equalization. — The secretary of State of Mo., is entitled to receive the compensation provided by law for services as a member of the board of equalization. — *State ex rel. McGrath v. Walker*, S. O. Mo., Feb. 4, 1889; 10 S. W. Rep. 473.

110. TAXATION — Recovery of Taxes — Liability of County. — When a county places in the hands of the person by law authorized to collect and receive taxes process directing him to collect and receive taxes for it, a collection made by such person is received by the county. — *Galveston Co. v. Galveston Gas Co.*, S. C. Tex., Jan. 25, 1889; 10 S. W. Rep. 533.

111. TAXATION—Taxable Property — Wharf Privileges. — Under Gen. Laws, Tex. 1874, p. 214, requiring that "wharf privileges," as well as wharves, shall be taxed, such privileges are to be taxed as a thing separate and distinct from the real and personal property with which the business of a wharfinger is conducted. — *Galveston County v. Galveston Wharf Co.*, S. C. Tex., Jan. 29, 1889; 10 S. W. Rep. 537.

112. TAXATION—Void Tax—Remedy by Injunction. — Where property has been levied on to enforce payment of a void tax, injunction is the proper remedy. — *St. Louis, etc. R. Co. v. Epperson*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 473.

113. TELEPHONE COMPANIES — Charges. — A telephone company doing only a toll business is included in statutes of Ind. 1885, regulating charges of telephone companies doing a general business. — *Central Tel. Co. v. State*, S. C. Ind., Jan. 22, 1889; 19 N. E. Rep. 605.

114. TRADE-MARKS. — The fact that the owner of the trade-mark allows boxes to be labelled with the names of dealers to whom the cigars are sold, does not amount to a deception so as to invalidate the trade-mark. — *Lichtenstein v. Goldsmith*, U. S. C. C. (Mass.), Jan. 23, 1889; 37 Fed. Rep. 359.

115. TRADE-MARKS — Dishonest Competition in Trade. — A person has no right to use so much of his rival's name or trade-mark as will enable any dishonest trader into whose hands his goods may come to sell them as the good of his rival. — *Brown Chemical Co. v. Stearns*, U. S. C. C. (Mich.), Jan. 7, 1889; 37 Fed. Rep. 360.

116. TRESPASS—Damages— Speculative. — Damages for injury to one's farming operations, by seizing and carrying away his stock used in farming, are too re-

mote and speculative to be recovered in trespass. — *Neilms v. Hill*, S. C. Ala., Jan. 31, 1889; 5 South. Rep. 344.

117. TRESPASS—To Realty—Measure of Damages. — When one occupies the land of another by mistake, the measure of damages is what the owner could have leased it for had the other not occupied it. — *Galveston Wharf Co. v. Gulf Ry. Co.*, S. C. Tex., Jan. 18, 1889; 10 S. W. Rep. 537.

118. TRESPASS TO TRY TITLE — Evidence — Certified Copies — Absence of Original. — In trespass to try title: *Held*, that a certified copy of a recorded patent, offered by plaintiff to show title in himself, there being no evidence of such common source, was not admissible, over defendant's objection, without accounting for the absence of the original, as provided by Rev. St. art. 2257. — *Rio Grande & E. P. R. Co. v. Milmo Nat. Bank*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 563.

119. TRESPASS TO TRY TITLE — Improvements — Evidence of Good Faith. — In ejectment, upon the issue of improvements made in good faith, it was not error to permit defendants to show that they were ignorant of plaintiff's existence, and of her claim to the land. — *Polk v. Chisom*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 581.

120. TRIAL—Calling Defendant and Counsel. — It is optional with the court to have the defendant or his counsel called, and the failure of the record to show a formal call is a defect of form, and not of substance, and is cured after final judgment by Code, § 2835. — *Home Co. v. Caldwell*, S. C. Ala., Jan. 22, 1889; 5 South. Rep. 333.

121. TRIAL—Reception of Evidence—Use of Deposition. — Under Rev. St. Tex. art. 2233, providing that when cross-interrogatories have been filed and answered either party has the right to use the depositions on the trial, party who has not filed cross-interrogatories cannot use depositions taken by his adversary over the latter's objection. — *San Antonio R. Co. v. Harrison*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 566.

122. TRIAL—Reception of Improper Evidence—Exclusion. — Where illegal evidence is admitted over defendant's objection, and is subsequently expressly excluded at plaintiff's request, defendant has no ground for complaint. — *Durrant v. Lexington Co.*, S. O. Mo., Feb. 4, 1889; 10 S. W. Rep. 484.

123. TURNPIKES—Defective Roads— Evidence. — In an action for injuries to plaintiff on account of balking of his horse while driving on the turnpike, evidence of the viciousness of the horse before and after the accident is admissible. — *Lebanon Turnpike Co. v. Hearn*, S. C. Tenn., Feb. 8, 1889; 10 S. W. Rep. 510.

124. VENDOR AND VENDEE—Notice of Lien — Innocent Purchaser. — Where a conveyance recites that certain notes are given as a part of the purchase price, a purchaser from the vendee is bound to take notice of the facts, and cannot defeat the vendor's lien on the ground that he is an innocent purchaser. — *Thompson v. Sheppard*, S. C. Ala., Jan. 22, 1889; 5 South. Rep. 334.

125. VENUE IN CIVIL CASES—Action to Restrain Execution Sale. — Rev. St. Tex. art. 1198, subd. 15, applies to suits going to the validity of the judgment, and not to suits to prevent the sale of property on which the judgment, however valid, is no lien. — *Van Ratcliff v. Call*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 578.

126. WILLS—Construction—Charge Upon Land. — In the absence of anything in a will indicating a different intention general legacies are not charged upon the land included in the residuary devise. — *Brill v. Wright*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 628.

127. WILLS—Proof in Foreign State—Certified Copy. — Where a will is made in another State, and duly proved and recorded in such State, a certified copy thereof, duly authenticated, is entitled to record in any county in this State where land is situated affected by said will. — *Gemmell v. Wilson*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 458.

128. WILLS—Revocation—Revival. — Under Rev. St. Tex. art. 4861: *Held*, that the cancellation of a will expressly revoking all former wills does not revive a former will. — *Hawes v. Nicholas*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 558.

The Central Law Journal.

ST. LOUIS, APRIL 12, 1889.

CURRENT EVENTS.

THE recent decision of the Supreme Court of Illinois, 28 Cent. L. J. 294, wherein it was held that the Chicago board of trade, acting in concert with the telegraph companies, having built up a great system for the instantaneous transmission of market reports, could not be permitted to discriminate between persons desiring to obtain them for lawful purposes, has a duplicate in a decision just rendered by the Supreme Court of Ontario. There it was held that though the board of trade is not bound by law to continue the business of collecting and furnishing to the public market quotations, and may voluntarily abandon such business, yet so long as it continues to carry it on, either directly or indirectly, it must do so without unjust discrimination as to persons, and must furnish market quotations to all who may desire to obtain them for lawful purposes, and upon the same terms. The principle upon which these two decisions rest is one which has been made familiar in the decisions upon railroad questions during the last few years. It is that where a business has become affected with a public interest, the service rendered by it must necessarily be common to all, and must be rendered to all upon equal terms.

PROBABLY the most interesting decision yet rendered by Chief Justice Fuller, in which, however, the remainder of the supreme court seems to have taken no part, is one involving the domestic relations and the course of true love. The defendant in the action was a rash Chicago youth, who had the temerity to fall in love and run off with the youngest daughter of the chief justice. The latter, it is reported, after careful consideration of the facts, but without hearing any argument, rendered his decision in the form of a telegram in these words: "Come home and all

will be forgiven." Though we have not been advised as to the grounds upon which the decision was reached, we feel sure that the chief justice wisely reasoned that a fellow who had the nerve to run away with his daughter, probably had smartness enough to keep her securely, and that there was no law to punish a man for eloping, even with the daughter of a chief justice. This decision, we think, reflects great credit upon its author, and stamps our highest judicial officer as a man of unusual sagacity and good sense, in addition to his already established judicial ability. It is to be hoped, however, that the decision will not be accepted as a precedent by all who contemplate elopement. The decision should be confined simply to the case of a daughter who runs away with the right kind of a young man. It should not be taken to justify the elopement with the coachman or with other men's wives. If these distinctions can be strictly observed the decision by Chief Justice Fuller will be of great value.

WE have received the report of the sixth annual meeting of the Kansas State Bar Association held in January last. The addresses there delivered were as follows: "The State Bar Association," by W. A. Johnston; "The Counterclaim," by J. H. Gilpatrick; "The Compensation of Lawyers," by T. A. McNeal; "The Legal Profession; Its Duties and Obligations to Society," by David Overmyer; "Centralization of Political Power," by C. W. Smith; "The Government of Cities," by C. S. Gleed. After eulogizing bar associations, their uses, and objects and giving a history of the Kansas State Bar Association, Mr. Johnston suggests the necessity of a revision of the constitution of that State, and the reorganization of the entire judicial system. He dwells particularly upon the need of placing a limitation upon the amount involved in a case, within which it cannot be appealed to the supreme court, citing many instances from the Kansas reports, of cases before the supreme court involving ridiculously small amounts of money. The address of Mr. Gilpatrick was at least original in the suggestion made, that a man wantonly sued in a civil action should be allowed to counterclaim for damages in

same action. He contends that inasmuch as the law is settled in that State that in any case where a malicious prosecution, without probable causes, has in fact been had and defendant has sustained damages over and above his taxable costs in the case, an action may be maintained, there is no reason why it may not be made the subject of a counterclaim in the original action. The remarks of Mr. McNeal may, in a measure, aid the Kansas lawyer in the difficult problem of what fees to charge clients, a branch of the practice which we judge has been grossly neglected. Mr. Overmyer was evidently full of his theme, and laid down the duties of an American lawyer in graphic word pictures. Mr. Smith discusses an old subject in an interesting manner, and Mr. Gleed argues for a form of city government, which is at least novel and unique. As a whole the addresses are interesting and the meeting of the association was in every way successful.

NOTES OF RECENT DECISIONS.

ONE of the most important of recent decisions and involving the question of the right of a debtor under State assignment laws to make a preference was decided by the Supreme Court of the United States in *White v. Cotzhausen*, 9 S. C. Rep. 309. The facts concisely stated are as follows: The appeal to the Supreme Court of the United States was taken from a decree declaring two conveyances of real property in Illinois, a bill of sale of numerous pictures, a judgment by confession in one of the courts of that State, pursuant to a warrant of attorney given for that purpose, and certain transfers of property accompanying that warrant, to be void as against the appellee Cotzhausen, a judgment creditor of Alexander White, Jr. The various transfers, judgment, etc., complained of were made by White to his family to pay them certain sums of money due from him as administrator. It was admitted that the sole consideration for the transfers of property to the members of White's family was his alleged indebtedness to them respectively. There was no claim that the money was not legally owing to the family, nor does the case show any actual fraud on the part of

White. It was contended that the conveyances, judgment by the confession, and transfers were illegal and void, under the provisions of the act of the General Assembly of Illinois, in force the 1st of July, 1877, concerning voluntary assignments for the benefit of creditors; the 13th section of which reads as follows: "Every provision in any assignment hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void, and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the assets thereof." The supreme court characterized what White had done as in execution of a scheme for the appropriation of his entire estate by his family, to the exclusion of other creditors, thereby avoiding the effect of a formal assignment, and it held, in a very exhaustive opinion, that the several writings executed by White for the purpose of effecting that result may be regarded as in legal effect one instrument designed to evade or defeat the provisions of the statute of Illinois, and that they were one instrument forming part of the assignment within the meaning of the statute. The court, after discussing *Preston v. Spaulding*, 10 N. E. Rep. 903, says:

We agree with the Supreme Court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed "largely and beneficially, so as to suppress the mischief and advance the remedy." That court said in *Railroad Co. v. Dunn*, 52 Ill. 260, 263: "The rule in construing remedial statutes, though it may be in derogation of the common law, is, that everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it." See, also, *Johnes v. Johnes*, 3 Dow. 15. If, then, we avoid overstrict construction, and regard substance rather than form; if effect be given to this legislation, as against mere devices that will defeat the object of its enactments—the several writings executed by Alexander White, Jr., all about the same time, to his mother, sisters, and brother, whereby, in contemplation of his bankruptcy, and according to a plan previously formed, he surrendered his entire estate for their benefit, to the exclusion of all other creditors, must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction, and operating as an assignment or transfer under which the appellee, Cotzhausen, may claim equality of right with the creditors so preferred. It is true there was not here, as in *Preston v. Spaulding*, a formal deed of assignment by the debtor under the statute. But of what avail will the statute be in securing equality among the creditors of a debtor who, being insolvent, has determined to yield the dominion of his entire estate, and surrender it for the benefit of creditors, if some of them can be preferred by the simple device of not making a formal assignment, and

permitting them, under the cover or by means of conveyances, bills of sale, or written transfers, to take his whole estate on account of their respective debts, to the exclusion of other creditors? If Alexander White, Jr., intending to surrender all his property for the benefit of his creditors, and to stop business, had excepted from the conveyances, bill of sale, and transfers executed to his mother, sisters, and brother a relatively small amount of property, and had shortly thereafter made a general assignment under the statute, it could not be doubted, under the decision in *Preston v. Spaulding*, and in view of the facts here disclosed, that such conveyances, bill of sale, and transfers would have been held void as giving forbidden preferences to particular creditors; and his assignment would have been held, at the suit of other creditors, to embrace, not simply the property owned by him when it was made, but all that he previously conveyed, sold, and transferred to his mother, sisters, and brother. But can he, having the intention to quit business and surrender his entire estate to creditors, be permitted to defeat any such result by simply omitting to make a formal assignment, and by including the whole of his property in conveyances, bills of sale, and transfers to the particular creditors whom he desires to prefer? Shall a failing debtor be allowed to employ indirect means to accomplish that which the law prohibits to be done directly? These questions must be answered in the negative. They could not be answered otherwise without suggesting an easy mode by which the entire object of this legislation may be defeated. We would not be understood as contravening the general principle, so distinctly announced by the Supreme Court of Illinois, that a debtor, even when financially embarrassed, may in good faith compromise his liabilities, sell or transfer property in payment of debts, or mortgage or pledge it as security for debts, or create a lien upon it by means even of a judgment confessed in favor of his creditors. *Preston v. Spaulding*; *Field v. Geohagan*, 125 Ill. 70, 16 N. E. Rep. 912. Such transactions often take place in the ordinary course of business, when the debtor has no purpose, in the near future, of discontinuing business, or of going into bankruptcy and surrendering control of all his property. A debtor is not bound to succumb under temporary reverses in his affairs, and has the right, acting in good faith, to use his property in any mode he chooses, in order to avoid a general assignment for the benefit of his creditors. We only mean by what has been said that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made, and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, we think, is the necessary result of the decisions in the highest court of the State. The views we have expressed find some support in adjudged cases in the eighth circuit, where the courts have construed the statute of Missouri providing that "every assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims."

Referring to that statute, Krekel, J., said, in *Kellog v. Richardson*, 19 Fed. Rep. 70, 72, following the previous case of *Martin v. Hausman*, 14 Fed. Rep. 160: "A merchant may give a mortgage or a deed of trust in part or all of his property, to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the assignment law of Missouri, which requires a distribution of the property of a failing debtor for the benefit of all the creditors in proportion to their respective claims. Such is the declared policy of the law; it places all creditors upon an equal footing." So in *Kerbe v. Ewing*, 22 Fed. Rep. 668, where Judge McCrary, referring to the Missouri statute, said: "No matter what the form of the instrument, where a debtor, being insolvent, conveys all his property to a third party, to pay one or more creditors, to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of all the creditors; the preference being in contravention of the assignment laws of this State." Again, in *Freund v. Yagerman*, 26 Fed. Rep. 812, it was said by Treat, J., that the conclusion reached by Mr. Justice Miller, and Judges McCrary, Krekel, and himself, was "that, under the statute of the State of Missouri concerning voluntary assignments, when property was disposed of in entirety or substantially—that is, the entire property of the debtor, he being insolvent—it fell within the provisions of the assignment law. The very purpose of the law was that no preference should be given. No matter by what name the end is sought to be effected, it is in violation of that statute. You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute." See, also, *Perry v. Corby*, 21 Fed. Rep. 737; *Clapp v. Dittmann*, *Id.* 15; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71.

The Supreme Court of Kansas, in *Peters v. City of Lindsburg*, 20 Pac. Rep. 490, decide an important question of false imprisonment. There, it was sought to hold a city liable in damages for arrest and false imprisonment of plaintiff by the city marshal. The court held that police officers of a city are not regarded as the agents of the city in its corporate capacity, and the city is not liable for their acts while so engaged. They say:

We believe the petition does not state a cause of action against the city. We cannot believe that it is within the power of a city to authorize its officers to perform an illegal act of the nature of the one complained of in this petition; and, if the city has no power in the first place to authorize a police officer to commit such an unlawful act, it would have no power to ratify it after it had been performed. *Calwell v. City of Boone*, 51 Iowa, 687, 2 N. W. Rep. 614. There is another reason which is of primary and vital importance and controlling in this action: The police officers of a city are not regarded as the servants or agents of the city; their duties are of a public nature; their appointment is made by the city as a convenient

mode of exercising a function of government; their duties are to preserve the good order and provide for the safety of the people of the city; and in these duties they act as the public servants of the State, under the law, and not as the mere agents of the city. Hence the relation of principal and agent cannot exist between the city and the police force in the matter complained of in plaintiff's petition. We think this rule cannot be seriously questioned. *Calwell v. City of Boone, supra*; *Buttrick v. City of Lowell*, 1 Allen, 172; *Town of Odell v. Schröder*, 58 Ill. 353; *Worley v. Inhabitants*, 88 Mo. 106. Two authorities are cited by plaintiff as exceptions to this rule, and are earnestly pressed upon us for consideration. One is *Hunt v. City of Boonville*, 65 Mo. 620. It appears from the opinion in that case the agent of the city took and carried away some stone unlawfully. The city had authority under its charter to purchase and use stone for the purpose of the corporation, and in the answer of the city it was claimed it had purchased the rock by its agent from another than plaintiff. The city was held liable for the value of the rock so taken. The other authority cited is *Brown v. City of Cape Girardeau*, 80 Mo. 377, 2 S. W. Rep. 302. From the petition it appears that prior to the commencement of the case reported the city had instituted a suit against plaintiffs to recover taxes it alleged to be due, but, after vexatious delay, dismissed it without prejudice, and began another for the same taxes, which was also after delay dismissed. Afterwards the defendants in the former actions, as plaintiffs, brought the action cited, for malicious prosecution; and it was held that a city might be liable for acts of its agents injurious to others when they were in their nature lawful, but performed in an unlawful manner. These authorities cited, upon which the plaintiff relies, are not applicable in this action. There is a wide and fundamental difference in the facts. The plaintiff here complains that the city marshal of the city of Lindsborg unlawfully arrested and imprisoned him. In the cases cited the unlawful acts complained of were done by the agents of the city, not the officers appointed to preserve order and enforce police regulations. The Supreme Court of Missouri, from which the authorities cited come, has recently held that "police officers of a town employed in enforcing its police regulations are not regarded as officers of the town in its corporate capacity, and the town is not liable for acts done by them while so engaged." *Worley v. Inhabitants, supra*.

A QUESTION of the liability of stockholders under peculiar circumstances, came before the Supreme Court of Georgia in *Hill v. Silvey*, 8 S. E. Rep. 808. There it was held that an arrangement among subscribers to the capital stock of a corporation which had not been made public, and which was entered into before the corporation had incurred debts, whereby, instead of issuing stock to the amount of the original subscriptions, each subscriber was given full paid stock to the amount he had actually paid in, was held valid as against creditors: *Sawyer v. Hoag*, 17 Wall. 610; *Scovill v. Thayer*, 105 U. S. 143; *Ins. Co. v. Mfg. Co.*, 97 Ill. 537; *Jackson v. Traer*, 64 Iowa, 469; *Coit v. Amalgamating Co.*, 14 Fed. Rep. 12.

VALID STATE LAWS INCIDENTALLY AFFECTING FOREIGN AND INTER-STATE COMMERCE.

What constitutes interstate commerce, and what State laws are in violation of the constitutional provisions on that subject, is a question which has not been easily solved by the courts. "It may be admitted that the court has not always employed the same language, and that the judges of the court who have written opinions for it may not have meant precisely the same thing."¹

The general rule is that congress has the exclusive power to pass laws which directly regulate foreign or interstate commerce.² But laws passed by a State in pursuance of their general power over internal commerce, may incidentally affect interstate commerce, and yet be valid, provided such acts do not discriminate against this interstate traffic, and do not conflict with acts of congress. So when warehouses are situated and their business carried on exclusively within a State, the State may, as a matter of internal concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate as well as State commerce; and until congress acts in reference to their interstate relations, such relations can be enforced, even though they may indirectly operate upon commerce beyond the State's immediate jurisdiction.³

On this principle State laws have been upheld as valid, notwithstanding their incidental effect upon interstate commerce.⁴ It is an act of legislation within the scope of the powers reserved to the States, to regulate the relative rights and duties of persons, within their respective territorial jurisdiction. So a statute of a State requiring locomotive engineers in the State to be examined and licensed by a board to be appointed for that purpose, is valid and not in conflict with the federal constitution, because so far as this law affects transactions of commerce among the

¹ *Fargo v. Michigan*, 121 U. S. 230.

² U. S. Const., art. 1, § 8.

³ *Munn v. Illinois*, 94 U. S. 113.

⁴ *The License Cases*, 5 How. 504; *Woodruff v. Parham*, 8 Wall. 123; *Philadelphia R. Co. v. Pennsylvania*, 15 Wall. 284; *Osborn v. Mobile*, 16 Wall. 479; *Chicago R. Co. v. Fuller*, 17 Wall. 560; *Sherlock v. Ailing*, 93 U. S. 99; *Chicago R. Co. v. Iowa*, 94 U. S. 135; *Machine Co. v. Gage*, 106 U. S. 676.

States, it does so only indirectly, incidentally and remotely, and not so as to burden or impede such transactions, and that in the particulars in which it touches them at all, it is not in conflict with any express enactment of congress on the subject, nor contrary to any intention of congress to be presumed from its silence.⁵ But a State law requiring the payment of a license tax by persons who deal in the sale of goods, wares, and merchandise, which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same in the State, and requiring no such license tax from persons selling in a similar way, goods which are brought into existence in the State, is in conflict with the power vested in congress to regulate commerce with foreign nations and among the several States.⁶ So, when a State requires an auctioneer to collect and pay into the State treasury a tax on his sales, this requirement when applied to imported goods in the original package, by him sold for the importer, is void and in conflict with the United States constitution.⁷ And a tax imposed upon an occupation which necessarily discriminates against the introduction and sale of the products of another State, or against the citizens of another State, is repugnant to the federal constitution.⁸ So, also, a State statute requiring the agent for the sale of articles of manufacture in another State, to take out a license for which he is required to pay a specific tax for each county in which he sells or offers to sell them, while the agent for the sale of articles manufactured in that State, if acting for the manufacturer, is not required to obtain a license or pay any license tax, is void.⁹

A statute of a State, forbidding common carriers to bring intoxicating liquors into the State, except on consignment to persons licensed to sell the same, is contrary to the commerce clause of the federal constitution. But in this case the court refrained from rendering any opinion, whether the right of transportation from one State to another in-

cludes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates.¹⁰ So, it is held that congress has exclusive power to regulate foreign and interstate commerce whenever the subject of this commerce is national in its character, or admits of only one uniform system or plan of regulation.¹¹ Thus, all laws imposing a tax upon commercial travelers selling by sample, coming from outside of the State with goods not produced within the State, are unconstitutional.¹² The State courts follow this doctrine. In Alabama, it is held that a law imposing a license tax upon a tree peddler selling for a non-resident principal, is an attempt to regulate interstate commerce, and therefore conflicts with the United States constitution.¹³ So in Nevada, a law imposing a license upon commercial travelers, for selling goods for non-resident principals is an attempt to regulate interstate commerce, and is null and void.¹⁴ Neither can a State empower its cities, by law, to impose a license tax upon a book canvasser for taking subscriptions for books of a non-resident principal, the books to be delivered and to come from outside of the State.¹⁵ A Vermont statute is invalid which requires a peddler of articles grown or manufactured outside of the State, to have a license.¹⁶ In Louisiana, a law is unconstitutional which imposes a license upon all traveling agents or drummers, offering any kind of merchandise for sale in that State, or selling by sample or otherwise, because such a statute is in conflict with art. 1, § 8, of the federal constitution.¹⁷ The Texas court of appeals holds a contrary doctrine and antagonizes not only the other State supreme court's decisions but even the decision of the United States Supreme Court, and says a law

⁵ *Smith v. Alabama*, 124 U. S. 436.

⁶ *Welton v. Missouri*, 91 U. S. 275.

⁷ *Cook v. Pennsylvania*, 97 U. S. 566.

⁸ *Walling v. Michigan*, 116 U. S. 446. See also *Hinson v. Lott*, 8 Wall. 148; *Wood v. Maryland*, 12 Wall. 418; *Guy v. Baltimore*, 100 U. S. 434; *Mobile v. Kimball*, 102 U. S. 691.

⁹ *Webber v. Virginia*, 103 U. S. 344.

¹⁰ *Bowman v. Chicago R. Co.*, 125 U. S. 465.

¹¹ *Robbins v. Taxing District*, 120 U. S. 489; *Cooley v. Philadelphia*, 12 How. 299; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419; *Passenger Cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 35; *Ward v. Maryland*, 12 Wall. 418; *Henderson v. New York*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 485; *Wabash R. Co. v. Illinois*, 118 U. S. 557.

¹² *Carson v. Maryland*, 120 U. S. 502; *Robbins v. Taxing District*, 120 U. S. 489.

¹³ *State v. Agee*, 3 South. Rep. 856.

¹⁴ *Ex parte Rossenblatt*, 19 Nev. 439.

¹⁵ *Fort Scott v. Pelton*, 18 Pac. Rep. (Kan.) 954.

¹⁶ *State v. Pratt*, 59 Vt. 590.

¹⁷ *Simmons Hardware Co. v. McGuire*, 2 South. Rep. 592.

imposing an occupation tax upon commercial travelers selling by samples for non-resident principals, is constitutional and does not contravene the provisions of the federal constitution.¹⁸

It is no longer a question, that purely interstate or foreign commerce can be regulated only by congressional enactments. But there is a class of cases which are exceptional and cannot be governed by uniform rules. Under this condition the States may enact laws regulating foreign or interstate commerce in these special and exceptional cases, provided they do not pass any law in conflict with acts of congress. Thus a system of quarantine laws established by a State statute is a rightful exercise of the police power for the protection of health, which is not forbidden by the provisions of the federal constitution. While some rules of this system may amount to a regulation of commerce with foreign nations or among the States, though not so designed, they belong to that class which the States may establish, until congress acts in the matter by covering the same ground or forbidding such State laws. But congress, in this case, has adopted these laws and forbidden all interference with their enforcement.¹⁹

So likewise a regulation of pilots and pilotage is a regulation of commerce, within the grant to congress of the commercial power contained in art. 1, § 8, of the constitution of the United States. But this does not prevent the States from regulating pilots and pilotage, and does not conflict with the State's right to pass suitable laws on this subject.²⁰ Wharfage and other matters relating thereto which are enforced upon the navigable waters of the country, when the amount of commerce requires them, if regarded as regulating commerce, are such as the States may respectively adopt, until congress deems it expedient to act.²¹ But the individual State

nor any municipal corporation acting under its authority, can lay duties on tonnage, for that is expressly forbidden by the federal constitution; but charges for wharfage may be graduated by the tonnage of vessels using a wharf, and this is not a duty on tonnage within the meaning of the United States constitution.²² An ordinance of a city prescribing where a vessel may lie in the harbor, how long she may remain there, what light she must show at night, and making other and similar regulations, is not in conflict with any law of congress regulating commerce, and is valid.²³ State laws are not forbidden touching matters either local in their nature, or operating or intended to be mere aids to commerce for which special regulations can more effectually provide. Hence a State can provide, by law, for the improvement of a river, bay, and harbor within its jurisdiction, and such law does not conflict with the federal constitution.²⁴ The authority to establish and to regulate ferries belongs to the States, and is a part of the undelegated powers reserved to the States.²⁵ And in particular cases in which congress has not exercised the power of regulating commerce, with which it is invested by the constitution, and when the object does not, in its nature, require the exclusive use of that power, the State, until congress acts, may continue to legislate. Hence lien laws of a State for the benefit of material men, may be enforced upon a vessel in her port.²⁶ So when the navigable waters of a State can best be regulated by rules and provisions suggested by varying circumstances of different localities, and limited in their operation by such places respectively, and to the extent required by these last cases, the power to regulate commerce may be exercised by the State.²⁷ Likewise, in the absence of congressional legislation, a State may authorize a navigable stream within its limits to be obstructed by a bridge or highway.²⁸ In granting to congress the right to

¹⁸ *Ex parte Asher*, 5 S. W. Rep. 91. This decision has been overruled by the United States Supreme Court: 9 Sup. Ct. Rep. 1; 128 U. S. 129.

¹⁹ *Morgan v. Louisiana*, 118 U. S. 455.

²⁰ *Cooley v. Philadelphia*, 12 How. 299; *Houston v. Moore*, 5 Wheat. 1; *Wilson v. Blackbird Co.*, 2 Pet. 251.

²¹ *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Gilman v. Philadelphia*, 8 Wall. 718; *Crandall v. Nevada*, 6 Wall. 35; *Pound v. Turck*, 95 U. S. 459; *Packet Co. v. Aiken*, 121 U. S. 444; *Transportation Co. v. Parksburg*, 107 U. S. 691; *Huse v. Glover*, 119 U. S. 543.

²² *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. St. Louis*, 100 U. S. 423.

²³ *The James Gray v. The John Fraser*, 21 How. 184.

²⁴ *Mobile v. Kimball*, 102 U. S. 691.

²⁵ *Conway v. Taylor*, 1 Black, 603; *Marshall v. The Adriatic*, 107 U. S. 365.

²⁶ *The Lattawanna*, 21 Wall. 558.

²⁷ *Gilman v. Philadelphia*, 8 Wall. 718.

²⁸ *Cardwell v. American Bridge Co.*, 118 U. S. 205; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Miller v. New York*, 109 U. S. 385.

regulate interstate and foreign commerce, it was not intended to prohibit the States from passing laws on all subjects relating to the health, life, and safety of their citizens, though the law might indirectly affect interstate and foreign commerce.²⁹

The delegation to congress of the power to regulate interstate and foreign commerce was not a surrender of that right denominated police power, which includes in each case the power to adopt precautionary measures against social evils, to prevent the spread of crime, or pauperism or disturbance of the peace; to exclude from the State convicts, paupers, idiots and lunatics, and persons likely to become a public charge, and persons afflicted with contagious or infectious diseases; to exclude property dangerous to the property of citizens of the State.³⁰

The right of a State to prohibit the sales of merchandise, so far as conceded to the State, arises only after the act of importation has terminated. The State can only forbid the sales of things within its jurisdiction. Its power over them does not act until they are laid down within its territorial limits.³¹ It is only after the importation of property is completed, and the property imported has been mingled with and becomes a part of the general property of the State, that the State's regulation can operate upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.³²

If a State law does not discriminate against products of sister States, but merely subjects them to the same rate of taxation which is imposed upon articles manufactured within the State, it is valid and not an attempt to regulate interstate commerce, but an appropriate and legitimate exercise of the taxing power of the State.³³ Thus coal transported from Pennsylvania to New Orleans, and there put upon the market becomes a commodity

in the market of New Orleans, and is therefore a part of the property of the State and subject to taxation like other property.³⁴ Of course, when goods or commodities thus transported to another State, and become part of its general property, they are amenable to its laws, provided that no discrimination is made against them as goods from another State.³⁵ When goods are intended for transportation to another State, they do not pass beyond the general jurisdiction of the State in which they are located, and into the exclusive jurisdiction of congress, as articles of interstate commerce, until they are shipped, or entered with a common carrier for transportation to another State, or are started upon such transportation in a continuous route.³⁶ A license granted by the United States regulating, to a certain extent, a business in a particular State named, does not, although it was granted in consideration of a fee paid, give the party receiving it power to carry on business in violation of the State law forbidding such business to be conducted within its limits and jurisdiction.³⁷ To determine whether a State law is an attempt to regulate interstate and foreign commerce in a direct manner, is often a difficult question. It is not so difficult to determine whether a State law is invalid when it discriminates unfavorably against foreign or interstate commerce. Even the United States Supreme Court seems to have fluctuated somewhat in drawing the line of demarkation between State and interstate commerce, which can be seen in studying the decisions upon this subject. D. H. PINGREY.

²⁹ *Brown v. Houston*, 114 U. S. 622.

³⁰ *Robbins v. Taxing District*, 120 U. S. 497.

³¹ *Coe v. Errol*, 116 U. S. 517.

³² *McGuire v. Commonwealth*, 3 Wall. 387; *Pervear v. Commonwealth*, 5 Wall. 462.

²⁹ *Sherlock v. Alling*, 98 U. S. 99.

³⁰ *Railroad Co. v. Houston*, 95 U. S. 471.

³¹ *Bowman v. Chicago Railroad Co.*, 125 U. S. 465.

³² *Cooley v. Philadelphia*, 12 How. 299; *State Freight Tax Cases*, 15 Wall. 232; *Welton v. Missouri*, 91 U. S. 275; *Railroad Co. v. Husen*, 95 U. S. 465; *Mobile v. Kimball*, 102 U. S. 691; *Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Brown v. Houston*, 114 U. S. 622; *Walling v. Michigan*, 116 U. S. 446; *Pickard v. Car Co.*, 117 U. S. 34; *Wabash R. Co. v. Illinois*, 118 U. S. 557; *Robbins v. Taxing District*, 120 U. S. 487.

³³ *Hinson v. Lott*, 8 Wall. 148.

GUARDIAN AND WARD—PURSUIT AND RECOVERY OF TRUST FUNDS—COPARTNERSHIPS—INTERMINGLING OF TRUST FUNDS—LIABILITY OF FIRM.

ENGLAR V. OFFUTT.

Court of Appeals of Maryland, January 9, 1889.

1. *Guardian and Ward—Pursuit and Recovery of Trust Funds—General Rule.*—Trust funds may ordinarily be traced and recovered, so long as they are capable of identification.

2. *Copartnerships—Intermingling of Trust Funds with those of Firm—Liability of Firm in such Case.*—Where a trustee, being a member of a firm, puts trust funds into the business, such firm is liable therefor to the *cestui que trust*, if all the members thereof were cognizant of the character of such funds; otherwise not.

ALVEY, C. J., delivered the opinion of the court:

Prior to the 21st day of May, 1883, and down to the 1st of January, 1886, John P. Schriver was a merchant, and manufacturer of harness, in the city of Baltimore, and he carried on the business under the name and style of John P. Schriver & Co., though he was the only person interested in the business. On the 21st of May, 1883, he was appointed, by the orphans' court of Carroll county, guardian of Mary and John Englar, infants, and received into his possession, as belonging to his wards, the sum of \$10,846.25. Of this sum there was deposited by Schriver, on the day of its receipt by him, that is to say, the 21st of May, 1883, in the Howard Bank of Baltimore, to his own credit, in an account kept in the name of John P. Schriver & Co., the sum of \$10,238.20. As against this and all other credits in such account, amounting in the aggregate, between the date just mentioned and the 28th of August, 1883, to the sum of \$28,804.13, John P. Schriver checked and otherwise drew out, as he needed the money, various sums, amounting in the aggregate to the sum of \$28,755.64; so that at the date last mentioned there remained in bank to his credit on this account only the small balance of \$48.49. The money appears to have been drawn out of bank for various purposes; some of it to be loaned out, a considerable portion of it to take up outstanding paper payable by Schriver, and some of it to pay bills of merchandise, etc. Schriver also kept an account in the Manufacturers' National Bank of Baltimore, during the same time of the account in the Howard Bank, but there is nothing to show that there was any specific sum belonging to the Englar trust fund deposited to his credit in that account. There were a great many deposits made to his credit in that account, but there is nothing to indicate that any portion of them belonged to a trust; and the checks against the credits in that account, down to the 1st of September, 1883, had reduced the balance in favor of Schriver to the small sum of \$34.01. For some time immediately preceding the 31st of December, 1885, Edward C. Schriver, a younger brother of John P., had been a clerk in his brother's store; and on the 31st of December, 1885, the brothers entered into the following agreement: "John P. Schriver, owning the business of John P. Schriver & Co., hereby agrees to associate with him in said business the said Edward C. Schriver, upon the following terms and conditions: The said Edward C. Schriver is to receive for his services to be rendered in said business the annual salary of six hundred and twenty-four dollars, and is to receive in addition thereto, one-tenth part of the profits

of said business, as carried on in the city of Baltimore or elsewhere by said firm, after all expenses, including the said salary, are paid and satisfied. John P. Schriver is to have the right alone to sign all checks, notes, etc., of said firm, and to conduct the business thereof as he shall think proper, and to the best interest of both, as he has heretofore carried on said business. And the said Edward C. Schriver, in consideration of said salary and said interest in said firm, hereby agrees to devote his whole time and attention to said business. Witness our hand and seals." By this agreement, and the clear intention of the parties thereto, Edward C. Schriver was made a partner with his brother in the business, with all the responsibilities of a partner to creditors and other third parties dealing with the firm; and, being such partner, and interested in the discharge of partnership obligations, it was his right to require that all the partnership funds and effects be directly and regularly applied to the payment of the partnership debts; and it is only after all partnership debts are paid that the separate debts of the partners can be paid from partnership assets. It was in respect to these rights, and this order of payment of debts, that the general assignment for the benefit of creditors, executed by the partners on the 15th of November, 1886, made provision. To this order of payment the creditors of the firm of John P. Schriver & Co. are, by the terms of the deed of assignment, entitled to insist, unless some superior right be shown. It appears that the trustee to whom the general assignment was made sold at private sale all the partnership property and assets of every kind for the sum of \$9,500, which sale was ratified by the court. The trustee has in his hands, of this purchase money, the sum of \$6,543.60, for distribution to those entitled to receive it. In this state of the case, the appellants filed their petition, stating the facts under which John P. Schriver received their money, and alleging that he applied the same to the use of the firm of John P. Schriver & Co., and that "the said firm received said money with full knowledge as to its character, and as to the violation of his trust by the said John P. Schriver, guardian, as aforesaid, and used said money in the business of said firm, converting the same into stock and materials used in the said business;" and that, "while still holding said money, and using the same in their business as aforesaid, the members of said firm, including the said John P. Schriver," made the general assignment for the benefit of creditors. The petition then proceeds to allege the amount of money realized from the sale of partnership effects remaining in the hands of the trustee, and after alleging the amount due them from their guardian the appellants "charge that they are entitled to priority over other creditors of the firm of John P. Schriver & Co. in the distribution of the net proceeds of sale of the stock of said firm," now subject to the control of the court for distribution. The matter of the petition was referred to the auditor of the court, with power to

take testimony, and state an account. Testimony was taken, and an account stated; but, the auditor finding nothing in the evidence, according to his view, to justify the application of the fund to the claim of the appellants, he distributed the entire fund to the claims of the partnership creditors. To this account the appellants excepted, but their exceptions were overruled, and the account ratified, and the petition of the appellants was dismissed. It is from that order that this appeal is taken. The appeal presents two questions: First, whether the trust fund belonging to the appellants is traceable under the facts of this case, so as to be identified with reasonable certainty, and shown to be the fund that is ordered to be distributed to the general creditors of the partnership under the deed of assignment; and, if not, second, whether the appellants are entitled as creditors of the partnership to share in the distribution of the fund.

1. The principle upon which trust funds may be traced, when attempted to be misapplied, or where they have been converted into other property or become mixed with other funds belonging to the trustee or fiduciary, is a very plain one, and all the difficulty that is found to exist is in matters of fact, and in identifying the fund. So long as a trust fund can be traced, the court will always attribute the ownership thereof to the *cestui que trust*, and will not allow the right to be defeated by the wrongful act of the trustee or fiduciary in mixing or confusing the trust fund with funds of his own, or even those of a third party. The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him, and it can make no manner of difference whether the fund be traced into a bank account, the possession of an individual, or into the hands of a firm composed of many individuals, if the essential facts are shown by which the identification of the fund can be established, and no superior rights of innocent third parties have intervened. The doctrine has been recognized and applied in courts of equity from a very early period; but it has recently undergone full and elaborate discussion, with ample illustration, both in the English court of appeal, and the Supreme Court of the United States, where all the authorities have been reviewed. In the cases *In re Hallett's Estate* and *Knatchbull v. Hallett*, 13 Ch. Div. 696, 753, it was held by the court of appeal that where money had been received by a person in a fiduciary character, though not as technical trustee, and had paid it to his account at his banker's, the person for whom he had received the money could follow it, and had a charge on the balance in the banker's hands, as shown by the account. And in order to protect the rights of the *cestui que trust*, and as means of effectuating justice by the application of an established principle, it was further held that if a person who holds money as a trustee, or in a fiduciary character, pays it to his account at his banker's,

and mixes it with his own money, and afterwards draws out sums by checks, from time to time, in the ordinary manner, the general rule laid down in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money, rather than that belonging to the trust. It was in regard to this latter point that some of the previous English cases were criticised and dissented from by the court of appeal. In the case of *Bank v. Insurance Co.*, 104 U. S. 54, the supreme court, approving and following the decision of the English court of appeal in *Re Hallett's Estate*, held that as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a trustee or fiduciary mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his from that which belongs to the trust; that this doctrine applies, in every case of a trust relation, as well to money deposited in bank, and to the debt thereby created, as to every other description of property. Indeed, it may be stated as the clear result of the authorities, to use the language of Lord Justice Turner in *Pennell v. Daffell*, 4 De Gex, M. & G. 372, "that as between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust." This is so, said Lord Ellenborough, in *Taylor v. Plumer*, 3 Maule & S. 562, repeated by Jessel, M. R., in the case of *In re Hallett's Estate*, *supra*, for the reason "that the product of our substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such, * * * and the right only ceases when the means of ascertainment fail." The sole question, therefore, in every case where trust property is attempted to be traced, is whether it can or cannot be identified, either in its original or altered form. In this case there is no difficulty in tracing the trust fund into the Howard Bank account, kept by John P. Schriver in the name of John P. Schriver & Co. It was deposited to his credit immediately upon its receipt by him. But the bank account, as exhibited in the record, shows that on the 28th of August, 1883, all the credits, including the trust fund, had been drawn out, leaving only the trifling balance of \$48.49. The contention of the appellants is that the trust fund drawn out of bank was invested in the business of John P. Schriver & Co., and, because so invested, they have a right to pursue the stock of goods found in the store more than three years afterwards, and to fix a charge upon the proceeds of the sale of those goods, to the exclusion of the claim of all persons. But John P. Schriver testifies, and the

bank itself shows, that a large portion of his credits in the account, including this trust fund, was drawn out for purposes of loan, and for taking up outstanding notes, and various other purposes, and only a comparatively small portion applied to the payment of merchandise accounts. The bank account was a continuing one, it is true, but it is not pretended that there is anything in the record to show that any portion of this trust fund, as such, was ever returned into the bank account after the 28th of August, 1883. Other trust funds, amounting to about \$10,000, derived from another source, were placed in the account to the credit of John P. Schriver & Co. some time after the 28th of August, 1883; but, if the testimony of John P. Schriver is to be relied on, all the trust fund now claimed had been spent in one way or another before that time; and, such being the case, the claim of the appellants upon the fund for distribution is altogether too indefinite. At most it is but matter of conjecture; for it is impossible to say, as this case is presented, and after the great lapse of time that has occurred, whether any, or, if any, what portion, of the stock of goods that passed into the hands of the assignee under the general assignment for the benefit of creditors was the product of the trust fund belonging to the appellants. Indeed, according to the evidence in the case, the stock of goods, or much the greater part of it, that passed to the assignee, and which produced the fund for distribution, has been purchased on credit, and many of the creditors who claim the fund are persons who sold the goods to the firm. It is clear, therefore, that the fund now in court for distribution cannot be identified as the product of any investment of the original trust fund belonging to the appellants.

2. But suppose at the time of the partnership formed between John P. Schriver and Edward C. Schriver that some portion of the trust fund remained invested in the stock of goods then on hand, or was otherwise employed in the business. In such case the question whether the appellants can be entitled to occupy the position of creditors of the firm, so as to share in the distribution of its assets, and to hold Edward C. Schriver liable, depends upon the fact whether Edward C. Schriver had notice of and acquiesced in the breach of trust by John P. Schriver, the guardian; for the principle of law is very clear that if a partner, being a trustee or fiduciary, improperly employs the money of his *cestui que trust* in the partnership business, or in the payment of partnership debts, this fact alone, and without anything more, is not sufficient to entitle the *cestui que trust* to occupy the position of creditor, and to enforce repayment of his money as against the firm. To render the firm liable in such case the firm itself must be shown to have been implicated in the breach of trust, and this cannot be unless all the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. But if the other partners have knowledge of such misuse of trust money, and know that

such money is being employed in the partnership business for common benefit, they will all be bound for the money so employed, and be made answerable for the breach of trust committed by their copartner with their acquiescence. *Ex parte* Heaton, Buck, 386; *Ex parte* Apsey, 3 Brown, Ch. 266; *Smith v. Jameson*, 5 Term R. 601; *Ex parte* Watson, 2 Ves. & B. 415; *Story*, Partn. § 368; 1 *Lindl. Partn.* (5th ed.) 161. Here, however, the proof would seem to establish the fact of the entire absence of knowledge on the part of Edward C. Schriver of the use of trust money by John P. Schriver in the partnership business; and in this class of cases it is clearly established by the authorities that the knowledge of the partner committing the breach of trust does not affect the other members of the firm. 1 *Lindl. Partn.* 161. Edward C. Schriver swears that he had no such knowledge, and he is fully supported in his testimony as to this fact by the testimony of his brother, who swears that no part of the trust fund was used in the business after the formation of the partnership. It is true, Mr. Englar testifies to a declaration or admission made by Edward C. Schriver to the effect that he knew that the trust money was used in the partnership business; but we think there must be some mistake or misunderstanding in regard to the matter, as Edward C. Schriver is emphatic in denying that he ever made such declaration, and he is strongly corroborated in this by the testimony of his brother, and the circumstances of the case. Upon the whole, we are of opinion that the court below committed no error in overruling the appellant's exceptions to the auditor's account and distribution, and in dismissing the petition, and the order appealed from will therefore be affirmed.

NOTE.—1. *Tracing and Recovery of Trust Funds.*—It is hardly necessary to cite authorities in support of the well known rule that trust funds may be ordinarily traced and recovered, so long as they are capable of identification. "If an agent has converted the property of his principal into, or invested it in other property, and it can be directly traced, the principal may follow it wherever he can find it, and as far as it can thus be traced, subject, however, to the rights of a *bona fide* purchaser for a valuable consideration without notice."¹

It was laid down in a Tennessee case, that a trust fund might be followed into and out of a deposit in a bank, of which it had formed a part, and thence into the hands of a receiver for creditors of the partners, who were the trustees; and that the *cestui que trust* might recover it in equity from the receiver, the facts in the case being as follows: On the 25th day of June, 1869, Thomas and E. F. Broccus went to the commission house of John McClennan & Co., in Memphis, and placed in the hands of their bookkeeper, R. B. Hawley, five packages of national currency, each containing \$500, to be safely kept by the firm for a few days. Hawley executed receipts to them for their respective amounts, in the name of John McClennan & Co., and placed the money in the safe. It was not allowed to remain there, but was deposited in the

¹ *Story on Agency*, § 229.

First National Bank of Memphis by said Hawley, in the name of John McClennan & Co.; and the same was credited to them on their pass book. McClennan died soon after this, and the funds of the firm, including the amount in question, passed into the hands of the receiver of the assets of the firm. It will be observed that in this case there was no question as to the identification of the trust fund, the same money deposited coming into the hands of the receiver.²

But in a Canadian case, where the facts were very similar to those of the principal case, there being no specific property which could be identified as having been purchased with the trust money, it was held that the plaintiff was not entitled to a lien on the general assets of the trustee, but that he could only prove for the debt on his estate.³

It was held in a New York case, the facts being, viz: Complainant sent a draft to a bank for collection, charged with a trust to pay the proceeds to complainant. The bank kept the proceeds and mingled them with its own funds. It was insolvent at the time—that complainant must trace the fund misappropriated into the hands of the receiver of the insolvent bank, before it could charge him with the duty of recognizing its equitable title; and furthermore that a *cestui que trust* cannot follow his fund into the hands of an assignee or executor of the trustee, but must occupy the position of a general creditor of the estate, if the proceeds have been mingled with other moneys, so that they are indistinguishable.⁴

And in a Maine case, a bill in equity against an administrator stated in substance that the deceased at the time of his death, had on deposit in a bank in his own name and upon his individual account \$898.08, and that said deposit included and covered a balance of \$569.85, held by the deceased in trust for the plaintiff, and that the prayer was that the administrator be required to pay over for the benefit of the plaintiff such balance. It was held that the identity of the trust fund was lost, and that the *cestui que trust* stood no better than other creditors of the estate.⁵

And in a late Pennsylvania case, the facts being as follows: September 11, 1862, Amos S. Henderson, as executor, filed in the register's office an inventory and appraisement of the goods and chattels, rights and credits of Dorothea Brien, deceased, amounting altogether to \$16,083.16. Before an account was filed, Henderson died. John D. Skiles, administrator of Henderson, filed an account April 24, 1886, showing a balance of \$13,843 due the estate of Dorothea Brien. Exceptions to this account were filed by the trustee of said estate, and the court appointed an auditor, whose report was confirmed *visi*, on February 6, 1886, fixing the balance due from the estate of Amos S. Henderson to the Brien estate at \$13,267.50. This balance did not include two notes of \$1,500, not embraced in the inventory, which were ear-marked and found among the effects of Henderson's estate by his administrator, and by him previously handed to W. W. Hopkins, the new trustee of the Brien estate.

² Broochus v. Morgan, 5 Cent. L. J. 53.

³ Culham v. Stewart, 3 Can. L. T. 550.

⁴ Ill. T. & S. Bank v. First Nat. Bank of Buffalo, 16 Reporter, 261, citing Whitcomb v. Jacob, 1 Salk. 160; Trecothick v. Austin, 4 Mason, 29; *Ex parte* Maldout, 3 Dea. & C. 361; Kip v. Bank of New York, 10 Johns. 63; Bank of Commerce v. Russell, 2 Dill. 215; *Re* Coan Mfg. Co., 12 N. B. R. 203; *Re* Janeway, 4 N. B. R. 100. And see Story on Eq. Jur. § 1259.

⁵ Steamboat Co. v. Locke, 73 Me. 370. And see Goodell v. Buck, 67 Me. 514.

Said Hopkins, trustee, presented a preferred claim of \$13,267.50, with interest, against the Henderson estate. The auditor reported that outside of the two notes referred to, no trace whatever could be found of the trust estate, and that upon the principle that "the right of pursuing a trust fund fails when the means of ascertainment fails," the *cestui que trust* in the Brien estate was only entitled to a dividend with the general creditors. The auditor's decree was duly affirmed by the supreme court of the State.⁶

2. When such Fund has been Invested by a Partner, the Trustee, in his Firm's Business.—"A firm is not liable to make good trust money applied to its use by one of its members, in breach of the trust reposed in him, unless the firm can be implicated in the breach of trust; but this doctrine will not preclude a *cestui que trust* from following his own money into the hands of the firm and demanding it back, if he can show that the firm still has it and that the firm did not come by it by purchase for value without notice."⁷

In a Georgia case, a guardian loaned the trust funds to his firm and died. The surviving partner, with knowledge of the nature of the claim, assigned for the benefit of creditors. It was held that the *cestui* could compel repayment by the assignee, in preference to creditors, because he took only the surviving partner's title, and the survivor could not change the nature of the claim.⁸ Nothing was said in this case as to the identification of the fund.

It has been furthermore laid down that if the other copartners know that the fund put into the firm business belongs to an estate, they are bound to inquire on what trusts it is held, and knowledge of the trustee partner is imputed to them, whether they had actual notice or not.⁹ SOLON D. WILSON.

⁶ Appeal of Hopkins, 9 Atl. Rep. 867. See the following cases in point, cited therein: Thompson's Appeal, 22 Pa. St. 16; Bank v. King, 57 Pa. St. 208; Cunningham's Estate, 3 Am. L. Reg. 120; People's Bank's Appeal, 33 Pa. St. 167; Williams' Appeal, 101 Pa. St. 481; McClintock's Appeal, 29 Pa. St. 350; Abbott v. Reeves, 49 Pa. St. 494; Wylie's Appeal, 92 Pa. St. 196; Jefferies' Appeal, 23 Pa. St. 39; Lathrop v. Bampton, 31 Cal. 17; Carlton v. Conroy, 21 Cal. 170; George v. Ransom, 14 Cal. 658; Wells, Fargo & Co. v. Robinson, 18 Cal. 183; Turner v. Fendall, 1 Cranch, 116.

⁷ Lindley on Partnership (2d Am. ed., edited by Ewell), 162. And see Vanderwick v. Sumner, 2 Wash. 41; Case v. Beauregard, 1 Woods, 125; Dent v. Slough, 40 Ala. 518; Hollenback v. More, 44 N. Y. Superior Ct. 107; Seguin's Appeal, 103 Pa. St. 139; Ramsay v. Deas, 2 Dessau, 239; Coleman v. G'Neil, 1 N. W. Rep. 846; Chester v. Dickerson, 52 Barb. 349; Gavin v. Walker, 14 Lea (Tenn.) 648; Chamberlin v. Prior, 1 Abb. App. Dec. 383; Bates on Partnership, 481.

⁸ Carter v. Lipsey, 70 Ga. 417.

⁹ Travis v. Milne, 9 Hare, 141; Houser v. Riley, 45 Ga. 126; *In re* Ketchum, 1 Fed. Rep. 815. For a full consideration of the subject, embracing numerous English, as well as American cases, see 5 Cent. L. J. 51-75.

RECENT PUBLICATIONS.

THE CODE OF EVIDENCE of the State of New York. Reported complete by the Commissioners, Hon. David Dudley Field, Hon. William Rumsey, appointed pursuant to chapter 124 of the Laws of 1887. February 1889.

The commissioners appointed by the State of New York to prepare a code of evidence have just completed their final report and submitted it to the legislature in

the form of a statute. The commissioners were Mr. David Dudley Field, Judge William Rumsey and Judge Follett. The high legal standing of the commissioners is a guaranty that their labor has been well done and will be satisfactory to the legislature and the bar. The commissioners were appointed in 1887 under authority of the general laws of that year. They prepared a preliminary draft of the code, copies of which were placed in the hands of all the lawyers and judges of the State for examination and criticism. A large number of valuable suggestions were received from them, many of which were engrafted in this code. The commissioners say: "The code herewith submitted is intended for practical use in the field of actual litigation. While it has been constructed in the light of the accepted logical theory of the law of evidence it contains nothing abstruse or speculative. It is far from the intention of its authors to please a curious few by new or original views, or to impose on lawyers a special theory or novelty." It is evidently the intention of the authors of this proposed code to embody the best portion of the statutory law of the State, with such interpretations as have been put upon it by the appellate courts, to reconcile conflicting decisions, and to prepare as nearly as human foresight can provide a rule or guide to every problem of evidence which may arise in actual litigation. Simplicity and lucidity are two of the most important ingredients of every law, and the commissioners have apparently attained these attributes in every section of their code. Should New York adopt this code it will have taken a long stride forward in the march of legal science, and set an example which the other States will doubtless not be slow to follow. The notes of the commissioners to the code prove that they have made careful and full research for precedents, and the notes form a valuable brief to the code.

THE POWERS AND DUTIES OF POLICE OFFICERS AND CORONERS. By R. H. Vickers, of the Chicago Bar. Chicago: T. H. Flood & Co. 1889.

This little book, by Mr. Vickers, of the Chicago bar, will find a place in legal literature which for sometime has been practically unoccupied, and coming as it does, with the incidents of the Chicago and Birmingham riots and the collision between the police and citizens, fresh in the public mind, will be found of interest and of practical value in determining the exact limits of a policeman's duties and liabilities. As the author says: "Even capable and faithful officers are frequently very ill informed as to their proper functions. There is also a conflict in the minds of the community between the duties of policemen as they are regarded by the police, and the duties of policemen as they are regarded by the rest of the public." To define these duties and powers, and enlighten policemen themselves, as well as the community generally and also to lay down the law governing coroners, seems to be the object of the book. It is divided into chapters, discussing general police power, arrest without and with warrant, escape, and riots. Duties of officers in extorting confessions is a subject which might be studied to advantage by most officers. Duties of officers under city ordinances and when dangerous assemblages are expected are treated at considerable length. The decision of Judge Tukey of Chicago, as to the right of the anarchists to assemble is printed in full in the appendix. There are also forms for the use of coroners. The book, though not large, is concisely and clearly written, and is evidently intended for the enlightenment and entertainment of laymen as well as lawyers.

BOOKS RECEIVED.

REPORTS OF CASES Decided in The Court of Chancery, The Prerogative Court, and, on appeal, in The Court of Errors and Appeals, of the State of New Jersey. John H. Stewart, Reporter. Vol. XVII. Trenton, N. J.: The W. S. Sharp Printing Company. 1889.

THE AMERICAN DIGEST. Annual, Vol. 2, 1888. Being Vol. 2 of the United States Digest third Series annuals. A Digest of all the Decisions of the United States Supreme Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York State, as Reported in the National Reporter System during the year 1888. With Table of Cases Showing the official Citations; also a Supplementary Table of Cases for the Annual of 1887, Giving the official Citations of Cases in State Reports Published since that Annual was issued. Prepared and Edited By the Editorial Staff of the National Reporter System. St. Paul. Minn.: West Publishing Co., 1889.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXVI. Practice. St. Louis, Mo.: The Gilbert Book Company. 1889.

QUERIES AND ANSWERS.

[Subscribers are invited to send short answers to the following.]

QUERY NO. 17.

A has a mortgage for \$10,000, on realty worth, say \$20,000. His mortgage is not recorded. Subsequently B takes a mortgage on the same realty for \$10,000, with actual notice of A's unrecorded mortgage. B's mortgage is duly recorded. Subsequently to B's recorded mortgage, C takes a third mortgage on same realty for \$10,000, and his (C's) mortgage is duly recorded, and he has no notice of A's mortgage. What are the respective rights of the mortgagees? Say the realty sells for \$20,000, how is it to be divided between them? A's mortgage is superior to B's; B's is superior to C's, and C's is superior to A's.

JETSAM AND FLOTSAM.

The benefit of the malady of deafness has never been so admirably illustrated as in the case of a man who was convicted of murder last week, and declined to hear a word of what he must have felt to have been a disagreeable communication, because he had seen the judge put on the black cap. "You are found guilty," bawled the clerk of the court. "What?" replied the prisoner. "You are condemned to be hanged," cried the other in still louder tones. "I can't hear a word you say, my good man," was the unimpassioned rejoinder. So it had to be written down. If the poor fellow, as well as being deaf, had never learned to read, he would have been in an unassailable position, indeed—James Payn, in *The Independent*.

WEEKLY DIGEST

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1. ABATEMENT AND REVIVAL — Plea in Abatement — Pleading. — A plea in abatement, because defendant is not sued in the county in which he resides, cannot be sustained, unless it negatives the existence of any of the exceptions which under the statute, would authorize jurisdiction where the suit is brought. — *San Antonio & A. P. Ry. Co. v. Cockvill*, S. C. Tex., Feb. 5, 1889; 10 S. W. Rep. 702.

2. ADVERSE POSSESSION—Evidence. — Where a part of a single uninclosed tract is sold and the grantee fails to pay the purchase price and abandons possession and claim of right, the grantor's possession of the remainder of the tract and his exercise of acts of ownership over the part sold are constructive possession of that part under Rev. St. Mo. 1879, § 3223. — *Hickman v. Lank*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 600.

3. ALTERATION—Summons. — An alteration in the date named as the return-day in a summons, made after its delivery to the sheriff, makes a new summons of it, and the action is not commenced until its redelivery to the sheriff after the alteration. That an alteration was so made may be proved by parol. — *Woodville v. Harrison*, S. O. Wis., Jan. 29, 1889; 41 N. W. Rep. 526.

4. APPEAL—Dismissal—Motion to Set Aside. — When the party whose duty it is to file a transcript on appeal fails to do so, and the judgment is affirmed on certificate, a motion to set the judgment aside, based on "unavoidable absence and other engagements of counsel," will be overruled. — *Gulf C. & S. F. Ry. Co. v. Edwards*, S. C. Tex., Dec. 14, 1888; 10 S. W. Rep. 525.

5. APPEAL—Notice. — Under Code Iowa, § 3178, which provides that "an appeal is taken by the service of a notice in writing on the adverse party, and also upon the clerk of the court wherein the proceedings were had, stating the appeal," etc., where the abstract on

appeal does not show service of such notice on the clerk, the cause will be dismissed. — *Hayden v. Goepfinger*, S. C. Iowa, Feb. 6, 1889; 41 N. W. Rep. 607.

6. APPEAL—Notice. — It is the notice of appeal filed in the court of chancery that is the appellate act giving the court of appeals cognizance of the case. — *Barton v. Long*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Alt. Rep. 683.

7. APPEAL—Practice—Assignment of Errors. — An assignment of error stating that "the court erred in overruling defendant's motion for a new trial on the grounds therein stated," is too general, and will not be considered. — *Cullen v. Drame*, S. C. Tex., Dec. 7, 1888; 10 S. W. Rep. 720.

8. APPEAL—Practice—Cross-errors. — Cross-errors may be assigned in Indiana, though the Code makes no provision therefor. — *Feder v. Field*, S. C. Ind., Feb. 20, 1889; 20 N. E. Rep. 123.

9. APPEAL—Record. — Where the abstract in a case triable *de novo* fails to allege or show that it contains all the evidence, the certificates of the judge and reporter, printed in the abstract, that all the evidence is contained in the report of the short-hand reporter, is not sufficient to authorize a review of the case. — *Parks v. Garner*, S. C. Iowa, Feb. 5, 1889; 41 N. W. Rep. 601.

10. APPEAL—Review. — The supreme court will not interfere with the judgment of the lower court where the case is one of conflict of evidence. — *Dathoff v. Bennett*, S. C. Iowa, Feb. 4, 1889; 41 N. W. Rep. 597.

11. APPEAL—Review—Guardian's Account. — An appeal from a decree settling an account of a guardian only brings up items in that account, and rulings upon items contained in an account formerly filed and settled will not be reviewed. — *Kingsbury v. Powers*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 3.

12. APPEAL—Review—Nonsuit. — Facts proved as matter of defense cannot be considered on the question of the propriety of a nonsuit. — *Chappell v. Bates*, S. C. Err. Conn., July 7, 1888; 16 Atl. Rep. 673.

13. APPEAL—Review—Objections Not Raised Below. — Instructions given without exception at the trial will not be reviewed on appeal. — *Jefferson v. Chapman*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 33.

14. APPEAL—Review—Pleading. — The demurrer to the answer having been sustained, the appellate court will not look into the record to see whether the answer was true or false. — *Evans v. English*, Ky. Ct. App., Jan. 24, 1889; 10 S. W. Rep. 626.

15. APPEAL—Review—Questions of Fact. — Where an action involving questions of law and fact is tried by the court, and no propositions of law are submitted for its ruling, as provided by Rev. St. Ill. 1874, p. 790, it will be assumed that the trial court correctly determined the law of the case. — *Tradesmen's Nat. Bank v. Le Moynes*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 45.

16. APPEAL—Review—Weight of Evidence. — When there is evidence tending to support the finding of the trial court, such finding will not be reversed on appeal. — *Walter v. Walter*, S. C. Ind., Feb. 2, 1889; 20 N. E. Rep. 148.

17. APPEAL—Review—Weight of Evidence. — A finding of the trial court that defendant is entitled to nominal damages only for breach of contract by plaintiff to sell him goods, set up as a counterclaim, will not be reversed where the evidence as to whether the market price of such goods at the time in question was above or below the contract price is conflicting. — *Harrison Wire Co. v. Hall & Willis Hardware Co.*, S. C. Mo., Feb. 9, 1889; 10 S. W. Rep. 619.

18. ASSIGNMENT — Mutual Accounts — Rights of Assignee. — Where mutual accounts exist between parties, one of the parties cannot, before a balance has been struck, assign a particular item of credit in his favor, so as to enable the assignee to sue for the amount of such credit. — *Nonantum Co. v. Webb*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 632.

19. ASSIGNMENT FOR BENEFIT OF CREDITORS — Rights of Assignee. — The assignee for benefit of creditors

of such insolvent holder stands in the latter's shoes, and can assert no better right to the fund than could the assignor. — *Appeal of Fourth Nat. Bank*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 779.

20. ATTACHMENT — Foreign Attachment — Rights of Garnishee. — An invalid judgment in foreign attachment may be stricken off on the application of the garnishees. — *Melloy v. Burtis*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 747.

21. ATTACHMENT — Sheriffs. — Where a sheriff releases property attached, by order of counsel for both parties to the action, as the result of an agreement between them, he is not liable to the plaintiff for its value, though defendant fails to carry out his agreement upon which the release was ordered. — *Melhop v. Seaton*, S. C. Iowa, Feb. 5, 1889; 41 N. W. Rep. 600.

22. ATTORNEY AND CLIENT — Lien for Services. — Though an attorney has a lien for his fees upon the judgment recovered in favor of his client, such lien does not extend to property purchased by the client with the proceeds of the judgment. — *Goodrich v. McDonald*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 649.

23. BOND — Action On — State Party Plaintiff. — Under § 1067, allowing the State to sue for the use of the county where the latter has a demand to be enforced, the State is a proper party plaintiff in an action to compel the treasurer to replace in the county treasury money never legally drawn therefrom. — *State v. Wood*, S. C. Ark., Feb. 2, 1889; 10 S. W. Rep. 624.

24. CANCELLATION OF INSTRUMENTS — Pleading — Evidence. — A party who seeks to enjoin a judgment on the ground that it was obtained by fraud and misrepresentation must state the facts constituting the grounds for relief. — *Shufeldt v. Gandy*, S. C. Neb., Jan. 28, 1889; 41 N. W. Rep. 553.

25. CARRIERS OF PASSENGERS — Baggage. — A common carrier is liable as such for the personal baggage of a passenger delivered to and received by it solely for transportation, and not for storage, although for the convenience of the carrier the passenger consents to some delay in the transportation. — *Shaw v. Northern Pac. R. Co.*, S. C. Minn., Jan. 31, 1889; 41 N. W. Rep. 548.

26. CARRIERS OF PASSENGERS — Ejection from Train — Damages. — Where one purchases a ticket over a railroad, which the conductor, without legal right, refuses to accept, and the passenger is expelled, the latter may recover the cost of a ticket from the point where he was expelled to his destination. — *Pennsylvania Co. v. Connell*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 89.

27. CARRIERS OF PASSENGERS — Injury to Passengers — Evidence. — Under a general denial, defendant may show that the employees operating the road were not its servants, but the servants of a receiver operating the road under decree of court. — *Kansas & G. S. L. R. Co. v. Dorough*, S. C. Tex., Nov. 23, 1888; 10 S. W. Rep. 711.

28. CHATTEL MORTGAGES — Recording — Acknowledgment. — The word "proving," in § 1, p. 218, McClell. Dig., as to the admission of chattel mortgages to record, includes an acknowledgment of the instrument for record by the makers before a proper officer. — *Einstein's Sons v. Shouse*, S. C. Fla., Dec. 18, 1888; 5 South. Rep. 380.

29. CONSTITUTIONAL LAW — Legislative Power. — When questions involving private interests have been settled by the final sentence of a judicial tribunal, the power of reopening them is by our constitution confided to the judiciary, and denied to the legislature. — *State v. Essex Public Board*, N. J. Ct. Err. & App., Nov. 1888; 16 Atl. Rep. 695.

30. CONSTITUTIONAL LAW — Quo Warranto — County Supervisors. — A proceeding in the nature of *quo warranto* against a person in office is the appropriate manner of testing the validity of the statute under which his office was created. — *People ex rel. Bolt v. Riordan*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 482.

31. CONTINUANCE — Absent Witnesses. — Application for continuance denied on application failing to state

what the absent witness would testify. — *Berry v. Tex. & N. O. Ry. Co.*, S. O. Tex., Feb. 8, 1889; 10 S. W. Rep. 726.

32. CONTINUANCE — Certificate of Importance — Right to Appeal. — A continuance will not be granted to enable one to obtain a certificate from the appellate court that a case is important, and should be passed on by the supreme court. — *Wilson v. Scoville*, S. C. Ill., Jan. 21, 1889; 20 N. E. Rep. 88.

33. CONTRACTS — Action for Breach — Evidence. — In an action to recover for goods sold, where defendant contends that the goods were not delivered to him within the time provided for by the contract, and that he thereby suffered loss from not being able to supply his customers, he cannot show the amount of goods that could have been sold within the time named. — *Tilley v. Enterprise Stone Co.*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 71.

34. CONTRACTS — Construction. — Where a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other. — *Howard v. Pensacola R. Co.*, S. C. Fla., Jan. 7, 1889; 5 South. Rep. 356.

35. CONTRACT — Evidence. — A written contract drawn in accordance with an oral agreement, but unsigned, if admitted by the parties to be a correct statement of their agreement, is competent evidence of its terms. — *Grand Rapids Chair Co. v. Lyon*, S. C. Mich., Jan. 25, 1889; 41 N. W. Rep. 497.

36. CONTRACTS — Rescission. — In a contract for the building of a sewer, it was stipulated that the rock taken from the excavation should become the property of the contractor, except such part as should be necessary for the support of the work: *Held*, the right to sell the stone did not accrue until the contract was completed. — *Becker v. City of Philadelphia*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 625.

37. CONTRACT — Revocation. — Where defendant agreed that if complainant would support him for life, the latter should take possession and have at his death certain real estate, and where defendant, after being supported for some time left complainant's family without cause and conveyed the land to one who had knowledge of the facts: *Held*, that the deed should be set aside as in fraud of complainant's rights. — *Bird v. Pope*, S. C. Mich., Jan. 25, 1889; 41 N. W. Rep. 514.

38. COUNTY CLERKS — Fees. — Section 2, ch. 42, *Seas. Laws 1887*, is not repealed or modified by § 1, of ch. 44, thereof. Under the provisions of said chapter 42, the county clerk is entitled to four cents per line for preparing the tax list, but is not required to enter the same on his fee-book. — *Richardson County v. Musselman*, S. C. Neb., Jan. 23, 1889; 41 N. W. Rep. 553.

39. COURTS — Mandamus — To Judicial Officers. — A *mandamus* will not be allowed to compel a district judge to accept a bond, and settle and sign the case for appeal to the court of common pleas, in such cases. — *Gartner v. Cohen*, S. C. N. J., Feb. 7, 1889; 16 Atl. Rep. 684.

40. CRIMINAL LAW — Burglary. — On trial for burglary evidence that defendant had the night before been in the house and had made inquiries as to the weapons in the house is admissible. — *State v. Ward*, S. C. N. Car., Feb. 25, 1889; 8 S. E. Rep. 814.

41. CRIMINAL LAW — Homicide — Self-defense. — An instruction that if the defendant brought on the difficulty terminating in the homicide by his own unlawful act he could not set up the plea for self-defense is erroneous. — *State v. Stills*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 614.

42. CRIMINAL LAW — Seduction — Evidence. — Evidence of defendant's repeated promises of marriage after the seduction is competent to corroborate the statement of the girl that she had never had intercourse with any other man. — 8 S. E. Rep. 688.

43. DEED — Evidence — Declarations of Grantor after Conveyance. — The acts of a grantor subsequent to a conveyance by him are not competent to impeach the title of his grantee. — *Burke v. Hand*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 693.

44. **DIVORCE—Cruelty.** — Where, in a suit by the wife for divorce on the ground of cruelty, it appears that the plaintiff has not been blameless, and that the conduct of defendant, has not been such as would probably endanger plaintiff's life or health, a divorce should be refused. — *Gilbertson v. Gilbertson*, S. O. Iowa, Feb. 8, 1889; 41 N. W. Rep. 573.

45. **DOWER—Assignment—Incumbrances.** — In assigning dower in lands, some tracts of which are subject to mortgages paramount to the widow's right, the widow is entitled only to one-third in value of all the tracts, less the aggregate of the mortgage debts. — *Appeal of Platt*, S. C. Conn., June 2, 1889; 16 Atl. Rep. 669.

46. **DOWER—Renunciation by Widow.** — When the widow renounces a provision in lieu of dower, the property so devised and bequeathed falls into the residue, subject, like the rest of the estate, to the widow's rights under the law. — *Devcomon v. Shaw*, Md. Ct. App., Feb. 8, 1889; 16 Atl. Rep. 645.

47. **DRAINAGE—Correction of Mistakes—Vested Rights.** — Drainage act Ill. 1885, simply provides a means for correcting mistakes in the assessment of benefits, and does not interfere with vested rights, as the property owner acquired none under the assessment. — *Boul v. Baker*, S. C. Ill., Jan. 26, 1889; 20 N. E. Rep. 1.

48. **EJECTMENT—Improvements by Life tenant—Compensation.** — One deriving title through a life tenant, is not entitled to compensation from the remainderman for improvements. — *Stewart v. Matheny*, S. C. Miss., Jan. 21, 1889; 5 South. Rep. 887.

49. **EJECTMENT—Province of Jury.** — In ejectment, the issue being which of two Indian woman of the same name made a selection of the land in controversy, and for which one the patent issued by the government was intended and the evidence on that point being conflicting the court properly refused to direct a verdict for plaintiff. — *Litchfield v. Ripley*, S. C. Mich., Jan. 25, 1889; 41 N. W. Rep. 504.

50. **EMINENT DOMAIN — Compensation — Excessive Damages.** — In condemnation proceedings, where the verdict of the jury awards to the lessees of the property a sum largely in excess of that warranted by their own testimony as to the rental value and cost of removal, the verdict will be set aside, notwithstanding the jury viewed the premises. — *Atchison, T. & S. F. R. Co. v. Schneider*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 41.

51. **EQUITY—Counterclaim—Stay Pending Action at Law.** — In an action for discovery and account against defendants where the latter set up against the complainant counterclaims which could not be tried in equity, a decree for complainant should be stayed until the defendants have an opportunity of testing at law their counterclaims. — *Alpaugh v. Wood*, N. J. Ct. Err. & App., Jan. 22, 1889; 16 Atl. Rep. 676.

52. **EQUITY—Enforcement of Forfeiture—Condition Subsequent.** — A court of equity will not lend its aid to enforce a forfeiture because of a breach of a condition subsequent in a deed. — *Douglas v. Ins. Co.*, S. O. Ill., Jan. 25, 1889; 20 N. E. Rep. 61.

53. **EQUITY—Jurisdiction—Running Account.** — The subject of controversy being a complicated, disputed, mutual account, current, covering a period of thirteen years, the transfer of the case to equity was properly made. — *Rogers v. Yarnell*, S. C. Ark., Feb. 2, 1889; 10 S. W. Rep. 623.

54. **ERROR—Writ of—Petition.** — A petition in error filed by the State's attorney, failing to point out the particular errors complained of, as required by Code Md. art. 5, § 4, will not be considered, though submitted on a brief by the attorney general, there being no brief or argument by the traverser. — *State v. Brown*, Md. Ct. App., Feb. 21, 1889; 16 Atl. Rep. 732.

55. **EVIDENCE—Best of Secondary.** — Evidence of the contents of a deed is inadmissible until a foundation for the introduction of secondary evidence is laid. — *Lowry v. Davis*, S. C. Ind., Feb. 13, 1889; 20 N. E. Rep. 159.

56. **EVIDENCE—Competency.** — In an action for slander, plaintiff having testified that he had visited a

house of ill fame, not knowing its character, and for an innocent purpose, evidence of his acts at such house, prior to the misconduct charged by defendant, which tends to contradict him, is admissible. — *Fitzgerald v. Williams*, S. J. C. Mass., Feb. 26, 1889; 20 N. E. Rep. 100.

57. **EVIDENCE—Opinion—Value of Land.** — A person who has personally examined real property and made inquiry of qualified persons concerning its value is competent to testify as to its value. — *Jones v. Snyder*, S. O. Ind., Feb. 1, 1889; 20 N. E. Rep. 140.

58. **EVIDENCE—Parol to Vary Tax Receipt.** — It may be shown by parol that taxes were in fact paid by another than the person named in the receipt for them. — *Gage v. Hampton*, S. O. Ill., Jan. 25, 1889; 20 N. E. Rep. 12.

59. **EVIDENCE—Secondary.** — In an action to recover money paid by plaintiff to defendant, where plaintiff's evidence shows that he sent the money to a third person to be paid to defendant, and said person testifies that he received the money inclosed in a letter, and that the letter has been lost, a letterpress copy thereof is admissible. — *Nowlen v. Lyon*, S. O. Mich., Jan. 25, 1889; 41 N. W. Rep. 496.

60. **EXCEPTIONS—Bill of—Exceptions to Charges.** — Where it appears that certain exceptions to instructions, formally taken, and signed by the judge, have been mislaid, it is proper to allow a general exception to the entire charge. — *Collins v. Leafey*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 765.

61. **EXECUTION—Sale—Discharge of Liens—Purchase by Attorney.** — At a sheriff's sale the land was purchased in the interest of the judgment debtor by his attorney, but in the name of the attorney, for the purpose of securing title in himself, so that he might sell it without sacrifice. Plaintiff advanced the price, and his name was substituted as purchaser in the return, and the deed was made to him: Held, that the sale was valid. — *Saunders v. Gould*, S. O. Penn., Feb. 18, 1889; 16 Atl. Rep. 807.

62. **EXECUTION SALE—Failure of Title.** — The purchaser of property at sheriff's sale, cannot, upon the failure of title thereto, recover of the execution plaintiffs, for whose debt the sale was made, the price paid. — *Lewark v. Carter*, S. O. Ind., Jan. 31, 1889; 20 N. E. Rep. 119.

63. **EXECUTION—Sale by United States Marshal—Collateral Attack.** — A sale by a United States marshal under an execution from a United States court, made before the door of the United States court house, instead of the door of the court-house of the county in which the land is situated, is void. — *Moody's Heirs v. Moeller*, S. O. Tex., Feb. 8, 1889; 10 S. W. Rep. 777.

64. **EXECUTION—Sheriff's Deed—Description of Land.** — A sheriff's deed describes the land by adjoining, with the number of varas and acres therein contained, sufficiently describes the land, and, at a distance in time of forty years, will be presumed to cover the proper land, the petition being lost. — *Ruby v. Folkenberg*, S. O. Tex., Jan. 18, 1889; 19 S. W. Rep. 544.

65. **EXECUTORS AND ADMINISTRATORS—Defense to Claim.** — In proceedings to establish a claim against an estate, no formal pleadings being required, the administrator's resistance of a claim on a judgment puts in issue the validity, not only of the judgment as a claim, but also of the debt on which the judgment is founded. — *Scott v. Fisher*, S. O. Iowa, Jan. 31, 1889; 41 N. W. Rep. 563.

66. **EXECUTORS AND ADMINISTRATORS—Joint Accounts—Liability.** — Where two or more executors exhibit a joint account for settlement, and procure the same to be finally settled and allowed, they stand jointly liable for the balance shown by the account to be in their hands. — *Tehan v. Maloy's Ex'rs*, N. J. Ct. Chan., Feb. 9, 1889; 16 Atl. Rep. 686.

67. **EXECUTORS AND ADMINISTRATORS—Right to Appeal.** — The principal administrator and the widow of the intestate may appeal from an order appointing an ancillary administrator. — *In re Shaw's Estate*, S. J. C. Me., Jan. 14, 1889; 16 Atl. Rep. 662.

68. FRAUDS—Statute of— Oral Lease of Land. — In Mississippi, a lease of land for a term not exceeding one year not being required to be in writing, an oral lease, made December 15, 1887, for the year 1888, is valid, notwithstanding it is a contract which is not to be performed within a year. — *McCroy v. Toney*, S. C. Miss., Feb. 4, 1889; 5 South. Rep. 392.

69. FRAUDULENT CONVEYANCES—Action to Set Aside—Knowledge of Grantee. — Where the purchaser of land is not a mere volunteer the conveyance cannot be set aside as fraudulent without proof of fraud on the part of the grantor, and also a participation therein, or knowledge thereof, on the part of the grantee. — *Scott v. Davis*, S. C. Ind., Feb. 1, 1889; 20 N. E. Rep. 139.

70. FRAUDULENT CONVEYANCES—Action to Set Aside—Pleading. — A petition in an action to set aside a conveyance to a wife of land by her husband, as made with intent to defraud creditors, need not aver actual fraud on the part of the wife, such a conveyance of property, obtained with her husband's means, being constructively fraudulent. — *Jordan v. Buschmeyer*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 616.

71. FRAUDULENT CONVEYANCES — Agricultural College Lands. — A conveyance in fraud of creditors will not be set aside where the evidence fails to show that a subsequent grantee for a consideration not so inadequate as to show fraud had knowledge of the fraudulent intent. — *Burtis v. Humboldt County Bank*, S. C. Iowa, Jan. 31, 1889; 41 N. W. Rep. 586.

72. FRAUDULENT CONVEYANCE—Husband and Wife. — Facts upon which court set aside quitclaim deed from husband to wife, not recorded for ten years, and in meantime husband becoming insolvent, at instance of creditor whose account extended over ten years. — *Fetters v. Duvernois*, S. C. Mich., Jan. 25, 1889; 41 N. W. Rep. 514.

73. FRAUDULENT CONVEYANCES — What Amounts To. — A surety for an insolvent principal conveyed all his property to his son and daughter. The conveyance to the daughter appeared to be voluntary on its face. The son paid nothing at the time of receiving the deed, but afterwards paid debts of his father to the amount of about \$17,000. *Held*, that the conveyances were voluntary and should be set aside. — *Benson v. Benson*, Md. Ct. App., Feb. 8, 1889; 16 Atl. Rep. 657.

74. GAMING—Gambling Contract—Evidence. — In an action to recover moneys advanced by plaintiff to defendant for the purchase of corn, where it is alleged that the contract was a gambling transaction, evidence that the means of the defendant were inadequate to carry the contract into effect is proper to be considered in determining whether his intention was to purchase the corn. — *Myers v. Tobias*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 641.

75. GAMING—Gambling Contracts—Recovery of Money from Broker. — Though a contract for the future delivery of wheat be illegal as a gaming contract, yet a sum of money representing the margins deposited, paid over by one of the parties to the broker to be by him paid to the other, can be recovered in an action by the latter against the broker. — *Floyd v. Patterson*, S. C. Tex., Dec. 4, 1888; 10 S. W. Rep. 526.

76. GAS COMPANIES—Taxation—Assessment. — Gas companies are not manufacturing companies, within the meaning of § 3, Rev. St. Ill. ch. 120, and are assessable under §§ 83, 88. — *Ottawa G. & C. Co. v. Downey*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 20.

77. HIGHWAYS—Establishment by Statutory Proceedings. — Under act Pa. 1836, § 4, it is the duty of the court on approving the report of reviewers appointed to lay out a road to direct of what width the road shall be in every case. — *In re Road in Hendricks Tp.*, S. C. Penn., Oct. 22, 1888; 16 Atl. Rep. 788.

78. HIGHWAYS—Injury from Defects — Contributory Negligence. — A traveler on a public highway who falls into an excavation cannot recover for the injuries thereby sustained, if he was lacking in ordinary care and prudence, although such excavation may have

been left unguarded. — *Schonhoff v. Jackson Branch R. Co.*, S. C. Mo., Feb. 9, 1889; 10 S. W. Rep. 618.

79. HOMESTEAD—Conveyance— Verbal Assent of Wife. — Under Code Tenn. § 2114a, a conveyance by the husband in which the wife does not join, but to which she assents verbally, will not deprive the wife of her homestead right. — *Collins v. Baytt*, S. C. Tenn., Feb. 16, 1889; 10 S. W. Rep. 512.

80. HOMICIDE—Assault with Intent to Kill—Trial. — On a trial for assault with intent to kill it is error to compel defendant, if he wishes to testify, to do so before other witnesses. — *Bell v. State*, S. C. Miss., Jan. 21, 1889; 5 South. Rep. 389.

81. HORSE AND STREET RAILROADS—Transfer of Franchise—Liabilities. — Where a street-railway company transfers its property and franchises, without legislative consent, to another company, it is still liable for injuries to a passenger. — *Ricketts v. Birmingham St. Ry. Co.*, S. C. Ala., Jan. 23, 1889; 5 South. Rep. 353.

82. INJUNCTION — Preliminary Mandatory Injunction. — A mandatory injunction is rarely granted before final hearing, and will only be ordered to prevent extreme or very serious damage. — *Bailey v. Schnitzler*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 680.

83. INSURANCE—Mortgage—Pleading. — The holder of a mortgage on insured property at the time of a loss may maintain an action on the policy which contains the provision, "Loss, if any, payable to mortgagees as their interest may appear." — *Bartlett v. State Ins. Co.*, S. C. Iowa, Jan. 31, 1889; 41 N. W. Rep. 579.

84. INSURANCE—Proofs of Loss—Waiver of Defects. — The receipt and retention of proofs of loss without objection, the company basing its refusal to pay the loss on the breach of the condition of the policy relative to occupancy, is a waiver of any formal defects in the proofs. — *Cont. Ins. Co. v. Ruckman*, S. C. Ill., Jan. 26, 1889; 20 N. E. Rep. 77.

85. INSURANCE—Suit on Policy — Abstract of Title. — Plaintiff cannot be required to furnish an abstract of title, under Rev. St. Ind. 1881, § 363, permitting the court, in a proper case, to order one to be furnished. — *Phoenix Ins. Co. v. Rowe*, S. C. Ind., Jan. 31, 1889; 20 N. E. Rep. 722.

86. INSTRUCTIONS — Evidence. — Where the court charges the jury so as to necessarily withdraw from their consideration incompetent evidence admitted on the trial, the error in admitting such evidence will be deemed to be without prejudice. — *Shepard v. Chicago, etc. R. Co.*, S. C. Iowa, Jan. 29, 1889; 41 N. W. Rep. 664.

87. INTOXICATING LIQUORS— Civil Damage Law — Evidence. — On the question of exemplary damages under Pub. Acts Mich. 1883, No. 191, evidence that plaintiff had requested defendant not to sell her husband liquor is competent. — *Larzelere v. Kirchgreisser*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 488.

88. INTOXICATING LIQUORS — Injunction. — A writ enjoining a party from unlawfully selling intoxicating liquors upon certain premises described as "part of lot No. 2, in the N. E. quarter of the N. W. quarter of section 23," etc., is not void for uncertainty, in not specifying the particular building or place intended. — *Ver Straeten v. Lewis*, S. C. Iowa, Feb. 2, 1889; 41 N. W. Rep. 594.

89. INTOXICATING LIQUORS—License— Bond. — Where a retail liquor dealer gave a bond conditioned for the observance of "all the provisions of the Revised Code of 1880," he was bound to observe such Code as amended and in force at the time of the execution of the bond. — *O'Hinn v. State ex rel. Payne*, S. C. Miss., Jan. 22, 1889; 5 South. Rep. 390.

90. INTOXICATING LIQUORS— Nuisance—Pleading. — In an action to abate a liquor nuisance, an answer is demurrable which does not deny that the nuisance sued for was being maintained at the time of bringing the action, but merely alleges that at a subsequent date defendant obtained a permit. — *Rice v. Schlopp*, S. C. Iowa, Feb. 5, 1889; 41 N. W. Rep. 603.

91. INTOXICATING LIQUORS — Penalty—Druggist. — Laws Iowa 1886, ch. 83, providing that nothing therein contained shall shield the druggist who abuses his

trust from the utmost rigors of the law, does not require the highest possible penalty to be fixed on the conviction of a druggist. — *State v. Hoagland*, S. C. Iowa, Feb. 4, 1889; 41 N. W. Rep. 595.

92. INTOXICATING LIQUORS—Tort at Common Law.—It was not a tort at common law to either sell or give intoxicating liquors to a strong and able bodied man. — *Cruse v. Aden*, S. C. Ill., Jan. 26, 1889; 20 N. E. Rep. 78.

93. JUDGMENT—Foreign Judgment — Affidavit of Defense. — In an action on a foreign judgment the fact that it was not certified according to the act of congress, so as to be admissible in evidence, is not available in an affidavit of defense. — *Mink v. Shaffer*, S. C. Penn., Feb. 18, 1889; 16 Atl. Rep. 805.

94. JUDGMENT—Partition.—A money judgment for plaintiff in partition for taxes alleged to have been paid by him for defendant's benefit is unauthorized. — *Tucker v. Whittlesey*, S. C. Wis., Feb. 19, 1889; 41 N. W. Rep. 535.

95. JUDGMENT—Res Adjudicata—Parol Evidence.—Where an action is brought on several promissory notes, each note being described in a separate count, and a general judgment entered, the plaintiff cannot afterwards show by parol that one of the notes sued on was not passed upon by the court and bring action on such note. — *Blodgett v. Dow*, S. J. C. Me., Jan. 9, 1889; 16 Atl. Rep. 600.

96. LANDLORD AND TENANT—Holding Over — Injunction.—Where a tenant, under a lease containing a privilege of renewal, holds over his term without any formal renewal, or notice to the landlord that he intends to renew, equity will not enjoin the landlord from ejecting him. — *Appeal of Pittsburgh & A. Drore Yard Co.*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 625.

97. LANDLORD AND TENANT—Lease — Estoppel. — Where one takes a lease of property, goes into possession, and pays rent under it, he cannot repudiate the lease on the ground of uncertainty as to the property leased. — *Bulkley v. Devine*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 16.

98. LANDLORD AND TENANT—Leases—Covenants.—Where a lease is ended before the expiration of the term by an agreement in writing for delivery of possession and payment of a sum certain, a covenant to deliver up possession on the expiration of the lease in good repair, is out off by the surrender. — *Reed v. Snow-Hill*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 679.

99. LANDLORD AND TENANT—Redemption of Leasehold — Construction.—Acts Md. 1889, ch. 395, providing for the redemption of rents in a lease, applies to a lease for fourteen years with a covenant to renew for a like period with the same covenants. — *Steward v. Gorter*, Md. Ct. App., Feb. 8, 1889; 16 Atl. Rep. 644.

100. LANDLORD AND TENANT—Ways.—A lessee cannot claim a right of access through other premises of the lessor, where there are other means of access, and the lease, in writing, does not provide for such right, and no mistake in it is alleged. — *Ward v. Robertson*, S. C. Iowa, Feb. 5, 1889; 41 N. W. Rep. 603.

101. LIBEL—What Actionable. — Defendants published an article alluding to a letter of plaintiff as "that letter of plaintiff giving his so-called reasons for falsely asserting that L's nomination was secured by corrupt means." Held, the article was not libelous. — *Walker v. Hawley*, S. C. Err. Conn., Dec. 14, 1888; 16 Atl. Rep. 674.

102. MANDAMUS—To County Clerk — Jury Certificate.—Code Crim. Proc. Tex. art. 1085, provides that the amount due to jurors for services shall be paid by the county treasurer upon the certificate of the county court in which such services were rendered: Held, that the county clerk could not be compelled by mandamus to issue to an assignee of such claim the certificate. — *Pace v. Ortiz*, S. C. Tex., Jan. 18, 1889;

103. MASTER AND SERVANT—Contract of Hiring.—A hiring for one year, with monthly payments of wages, is an entire contract. — *Larkin v. Hecksher*, S. C. N. J., Feb. 7, 1889; 16 Atl. Rep. 703.

104. MORTGAGES—Assignments — Rights of Assignee.—By the mere assignment of a debt and a mortgage by which the debt is secured, the assignee does not acquire the right to sue for an injury to the mortgaged property happening before the assignment. — *Gobbert v. Wallace*, S. C. Miss., Feb. 4, 1889; 5 South. Rep. 834.

105. MORTGAGES—Bond for Support — Oral Evidence.—In a real action on a mortgage given by defendant to secure her bond to support plaintiff during his life-time "in the house of" defendant, oral evidence that the house on the mortgaged premises was meant is inadmissible. — *Gatchell v. Morse*, S. J. C. Me., Jan. 12, 1889; 16 Atl. Rep. 662.

106. MORTGAGE—Building Association—Satisfaction by Mistake. — Where by a mistake an association of which defendant was director passed a resolution directing satisfaction of defendant's mortgage: Held that the latter had no cause to complain of a decree striking off the satisfaction. — *Appeal of Callahan*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 638.

107. MORTGAGES—Foreclosure—Strict Foreclosure.—In a strict foreclosure suit at common law the decree simply cut off the equity of redemption, and foreclosed the mortgagor from redeeming the estate by payment of the mortgage debt. — *Champion v. Hinkle*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 701.

108. MORTGAGES—Rights of Junior Mortgagees.—A mortgagee holding a lien on a single tract of land cannot be compelled by a junior lienholder to resort to property not embraced in his mortgage. — *Ely v. Aina Ins. Co.*, S. C. Ind. Feb. 2, 1889; 20 N. E. Rep. 144.

109. MUNICIPAL CORPORATIONS—Amendment of Claim.—Under act Pa. April 21, 1888, § 9, the allowance of an amendment to a claim is not a matter of absolute right, and its refusal will be presumed to have been proper where there is nothing in the record to show the ground for the application or for the refusal. — *Phila. v. Richards*, S. C. Penn., Feb. 25, 1889; 16 Atl. Rep. 602.

110. MUNICIPAL CORPORATIONS—Defective Sewer.—A municipal corporation is liable for negligence in failing to keep the sewer in repair, as well as for negligence in its construction. — *Frostburg v. Duffy*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 642.

111. MUNICIPAL CORPORATIONS — Opening Streets — Compensation.—Where a street has been laid out, but remains unopened, the description in a deed in which one of the courses is said to run along the line of the street, is not such a dedication of the land within its limits as will deprive the grantee of the right to compensation therefor when the street is opened. — *In re Wayne Avenue*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 631.

112. NEGLIGENCE—Blind Person on Highway.—It is not, as matter of law, negligence for a blind person to walk unattended on a public street. — *Nef v. Wellesley*, S. J. C. Mass., Feb. 28, 1889; 30 N. E. Rep. 111.

113. NEGLIGENCE—Damages—Opinion Evidence.—A non-expert is incompetent to give an opinion as to internal injuries suffered by the plaintiff. — *Lombard R. Co. v. Christian*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 628.

114. NEGLIGENCE—Injury to Trespasser—Contributory Negligence. — Plaintiff, a boy ten years old while playing on cars was pushed off by one of his companions and fell under the wheels of a moving train: Held, a demurrer to this evidence should have been sustained. — *Curley v. Mo. Pac. R. Co.*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 593.

115. NEGLIGENCE — Pleading — Contributory Negligence.—Where the petition in an action for personal injuries states a cause of action, and does not show a case from which it appears that the injury was caused by contributory negligence, defendant, in order to rely on such defense, must allege it. — *Mo. Pac. R. Co. v. Watson*, S. C. Tex., Feb. 8, 1889; 10 S. W. Rep. 731.

116. NEGOTIABLE INSTRUMENTS.—An instrument in the form of a promissory note, but providing that "the conditions of this note are, if not paid when due, the property for which it is given shall be the property" of the payee, the property constituting the consideration

of the note being named in the body of the instrument, is not negotiable.— *Wright v. Traver*, S. O. Mich., Jan. 25, 1889; 41 N. W. Rep. 517.

117. **NEGOTIABLE INSTRUMENTS**—Failure of Consideration.—Where defendant claims fraudulent representations of plaintiff as to quantity and value of land sold for which notes were given: *Held*, error to charge that defense is not sufficient, unless plaintiff by stratagem prevented defendant from making full investigation where such stratagem is not alleged in the answer.—*Merrill v. Taylor*, S. O. Tex., Dec. 14, 1888; 10 S. W. Rep. 533.

118. **NEGOTIABLE INSTRUMENT**—Fraud.—*Held*, that defendant had good defense, under the facts to a note signed by him where he was not able to read and he was induced to sign by misrepresentation of plaintiff.—*Wenzel v. Schultz*, S. O. Cal., Feb. 2, 1889; 20 Pac. Rep. 404.

119. **NUISANCE**—Evidence—Pleading.—In an action for a nuisance in maintaining a sewer, evidence offered by the defendant that another sewer of similar construction and use produced offensive smells was properly excluded. The defendant should show that the two sewers were alike in their construction and use.—*Randolph v. Town of Bloomfield*, S. C. Iowa, Jan. 29, 1889; 41 N. W. Rep. 562.

120. **NUISANCE**—Public Nuisance—Abatement.—In case of a public nuisance, equity will interfere only when the complainant suffers some private, direct, and material damage, beyond that which is suffered by the public at large.—*Van Wageningen v. Cooney*, N. J. Ct. Chan., Feb. 12, 1889; 16 Atl. Rep. 689.

121. **OBSTRUCTING JUSTICE**—Resisting Officer.—A conviction for resisting an officer cannot be sustained where it is not shown that the person resisted was an officer, or that the person whose arrest was resisted had committed any offense authorizing the arrest.—*Merritt v. State*, S. O. Miss., Jan. 21, 1889; 5 South. Rep. 386.

122. **ORDER**—Appeal.—An order refusing a motion to strike certain matter out of a complaint as "redundant or irrelevant" is not appealable.—*Fisher v. Schurt*, S. O. Wis., Jan. 29, 1889; 41 N. W. Rep. 537.

123. **PARDON**—State's Evidence—Executive Clemency.—Where one indicted jointly with others for murder testifies for the State at the trial and afterwards pleads guilty of murder in the second degree, and the trial court is not requested to recommend executive clemency, the supreme court will not make such recommendation.—*Chapman v. State*, S. O. Tenn., Feb. 7, 1889; 10 S. W. Rep. 511.

124. **PARTITION**—Supplemental Bill—Deductions for Fixtures Removed.—Having decreed a sale in partition, equity has jurisdiction of a supplemental bill filed by the purchasing co-tenant to have deducted from the proceeds remaining in the master's hands payable to the other co-tenant the value of fixtures removed by the latter.—*Appeal of Williams*, S. C. Penn., Feb. 18, 1889; 16 Atl. Rep. 810.

125. **PARTNERSHIP**—Liability as Partner.—W furnished to the defendant firm a stock of goods on consignment, the latter to receive for their services in making sales a share of the profits. In other business of the firm W had no interest whatever: *Held*, that he could not be made liable as a member of the firm.—*Cherry v. Owsley*, S. O. Tex., Dec. 7, 1888; 10 S. W. Rep. 619.

126. **PATENTS FOR INVENTIONS**—Prior Publication.—A prior publication of part of an invention renders an English patent void, even though the patent purports to include an additional new and useful invention.—*Chemical Electric Light & Power Co. v. Howard*, S. J. O. Mass., Jan. 4, 1889; 20 N. E. Rep. 92.

127. **PLEADING**—Amendment—Discretion of Court.—Under Rev. St. Ind. 1881, § 391, the granting of permission to file an amended complaint is within the discretion of the court; and where the record shows no abuse of this discretion, there is no error.—*Grand Rapids R. Co. v. Ellison*, S. O. Ind., Feb. 1, 1889; 20 N. E. Rep. 135.

128. **PLEADING**—Answer—Counterclaim.—An answer cannot be said to contain a counterclaim, so

as to necessitate a reply, where a decree in favor of defendants on the allegations of the petition would give them all the relief which they would obtain on the averments of their answer.—*Kavaler v. Mackula*, S. C. Iowa, Feb. 1, 1889; 41 N. W. Rep. 590.

129. **PLEADING**—Appeal.—An order striking out demurrer as frivolous will not be reversed on appeal therefrom unless the demurrer appears to have been well taken. Whether or not it is frivolous will not be considered.—*Potter v. Van Nooman*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 524.

130. **PLEADING**—Complaint—Allegations of Damage.—Allegations, that on account of the maintenance of the bawdy-house plaintiff had been damaged by difficulty in renting his property as well as by depreciation in its value, and that his aggregate damages were a stated sum, are sufficient to warrant a recovery for loss of rents.—*Bisso v. Southworth*, S. C. Tex., Nov. 16, 1888; 10 S. W. Rep. 523.

131. **PLEADING**—Demurrer.—A demurrer to a petition "for the reason that the same does not state facts sufficient to constitute a good and sufficient petition" is not sufficient to raise the question of whether the petition states a cause of action.—*Grubbs v. King*, S. C. Ind., Feb. 2, 1889; 20 N. E. Rep. 142.

132. **PLEADINGS**—Instructions—Issue.—An issue not made by the pleadings or some other appropriate way cannot be thrust into the cause by the instructions asked by a party.—*Nail v. Wab. R. Co.*, S. O. Mo., Feb. 4, 1889; 10 S. W. Rep. 610.

133. **PRINCIPAL AND AGENT**—Joint Verdict.—Where a joint verdict has been rendered against a principal and his agent, and the testimony fails to show the liability of such agent, the verdict may be set aside as to him, and permitted to stand as to principal.—*Durrell v. Hart*, S. O. Neb., Jan. 28, 1889; 41 N. W. Rep. 551.

134. **PUBLIC LANDS**—Entry—Survey.—Under Rev. St. Tex. art. 3503, one who has failed to have his survey made within twelve months, and then relocates the land, has no such equitable title as to prevent another from locating the land.—*Garza v. Cassin*, S. O. Tex., Jan. 18, 1889; 10 S. W. Rep. 539.

135. **QUIET TITLE**—Error—Appeal.—In an action to quiet title, an assignment of error, to the effect that "the court erred in refusing to quiet plaintiff's title against the defendants in default," is too general to be considered on appeal.—*Gilstrap v. Walters*, S. C. Iowa, Feb. 4, 1889; 41 N. W. Rep. 600.

136. **RAILROAD COMPANIES**—Fires—Pleading.—Since, under the Iowa statute, the fact that a fire was set out in the operation of a railroad is *prima facie* evidence of negligence, a petition alleging that fire was set out by a locomotive operated on defendant's road, but not stating that it was caused by negligence of defendant or its servants, is good on motion in arrest of judgment.—*Seska v. Chicago M. & St. P. Ry. Co.*, S. C. Iowa, Feb. 4, 1889; 41 N. W. Rep. 606.

137. **RAILROAD COMPANIES**—Killing Stock—Constitutional Law.—Comp. St. Mont. § 712, providing that every railroad within the territory which shall kill any horse by running against it with an engine, shall be liable to the owner for its value, is unconstitutional, for attempting to impose a liability upon such corporation without any negligence on its part.—*Bismeyer v. Montana Union Ry. Co.*, S. C. Mont., Feb. 2, 1889; 20 Pac. Rep. 314.

138. **RAILROAD COMPANIES**—Killing Stock—Negligence.—The fact that a train was running in a town at a greater speed than six miles an hour, when it struck and killed cattle, though such speed is negligence, does not render the company liable therefor, unless the accident resulted therefrom.—*Louisville, N. O. & T. Ry. Co. v. Carter*, S. O. Miss., Jan. 28, 1889; 5 South. Rep. 388.

139. **RAPE**—Punishment.—Defendant was convicted of an assault with intent to commit rape upon a child of tender years, but in its other facts the case was an ordinary one: *Held*, that a judgment for the imprisonment of the defendant for fifteen years was excessive.—*State v. Blunt*, S. C. Iowa, Feb. 1, 1889; 41 N. W. Rep. 586.

140. **REFERENCE—Report of Referee—Notice of Filing.**—Where, after the completion of a referee's report, counsel indorse thereon their acceptance of service of notice that it will be filed on a given day, the actual notice that such report is filed, required by statute to be given by the prothonotary, is unnecessary. — *Allison v. Glison*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 734.

141. **REVIEW—Writ of Parties.**—The widow, who is residuary legatee of a testator, is not a party in interest to entitle her to a review of an action by the administrator *c. t. a.* of said testator against an alleged debtor of the estate, under Rev. St. Me. ch. 87, § 1. — *Johnson v. Johnson*, S. J. C. Me., Jan. 10, 1889; 16 Atl. Rep. 661.

142. **SEAMEN—Shipping Commissioner—Fees.**—A vessel engaged in the carrying trade on a navigable river is "engaged in the coastwise trade" under act of June 19, 1886, and the shipping commissioner is entitled to fees for shipping seamen on such vessel. — *Ravesies v. United States*, U. S. O. C. (Ala.), Jan. 30, 1889; 87 Fed. Rep. 447.

143. **SET-OFF AND COUNTERCLAIM**—Claim Purchased After Suit.—Under Code Civil Proc. S. C. § 171, requiring that a counterclaim should exist "at the commencement of the action," defendant cannot set-off a claim against plaintiff purchased by him after the action is begun and answer filed, and before trial. — *Enter v. Queeze*, S. C. S. Car., Feb. 11, 1889; 8 S. E. Rep. 796.

144. **SHERIFFS—Returns.**—Default or neglect of a sheriff cannot be shown in a collateral proceeding for the purpose of impeaching his return. — *Johnson v. Mead*, S. C. Mich., Jan. 18, 1889; 41 N. W. Rep. 487.

145. **SHIPPING—Towage—Recoupment.**—Libellant contracted to transport a cargo of lumber in a canal boat to pier 4, East river. Through mistake of the shipper no consignee appeared and the claimant at the shipper's request towed the canal boat to his own yards: Held, that claimant could not recoup against the claim for freight, the cost of towage. — *Martin v. Hemlock Lumber*, U. S. D. C. (N. Y.), Dec. 4, 1888; 27 Fed. Rep. 415.

146. **SLANDER—Limitation of Actions.**—A slander, once barred, cannot be revived by an admission that it had formerly been made, and malice cannot be attached to such admission. — *Vickers v. Stoneman*, S. C. Mich., Jan. 26, 1889; 41 N. W. Rep. 496.

147. **STATE AND STATE OFFICERS—Boundaries—Concurrent Jurisdiction.**—The Missouri statute, (Rev. St. ch. 26,) giving damages for injuries resulting in death, controls a case between citizens of Missouri arising from an accident on the Mississippi river, near the Illinois shore, east of the main channel. — *Sanders v. St. Louis & N. O. Anchor Line*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 695.

148. **STATUTE OF LIMITATIONS**—Pleading the Statute. When it affirmatively appears on the face of the bill that the statutory period has run, the objection may be raised by demurrer. — *Rich v. Brady*, U. S. O. C. (Mo.), Jan. 4, 1889; 37 Fed. Rep. 278.

149. **TAXATION—Equalization.**—A person who has had actual notice of, and who has attended and been fully heard as to, his own tax assessment, at a meeting of the board of review, cannot object that the statutory notice of the meeting was not given. — *State ex rel. Smith v. Gaylord*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 518.

150. **TAXATION—Exemptions—School Property.**—Under Rev. St. Tex. art. 4678, § 1, exempting from taxation "all buildings used by persons or associations for school purposes," it is not necessary that the property, in order to be exempt, shall have been dedicated to school uses. It is sufficient if it is in fact so used. — *Red v. Morris*, S. C. Tex., Jan. 29, 1889; 10 S. W. Rep. 681.

151. **TAXATION—Tax-sale—Judgment.**—Under Ill. statutes, to include in a tax judgment fees which cannot accrue until after the sale renders the judgment and deed thereunder void. — *Coombs v. Goff*, S. C. Ill., Jan. 26, 1889; 20 N. E. Rep. 9.

152. **TAXATION—Tax-sale—Wife's Separate Property.**

—Under Rev. St. Mo. § 3395, the husband's interest in the wife's land does not pass by a sale under a judgment in a suit for taxes to which the husband but not the wife is a party. — *Mason v. Mitchell*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 608.

153. **TAX TITLES—Evidence.**—To sustain the title of the holder of a State assignment certificate issued under § 129, ch. 1, Laws 1874, it is necessary for him to establish the execution in due form of a certificate of sale to the State by the county auditor, as an essential muniment of his title. — *Philbrook v. Smith*, S. O. Minn., Jan. 29, 1889; 41 N. W. Rep. 546.

154. **TELEGRAPH COMPANIES—Elements of Damage—Mental Anguish.**—Mental anguish and suffering are proper elements of damage for delay in delivering a telegram announcing the bringing of a corpse. — *Western Union Tel. Co. v. Broesche*, S. C. Tex., Feb. 12, 1889; 10 S. W. Rep. 734.

155. **TORTS—Accord and Satisfaction.**—The rule is that where the damages are uncertain, accord and satisfaction before judgment by one of the several joint wrong-doers is satisfaction as to all; but the discharge of a party not shown to be a joint wrong-doer will not operate as a discharge of the other defendants. — *Wardell v. McConnell*, S. C. Neb., Jan. 16, 1889; 41 N. W. Rep. 548.

156. **TOWNS—Liability for Defective Bridge.**—Where a town is directed, by an act of the legislature, to rebuild a bridge, and has full control thereof, it is liable for injuries resulting from the negligence of its agents in constructing the bridge. — *Doherty v. Inhabitants*, S. J. O. Mass., Feb. 27, 1889; 20 N. E. Rep. 106.

157. **TRESPASS—Nominal Damages—Verdict.**—Where, in a suit for wrongfully destroying papers belonging to plaintiff, defendant alleges that the papers belong to him, and the jury find for defendant, it is conclusive of the fact that plaintiff is not entitled even to nominal damages. — *Lunsford v. Deltrick*, S. C. Ala., Jan. 23, 1889; 5 South. Rep. 355.

158. **TRESPASS—Suit Against Corporation—Pleading.**—An action cannot be sustained against a corporation on a mere allegation that a trespass was committed on plaintiff's close, and that his property was seized by the corporation, it not appearing how or by whom the trespass was committed. — *Perkins v. Maysville, etc.*, Ky. Ct. App., Feb. 7, 1889; 10 S. W. Rep. 659.

159. **TRESPASS TO TRY TITLE—Stale Demand.**—The plea of stale demand is not applicable where plaintiff claims under legal title. — *Bullock v. Smith*, S. C. Tex., Jan. 25, 1889; 10 S. W. Rep. 687.

160. **TRIAL—Instructions.**—The court should charge upon decisive rules of law called to its attention by special charges, though they are not technically correct in every particular. — *Willis v. Smith*, S. O. Tex., Jan. 29, 1889; 10 S. W. Rep. 683.

161. **TRIAL—Instructions.**—A party asking for an instruction cannot object to an answer that "this point is affirmed if the evidence satisfies the jury that the facts are as stated." — *West Bellevue v. Huddleson*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 764.

162. **TRIAL—Instructions.**—Where instructions present the law of a case with reasonable accuracy, it is immaterial that all points sought to be covered by instructions requested are not met. — *People's Ins. Co. v. Pulver*, S. O. Ill., Jan. 26, 1889; 20 N. E. Rep. 18.

163. **TRIAL—Objection to Evidence.**—Where evidence has been improperly admitted, without objection, the only remedy is by motion to strike it out. — *Penn. Natural Gas Co. v. Cook*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 762.

164. **TRIAL—Recalling Witness.**—The rule that a witness cannot be recalled after having been once on the stand does not apply where he is recalled for different testimony, the occasion for which has arisen since his former examination. — *Miss. & T. R. Co. v. Gull*, S. C. Miss., Feb. 4, 1889; 5 South. Rep. 393.

165. **TROVER—Pleading—Complaint.**—A declaration in trover, alleging that defendant converted to his own

use "large sums of money, the property of the plaintiff," is good, on general demurrer.— *Isaigt v. Shea*, S. J. C. Mass., Feb. 26, 1889; 20 N. E. Rep. 110.

166. TRUSTS.—A contract by a third person to support plaintiff for life, in consideration of a conveyance to him by plaintiff, and a contract by defendant to assume and carry out the first contract, in consideration of a conveyance to him, do not constitute a trust, where absolute conveyances have been executed.— *Riddle v. Beattie*, S. C. Iowa, Feb. 6, 1889; 41 N. W. Rep. 606.

167. TRUSTS—Fraud of Trustees.— P sold corporation stock to Y for \$7,000, all but \$2,000 being paid by Y. Attachments were brought against P, and upon the statements of Y that the stock belonged to P it was sold under the attachments and bought by Y for \$496. In a suit between F, who paid for Y the \$2,000 balance of the stock and Y as to the ownership of the stock: Held, that Y was a trustee for P and F and was not entitled to have refunded the \$496 which he paid.— *Young v. Fox*, U. S. C. C. (Tenn.), Nov. 23, 1889; 37 Fed. Rep. 385.

168. VENDOR AND VENDEE—The Contract—Interest.— E, in his life-time, sold a lot of land to W, and agreed that, when the deed was delivered, W should give him his note for "fifty-eight dollars." E died, and his heirs refused to convey upon tender of W's note for \$58, claiming interest thereon also: Held, that as E, in his life time had not demanded the note, he could not have required interest, and that his heirs stand in no better position.— *Ware v. Lippincott*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 684.

169. VENDOR AND VENDEE—Vendor's Lien.—Plaintiff owned land on which was a lien for purchase money. He sold part of it to defendant, who paid part, and agreed to pay two-thirds of the original purchase-money notes, but failed to meet one of them when due, and plaintiff paid it. By mutual agreement plaintiff's vendor conveyed their respective portions to each: Held, that plaintiff had a lien on defendant's tract for the two-thirds of the note so paid by him.— *Henson v. Reed*, S. C. Tex., Nov. 13, 1888; 10 S. W. Rep. 523.

170. VENUE—Change of Venue—Mandamus.—Under act Pa. March 30, 1875, providing that a change of venue may be granted for certain causes, of the existence of which the court or judge must be satisfied, a mandamus will not issue to the judge upon his refusal to grant the change.— *Newlin v. Indiana County*, S. C. Penn., Jan. 21, 1889; 16 Atl. Rep. 737.

171. VENUE IN CIVIL CASES—Disqualification of Judge.—Where an order of the county court transferring a cause recites as the reason thereof that the county judge had been counsel in another suit growing out of the same cause of action, in the absence of evidence in the record to the contrary the supreme court is not authorized to hold that the case was not properly transferred.— *Kahanek v. Galveston, H. & S. A. Ry. Co.*, S. C. Tex., Jan. 22, 1889; 10 S. W. Rep. 570.

172. VENUE IN CIVIL CASES—Joint Defendants.—The petition being originally filed against the execution plaintiffs and the sheriff jointly, and alleging that the trespass was committed in the county in which the sheriff resided and the action was brought, an objection by the other defendants that they should have been sued in the county of their residence is not well taken.— *Willis v. Hudson*, S. C. Tex., Feb. 5, 1889; 10 S. W. Rep. 715.

173. VERDICT—Judgment—Appeal.—The fact that the court renders judgment against a party for a sum less than the amount, the verdict affords him no ground for appeal.— *Deere v. Wolf*, S. C. Iowa, Feb. 1, 1889; 41 N. W. Rep. 588.

174. WILLS—Construction—Precatory Words.—A clause in a will read, "I give to my daughter one half of the land I possess with the restriction not to sell but may leave the same to her children:" Held, that the latter words are merely precatory.— *McIntyre v. McIntyre*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 783.

175. WILLS—Construction—Shelley's Case.—Held, under the language used in a will, that a devise to E &

G for their lives and after them to their children forever, fell within the rule in Shelley's case, and vested an estate in fee to E and G.— *Petition of Browning*, S. C. R. I., Feb. 9, 1889; 16 Atl. Rep. 717.

176. WILLS—Construction—Trusts.—A residuary bequest to the executors "to be given by them to such uses as they in their best judgment may consider the most compatible with the views which I have given them," does not vest them with the absolute power of disposition of the property in their own discretion.— *Appeal of McCurdy*, S. C. Penn., Feb. 4, 1889; 16 Atl. Rep. 626.

177. WILLS—Probate—Evidence of Signing.—On the probate of a will the issue was whether it was signed by two witnesses in the testator's presence. Evidence held sufficient to prove proper attestation.— *Hof v. State*, S. C. Tex., Dec. 14, 1888; 10 S. W. Rep. 689.

178. WILLS—Requisites—Validity.—A paper, purporting to be a will, providing that one of testator's sons shall have no part of his estate at his death, naming no executors, and making no other provisions whatever, is not a will.— *Coffman v. Coffman*, Va. Ct. App., Nov. 15, 1888; 8 S. E. Rep. 672.

179. WILLS—Testamentary Capacity.—A person who is aged, and almost blind may make a valid will if capable of recollecting the property she is about to dispose of, knowing the objects of her bounty, and the nature of their business in which she is engaged.— *Waddington v. Busby*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 690.

180. WITNESS—Appeal.—Rule, as to the incompetency of one interested in the event of an action to testify as to conversations with a deceased party relative to the matter in issue, applied in a case of an alleged agreement made with a corporation through an agent of the latter who had since died.— *Farmers' Union Elevator Co. v. Syndicate Ins. Co.*, S. C. Minn., Jan. 31, 1889; 41 N. W. Rep. 547.

181. WITNESS—Competency—Transactions with Decedent.—In an action by the administrator of the deceased partner to enforce the alleged lien for the balance due his intestate, the survivor is a competent witness in reference to the status of the real estate.— *Wilkie's Adm. v. Boulevard*, Ky. Ct. App., Jan. 24, 1889; 10 S. W. Rep. 629.

182. WITNESS—Impeachment.—Where the reputation of a witness is sought to be impeached, a charge that in weighing the impeaching testimony the jury are to consider whether the persons giving it know the witness well, and the community in which he lives, is proper.— *Oberholzer v. Heist*, S. C. Penn., Feb. 13, 1889; 16 Atl. Rep. 804.

183. WITNESS—Competency—Transactions with Insane Persons.—Act Pa. June 8, 1874, rendering a party or person interested in the result of an action by or against the committee of a lunatic incompetent to testify therein, does not exclude the testimony of the mother of a minor in a proceeding to settle the accounts of the guardian, to which she is not a party.— *Appeals of Stone*, S. C. Penn., Oct. 22, 1888; 16 Atl. Rep. 731.

184. WITNESS—Cross-examination—Rebuttal.—Where a witness, in cross-examination, is questioned as to collateral and irrelevant matter, he cannot be contradicted in rebuttal as to such matter.— *Garrison v. State*, S. C. Miss., Jan. 21, 1889; 5 South. Rep. 385.

185. WITNESS—Fees.—A witness for the United States voluntarily coming to and attending court on the verbal instructions of the district attorney is entitled to *per diem*, and mileage.— *In re Williams*, U. S. D. C. (S. Car.), Jan. 23, 1889; 37 Fed. Rep. 325.

186. WRIT OF ERROR.—A writ of error will not lie to an order overruling a motion to quash the service of a summons, it being an interlocutory order only, and not a final judgment.— *Brady v. Toledo*, A. & N. M. R. Co., S. C. Mich., Jan. 25, 1889; 41 N. W. Rep. 503.

The Central Law Journal.

ST. LOUIS, APRIL 19, 1889.

CURRENT EVENTS.

IN a late issue of the JOURNAL we had a few words to say on the subject of libel, and recent legislation in reference thereto. Since its publication, the Supreme Court of Minnesota has decided a case involving the constitutionality of a statute, similar to the one lately held unconstitutional by the Supreme Court of Michigan, in *Park v. Detroit Free Press Co.* It will be remembered that the Michigan court held the statute unconstitutional, in that it deprived persons of all adequate remedy for many injuries to reputation caused by the publication of charges involving moral turpitude, but not technically criminal, inasmuch as the act provided that only actual damages could be recovered where the publication has been made in good faith and a retraction thereafter published, and then restricted actual damages to include damages suffered by plaintiff in respect to his business, trade, profession or occupation. The Minnesota court, in *Allen v. Pioneer Press Co.*, reported on page 356 of this issue, though claiming that the Michigan opinion, in so far as it declared the act invalid, hardly has the authority of a decision of the question, because it was not necessary to the decision or the case, directly and flatly controverts its reasoning and conclusion, and holds that the statute is constitutional, arguing that though there may be some cases of pecuniary injury which the statute would not reach, yet that by a liberal but allowable construction the statutory definition may include all cases of special damage. Opinions will differ as to the merits of the controversy thus called forth, but inasmuch as the Minnesota court declare their willingness to adopt a construction which may be made to cover all cases of special damages, the objection manifest to and insurmountable by the Michigan court does not practically have any force in Minnesota. In other words, there is no necessity for declaring the statute invalid, if by an

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allowable liberal construction it does not deprive any persons of all remedy for injuries to reputation.

All of this contention would be unnecessary in the case of a statute like that proposed in Wisconsin, which forbids the recovery of any but actual damages, where actual malice is not proved, and makes the retraction simply pleadable in mitigation of damages.

WE do not often feel called upon to comment upon decisions of courts not of last resort, but a recent decision of Chancellor Cobbs, of Alabama, is of such interest and will undoubtedly have such influence for good on railroad investments, that we go out of our way to call attention to it. It is a suit in equity by a stockholder of the Memphis & Charleston Railroad against the East Tennessee Railroad, alleging that the latter, having acquired a controlling interest in the stock of the former road, is operating it in the interest of the owners of a majority of the stock, so that the minority of the stockholders are deprived of the advantages in obtaining traffic with all roads with which it connects. This is a common and well understood scheme of railroad managers. While the majority stockholders are indemnified for any loss suffered in the decreased earnings of the purchased railroad by the increased earnings of the railroad holding the majority of the stock, the loss actually falls on the individual stockholders of the purchased road, who are unfortunate enough to be in the minority. This the court refuses to sanction, and takes the position that if a corporation can purchase any portion of the capital stock of another corporation it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business foreign to the purpose for which it was created; and that though a corporation may without express authority acquire shares in another corporation in payment of or as security for a claim which is in danger of being lost through the insolvency of the debtor corporation, and, having acquired the stock, it may collect the dividends, but it is not authorized to vote upon the stock. The directors of a corporation have no right

under any circumstances to purchase shares in the company with the company's money for the purpose of controlling the election of officers.

This decision is undoubtedly in the right direction, and will, we trust, go far toward the destruction of that policy known to the public as "railroad wrecking," which means simply the ruthless invasion of private ownership and private rights.

NOTES OF RECENT DECISIONS.

A QUESTION which often arises in the case of an insolvent corporation, as to the right of one to set off a claim in his favor, against an indebtedness due such corporation was considered by the Supreme Court of the United States in *Carr v. Hamilton*, 9 S. C. Rep. 295. That case arose out of an endowment policy of life insurance, issued by the Life Association of America upon the life of the appellee Hamilton, a resident of Shreveport La. The latter had also borrowed money of the association, and had given a mortgage upon certain real estate for the payment of same, and the main question was whether the amount due on the policy ought to be set off by way of compensation, or re-convention against the amount due on the mortgage. The court says that the principle of set off between mutual debts and credits has for a long time been adopted in the English bankrupt laws and has always prevailed in our own and it matters not whether the debt was due at the time of bankruptcy or not, and that it is difficult to see why this principle of justice should not apply to persons holding policies of life insurance in a company which becomes bankrupt, and it is no objection that in a contingency specified, the policy was in trust for his children if upon settled rules governing the valuation of life interests, the interests can be separately valued. In reaching this conclusion the court disapproved of a recent decision of the New York Court of Appeals—*Newcomb v. Almy*, 96 N. Y. 308—and to the objection made by appellant that by the law of Louisiana, compensation is not allowed against an insolvency in favor of a party, whose credit is not due when the insolvency occurred, the

court contend that "if there are technical reasons in the law of Louisiana for rejecting the defense when set up by way of compensation it was nevertheless allowed by the Supreme Court of that State, by way of re-convention, in a case exactly like the present: *Association v. Levy*, 33 La. Am. 1203."

THE question as to the right to sell intoxicating liquors in a State prohibiting same, where they are brought from without the State, came before the Supreme Court of Iowa, in *Collins v. Hill*, 41 N. W. Rep. 571. There defendant contended for the right to sell liquor purchased at a point outside of the State, put up in sealed bottles and packed in cases, and so transported to a point within the State, and in which bottles it was sold to consumers. The lower court held that the transaction of selling the beer in the manner in which it was done was beyond the power of the State to control or prohibit, but was purely a matter of commerce between the States, which could be regulated only by congress. The supreme court in reversing this opinion say:

The distinction drawn by the superior court between the different transactions does not appear to us to rest upon any sound legal principle. * * While he had the right to bring them within the State for the purpose of selling them here, yet, having brought them here in the exercise of that right, he had no right to sell them because he had adopted a mode of transportation which, although perfectly lawful, required their removal from the vessels in which they were transported. The unsoundness of the attempted distinction is shown by the absurd results to which it would lead. If he had the right to sell the liquors in the State because the transaction of their purchase and transportation was one of national, rather than State, jurisdiction, it follows necessarily that he had the right to make the sales in whatever form or quantity he saw fit. Any other holding, it seems to us, would lead to results and conclusions which, owing to their absurdity, would be shocking alike to legal judgment and the common sense of mankind. In our opinion, then, the case turns solely on the question whether defendant had the right, notwithstanding the statute of the State, to sell the liquors within the State. * * The validity of these particular statutes has frequently been declared by this court, and it has been adjudged by the highest tribunal in the nation that statutes having the same specific object are not in conflict with any provision of the federal constitution. *Mugler v. Kansas*, 123 U. S. 623. The statutes called in question in the *License Cases*, 5 How. 504, were not essentially different in their object from those of this State. They were enacted for the purpose of mitigating, and to some extent suppressing, the evils of intemperance. * * The other cases were under similar statutes of the States of New Hampshire and Rhode Island, and involved similar states of fact. Subsequently the same claim of right was urged in these cases that is here

alleged by the defendant, viz.: that as the liquors were transported into the States under the authority of the federal constitution and statutes, it was not competent for the State to prohibit their sale, or regulate the manner in which it should be conducted. But the court held that the statutes were not in their operation in conflict with the commercial provisions of the federal constitution. And it appears to us that this is necessarily so. When the power of the State to legislate with reference to the subject-matter is conceded, it follows necessarily, we think, that all property within the State is subject to the regulations it has enacted. When property purchased in another State is transported to this State, and there delivered to the purchaser, to be used or consumed within the State, the transaction, in so far as it is governed by the provisions for the regulation of commerce among the States, is at an end.

THE Supreme Court of Indiana, in *Mercer v. Corbin*, 20 N. E. Rep. 132, lay down the law as to the liability of bicycle riders for assault and battery in carelessly running into a pedestrian on the sidewalk. The appellee was standing on a public sidewalk, facing the east, and the appellant, coming from the west, rode a bicycle against him and severely injured him. The court, in sustaining the charge of assault and battery, says:

The specific facts stated in the verdict justify the finding of the jury that the act of the appellant was a rude and reckless one; and they also justify the legal conclusion that there was such a reckless disregard of consequences as to imply an intention to assault the appellee. They fully supply the grounds for inferring the constructive intent which makes wrongful act willful or intentional. There was at least ten feet of the sidewalk entirely unobstructed, and the slightest regard to the safety of the appellee would have enabled the appellant to have avoiding doing harm to him. There is no reason why the appellant might not, with the slightest care, have passed the appellee; and his failure to use this care implies a willingness to inflict the injury which he did in fact inflict upon the appellee. As the consequences of his wrongful and reckless disregard of the rights of others led to the injury, he must, under the familiar rule, be presumed to have intended that such consequences should result. *Peterson v. Haffner*, 59 Ind. 130. If, therefore, it be conceded that the appellant had a right to ride his bicycle upon a way set apart for the use of footmen, he is nevertheless liable in this action. Whether the appellant had a right to ride his bicycle upon the footway is a question which deserves consideration. This question would be important in the absence of any statute, and it is the more important because of our statute, which reads thus: "It shall be unlawful for any person to ride or drive upon the brick, stone, plank, or gravel sidewalk of any town or village, or upon any similar sidewalk for the use of foot passengers in this State, unless in the necessary act of crossing the same." Rev. St. 1881, § 3361. Sidewalks are intended for the use of pedestrians, and not for use by persons in vehicles. The manifest purpose of the statute is to preserve the sidewalks from use by persons in or on vehicles, and, if the bicycle can be deemed a vehicle, then the appellant had no right to ride or drive his bicycle longitudinally along the sidewalk. If sidewalks

are exclusively for the use of footmen, then bicycles, if they are vehicles, must not be ridden along them, since to affirm that sidewalks are exclusively for the use of footmen necessarily implies that they cannot be traveled by vehicles. It would be a palpable contradiction to affirm that footmen have the exclusive right to use the sidewalks, and yet concede that persons not traveling as pedestrians may also rightfully use them. A person on a bicycle is certainly not a footman, and, if not, then he makes an unlawful use of the sidewalk when he rides or drives his bicycle longitudinally along it. It would seem to follow that, even if a bicycle cannot be considered to be a vehicle, still it is unlawful to ride or drive it along a way set apart for the exclusive use of pedestrians. We think, however, that a bicycle must be regarded as a vehicle within the meaning of the law. Webster defines a bicycle as a "two-wheeled velocipede," and a velocipede is defined to be a "light carriage." Substantially the same definition is given by a law writer. 2 Am. & Eng. Cyclop. Law, 191. Under these definitions it must be regarded as a sort of vehicle, and so the courts have regarded it. In one case, the title of which cannot now be recalled, it was held that a bicycle was entitled to the "rights of the road," as other vehicles; and a driver of a wagon who refused to turn to the right, and thus caused a collision with a bicycle, was held liable. In *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228, it was held that one riding on a bicycle may be convicted of furiously driving a carriage upon a highway under a statute forbidding such an act. In commenting on this case, Mr. Irving Browne says: "This of course would exclude bicycles from sidewalks, which is quite necessary." 24 Alb. Law J. 282. If we are right in holding that the appellant, while riding his bicycle along the sidewalk, was engaged in the performance of an unlawful act, another important element is added to the appellee's case, making his right of recovery entirely clear; for a man who does an unlawful act is liable for the consequences, although they may not have been intended. *Peterson v. Haffner*, *supra*; *Hood v. State*, 56 Ind. 268; *Binford v. Johnston*, 82 Ind. 426; *Weick v. Lander*, 75 Ill. 98.

A QUESTION of probate of a will in a foreign State came before the Supreme Court of Missouri in *Keith v. Johnson*, 10 S. W. Rep. 597. It was there held that the probate of a will in one State, devising land in another, is not binding upon the courts of the latter State as an adjudication of the validity or effect of such devise, under the federal provisions requiring such faith and credit to be given to the judicial proceedings of the courts of other States as they have in their own State, inasmuch as the court of the former State had no jurisdiction to make such adjudication, if it had attempted to do so, and that a will probated in another State, affecting land in Missouri, and not recorded there as provided by statute, is not constructive notice of its provisions affecting such land. The court says:

It was held in *Lewis v. St. Louis*, 69 Mo. 595, that a certified copy of a foreign will, and its probate, could

be used and read in evidence in this State for the purpose of showing a transfer of title to land in this State, though not recorded here. That ruling was followed in this case when it was here before, and in the subsequent case of *Drake v. Curtis*, 88 Mo. 644, and in some intermediate cases. The question of constructive notice from a foreign will, not recorded here, was not considered in any of these cases, but it is presented on this appeal, and determines the appellants' rights in this case. No principle of law is better established in the United States than this: that the transfer of title to real estate must be in accordance with the law of the State where the property is situate. So a will, to be of any validity as a transfer of title to land, must be executed, attested, and probated in the manner prescribed by the law of the State where the land is located. *Cabanne v. Skinner*, 56 Mo. 357; *Story, Conf. Law*, § 474; *McCormick v. Sullivan*, 10 Wheat. 192, and cases cited; *Lucas v. Tucker*, 17 Ind. 41; 1 *Jarm. Wills*, 1; 1 *Redf. Wills* (3d ed.), 398; *Whart. Conf. Law*, § 587. It would seem to follow from this general principle that, if the laws of this State dispense with proof anew of a foreign will, then such laws must be complied with in order to give the foreign will the force and effect of a proved domestic will, and this is the clear ruling in the case of *McCormick v. Sullivan*, *supra*; and it is also the deduction to be drawn from what was said in *Cabanne v. Skinner*, *supra*. But we are met with the argument that because the federal constitution, and the act of congress, and the statute of this State, all provide that the records and judicial proceedings of the courts of other States shall have such faith and credit here as they have in the courts of the States from whence they are taken, therefore we must give this foreign probate full force and effect; and for this reason the will may not only be read in evidence here, but is constructive notice to persons dealing with lands in this State, though not recorded here. It is conceded that the probate of a will made in conformity with our law is a judicial act. This we have often held. *Jourden v. Meier*, 31 Mo. 40; *Creasy v. Alverson*, 43 Mo. 19; *Dilworth v. Rice*, 48 Mo. 131; *Smith v. Estes*, 72 Mo. 312. It was assumed in *Bright v. White*, 8 Mo. 421, and decided in *Haile v. Hill*, 13 Mo. 613, that the probate of a will was a judicial act, within the meaning of the act of congress. But in both of these cases the contest was over movable property, and the wills had been probated at the domicile of the testator; so that those cases have no bearing upon this case. When the Kentucky court admitted this will to probate, it adjudged it to be executed according to the laws of that State, and we accept that adjudication as conclusive upon that subject; but it did not undertake to say that the will transmitted the title to the Missouri land. That court did not assume to make any such adjudication. The probate of the will, then, does not have the credit in that State of affecting the title to land in this State, and hence we are not called upon to give it a credit here that it does not have in the courts of the State where the probate is declared. The force and effect which we must give to this Kentucky probate does not depend upon the said act of congress, nor our statute relating to the same object, so far as real property located in this State is concerned, but it depends wholly upon the statute before quoted, dispensing with proof anew, and declaring what force and effect shall be given to a will properly executed, probated in another State, and recorded here. Moreover, the courts of that State are without jurisdiction over the titles to land located in this State. The clause of the federal constitution and

the act of congress, before referred to, apply only so far as the courts of the other States have jurisdiction.

THE Supreme Court of Minnesota, in *Allen v. Pioneer Press Co.*, 41 N. W. Rep. 936, passed upon the validity of a libel law similar to the one lately declared unconstitutional by the Michigan Supreme Court. In this case the court upholds the statute, and after referring to the Michigan case (*Park v. Detroit Free Press Co.*, 28 Cent. L. J. 56) says:

While the views of that learned court, and especially of the eminent jurist who wrote the opinion in that case, are entitled to very great weight, yet we think they hardly have the authority of a decision of the question, because it was really not in the case, inasmuch as the court held that the publication involved a criminal charge, and hence was not within the operation of the statute. We are therefore compelled to consider the question mainly upon principle as *res integra*, which it certainly is in this State. * * Now, at common law the remedy allowed to a person injured by a libel was—First, special damages for every injury of a pecuniary nature resulting from the wrong, which he had to both plead and prove; and, second, general damages, that is, damages to his standing and reputation, which the law presumed without proof from the fact of the publication of libel actionable *per se*. Moreover, malice was the gist of every action for libel; either malice in fact, consisting of improper and unjustifiable motives, or constructive malice, which the law presumed without proof from the fact of the falsity of the publication. Evidence of intention, that is, of the absence of malice in fact, was always admissible, where the communication was privileged, in justification, and where it was not privileged, in mitigation of damages. A retraction of the libel was also always admissible in mitigation. In effect, this statute but extends this rule of evidence so as to permit evidence of intention—good faith—coupled with a full retraction, not merely in mitigation of damages, but to prevent the recovery of general damages, as distinguished from special damages, for injuries of a pecuniary nature. Now, in an action for libel, the object, so far at least as general damages is concerned, is not merely to obtain redress in the shape of pecuniary compensation, which is frequently but a secondary consideration, but also—which is usually of much greater importance—of vindicating the plaintiff's character by openly challenging his accusers to proof of their assertions, and of establishing their falsity, if they be false. Now, as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages. Indeed, where there has been perfect good faith, and an entire absence of improper motives, in the publication of a libel, and no special or pecuniary injury has resulted, an action for damages, brought after such a full and frank retraction and apology, is in a majority of cases purely speculative. It may be said that a retraction is not a complete remedy for injury to reputation, because even retracted falsehood may be repeated without the retraction; but the same may be said of it even after the falsity of the charge is established by

judgment for damages. It is also true that a retraction is not the remedy in the law guaranteed by the constitution, and, if the statute proposed to substitute it as a redress for pecuniary injuries, it could not be sustained. But if there was an entire absence of either negligence or improper and unjustifiable motives, but, on the contrary, perfect good faith on part of the publisher of the libel, and if he has done all that can reasonably be done in redressing the wrong, so far as it has affected a party's character, by publishing a full retraction, what principle of reason or natural justice is violated by limiting the recovery of pecuniary damages to the pecuniary injuries which he has sustained? Or, if good faith can be shown in mitigation of damages, what constitutional provision is violated by permitting it to be proven in connection with a retraction, so as to prevent altogether the recovery of money damages for the presumed injuries to reputation which are not at all pecuniary in their nature, and which have already been redressed, as far as they can be, by the retraction. A court ought not to declare invalid a solemn act of a co-ordinate branch of the government, except in a very clear case, and after all the consideration that we are able to give to the subject we are unable to say that the legislature has transcended its constitutional powers in imposing these restrictions and limitations upon the legal remedy of plaintiffs in actions for libel, or that by so doing they have deprived any one of "a certain remedy in the laws for injuries or wrongs received by him in his person, property, or character," within the meaning of the constitution. We have assumed that under this act a party is still allowed to recover pecuniary compensation for all injuries pecuniary in their nature, which he may have sustained by the libel. Section 2, in defining "actual damages," limits them to damages in respect to property, business, trade, profession, or occupation. It may be suggested that there may be some cases of pecuniary injury which this would not reach, but we are of opinion that by a liberal but allowable construction the definition referred to may be made to cover all cases of special damages; and, if so, we ought to adopt such construction, rather than hold the act invalid.

An interesting question of subscription to the stock of a corporation was decided by the Supreme Court of Tennessee, in *Morrow v. Nashville Iron & Steel Co.*, 10 S. W. Rep. 495. There, a contract with a subscriber to the organization stock of the corporation, that for every share subscribed for, he should receive interest bearing bonds to an equal amount secured by mortgage on the corporation's plant, was held void, not only as against creditors, but also between the subscriber and the corporation. The court further declared that though the bonds could only be obtained by payment of the capital stock, and the subscriber having become a director without receiving his bonds, the agreement to issue the bonds is not a condition precedent and the stock subscription stands absolute, though the agreement be void.

TELEPHONE LAW.

1. Introduction.
2. The Nature of the Business.
3. Common Carriers of News.
4. Rights.
5. Duties and Obligations.
6. Telephone Legislation.
7. Evidence of Telephonic Transactions.

1. *Introduction.*—Once more the flexibility of the common law has been put to the test; once more it has answered new questions, as to a new instrument of commerce—the telephone. For nearly forty years the judges of our courts have been drawing heavily upon the resources of analogy that they might solve knotty questions in regard to the duties and liabilities of its twin sister, the telegraph. And before that law has become settled, inventive genius has projected into the legal world a new but in many respects similar instrument of communication whose duties and liabilities must likewise be fixed by the courts. But, though a decade has elapsed since the introduction, the adjudications in these matters have been few and limited. And three causes may be assigned for this limitation. The courts of Great Britain within two years after the first telephone line was used decided that a conversation through a telephone is a "telegram," and that the telephone business, whether occupied in the transmission of separate messages or in maintaining exchanges, comes within the English statute of 1869, giving to the postmaster-general the exclusive control of the business of transmitting messages by telegraph.¹ Consequently, no other cases involving peculiarly telephone law are to be found in the English reports. Then, a second reason is the general acceptance by the commercial world of the analogy of the telephone to the telegraph business, and the willingness to be satisfied if it gets the same treatment from the former as from the latter. Finally, almost all the telephone interests of this country from almost the very first have been concentrated in one great company—The American Bell Telephone Co., of Massachusetts—which, fully aware of the fact that common law cannot be killed in the womb like legislative enactments, and yet is as obligatory as statute law has shrewdly avoided litigation; in fact, it has assisted its mighty

¹ *Atty.-Gen. v. Edison Telephone Co.*, 6 Q. B. D. 244.

ally, the Western Union Telegraph Co., in destroying or absorbing their litigious competitors.

2. *The Nature of the Business.*—A magnetic telephone is a mechanical device capable of transmitting articulate speech through wires by the power of magnetism and electricity.² So it is practicable for the general public to make individual and personal use of it; and the business which the telephone companies have undertaken may be divided into two quite different branches; (a) the transmission of separate messages or conversations from place to place, under circumstances similar to those incident to the telegraph business is one branch; one that will grow in importance with the development of long distance telephony; (b) the other is the maintenance of telephone exchanges, a system by which the offices or residences of all the individual members of the exchange are each connected with a central station where an operator is always in readiness at call to connect one subscriber's instrument with another's that they may communicate directly with each other. This double nature of the undertaking must ever be borne in mind in the legal consideration of telephone companies' relations to the public.

3. *A Common Carrier of News.*—The telephone is an indispensable instrument of commerce. The companies hold themselves out as public servants, and undertake not only to perform similar duties to those of telegraph companies, but also to supply a public demand beyond that undertaken by such companies, i. e., to send messages from their instruments, one of which they propose to supply to each person or interest requiring it if the conditions are reasonably favorable. They should, therefore, be considered as one of the great class of common carriers.³ But it is a common carrier of news, rather than of goods.⁴

Although one of the earliest cases held that a telegraph company is common carrier,

² Am. Rapid Tel. Co. v. Conn. Teleph. Co., 49 Conn. 871.

³ State v. Nebraska T. Co., 17 Neb. 126; 52 Am. Rep. 404. State of Missouri v. Bell T. Co., 23 Fed. Rep. 539; Central Union T. Co. v. Bradbury, 106 Ind. 1; 5 N. E. Rep. 571; Central Union T. Co. v. State, 19 N. E. Rep. 604; Wolf v. W. U. Tel. Co., 62 Pa. St. 83.

⁴ Hocket v. State, 105 Ind. 250, 5 N. E. Rep. 178; State v. Bell T. Co., 10 Cent. L. J. 435; Feiber v. Manhattan Dist. Tel. Co., 3 N. Y. Supp. 116.

yet the bulk of the decisions with their allusions to "quasi public servants," "analogy to common carriers," etc., have hesitatingly doubted its liability as such. Pretended ignorance of the nature of electricity is largely to blame for this; and the seeming simplicity of telephonic communication has resulted in a contrary opinion to which telegraph companies will ultimately have to yield.⁵

4. *Rights of Telephone Companies.*—Telephone companies probably would be held to have all the rights and privileges accorded to telegraph companies.⁶ These are the rights given all public servants. Prominent among them is the right of eminent domain which in some States is expressly given telephone companies by statute.⁷ They have the right to make reasonable rules and regulations for the conduct of their business, provided these do not contravene the constitution or laws of the country, or violate the common law or public policy. They may require messages to be prepaid, and they have the common carrier's lien. If a subscriber "damns" the company over the wire, under a regulation against improper or vulgar language, he forfeits his right to use the instrument.⁸

5. *Duties and Obligations.*—The telephone, by the necessities of commerce and by public use, has become a public servant, and is to all intents and purposes a part of the telegraphic system of the country; in so far as it has been introduced for public use and

⁵ Parks v. Alta. Cal. Tel. Co., 13 Cal. 422, 73 Am. Dec. 539; Baldwin v. U. S. Tel. Co., 1 Lans. 126; Breese v. U. S. Tel. Co., 43 N. Y. 132. Gray's Communication by Telegraph; Grinnell v. W. U. Tel. Co., 113 Mass. 299; McPherson v. W. U. Tel. Co., 52 N. Y. Superior Ct. 232; Schwartz v. Atlantic & Pacific Tel. Co., 18 Hun, 157; Ayers v. Tel. Co., 79 Me. 493.

⁶ Wisconsin T. Co. v. City of Oskosh, 62 Wis. 32.

⁷ State v. T. Co., 36 Ohio St. 296. 2 N. Y. Rev. Stat. p. 1720; Concord R. R. v. Greeley, 17 N. H. 47; New Orleans Tel. Co. v. Southern Tel. Co., 53 Ala. 211. A case in the Supreme Court of Missouri referred to in 18 Am. J. of So. Sci. 169. Irwin v. Great Southern T. Co., 37 La. An. 63; N. Y. & N. J. T. Co. v. Township of E. Orange (N. J.), 8 Atl. Rep. 289; Ches. & Potomac Tel. Co. v. B. & O. Tel. Co. (Md.), 7 Atl. Rep. 809; Domestic L. & T. Co. v. Newark, 16 Am. & Eng. Corp. Cas. 295; Teleg. Co. v. Texas, 105 U. S. 460; New Orleans, etc. v. S. & A. Tel. Co., 53 Ala. 211; Locke v. W. U. Tel. Co., 103 Ill. 401. The erection of poles and wires is an additional servitude upon highways, Board of Trade v. Tel. Co., 107 Ill. 508; Willis v. Erie Tel. & T. Co. (Minn.), 34 N. W. Rep. 337. *Contra*: Pierce v. Drew, 136 Mass. 73; N. Y., etc. Co. v. State (N. J.), 14 Atl. Rep. 122.

⁸ Pugh v. T. Co., 27 Alb. L. J. 162.

has undertaken to supply a public demand beyond that undertaken by the telegraph, so far should it be held to the same obligations as the telegraph and other public servants.⁹ Telephone companies must supply to any individual or company (even though it be a telegraph company applying) instruments and connection with their exchanges, and receive dispatches from and for other telephone or telegraph lines, and from and for any individual, and on payment of their charges for connection or for transmitting dispatches, as established by the rules and regulations of the company, transmit the same with impartiality and good faith.¹⁰ This common law duty is placed upon some of the statute books.¹¹

Telephone companies carrying on exchanges have persistently fought against their duty to furnish the facilities of the exchange to any person or corporation desiring them and offering to comply with their regulations. The first case to come before the courts was an application to the circuit court of St. Louis, in May, 1880, by the American Union Telegraph Co., for a *mandamus* to compel the Bell Telephone Co. to connect the relator's office with the telephone exchange in St. Louis.¹² Judge Thayer held that the principles of law applicable to railroad companies and other common carriers unquestionably applied to telegraph and telephone companies; that, instead of maintaining offices, the Bell Co. supplies instruments to offices and residences, and holds itself out to the world as prepared to supply all persons with such facilities for communication who reside or occupy offices contiguous to its established line, and, therefore, in refusing to grant to the relator such facilities as it affords to other customers, it has violated an imperative duty imposed upon it by law. Six months later the same case came again before the same court; and the telephone company alleged that it had acquired the right to use the telephone from the American Bell Telephone Co., the owner of the patent, under a license, by the terms of which it was provided, (1) that the telephone company's

patrons should not use the telephone for "transmitting messages for which toll is paid to any one but the local company, nor for transmitting market quotations, or news for sale or publication; (2) that the telephone company should not connect any of its offices with any telegraph company's offices or line, and that no telegraph company should be allowed to become a subscriber."¹³ The court (Judge Thayer) ruled that the second clause of the contract, if enforced as valid, would compel a discrimination, unlawful and against public policy, and the telegraph company might use the telephone for the same purpose at least that other subscribers are using it. About a year later, the Louisville chancery court¹⁴ restrained a company from removing the telephone from the office of a transfer company, which was a rival of the telephone company in furnishing carriages, omnibuses, and coupes.

After this preliminary skirmish, the Supreme Court of Ohio was called upon to determine whether the Columbus Telephone Co. could rightfully refuse to supply two rivals of the Western Union with connection with its exchange that they might by the means of it collect and distribute dispatches; and sometime during the closing months of 1881, a decision¹⁵ was rendered which has been a leading case ever since. Here great stress was laid on the defense that the local telephone company was not the owner of the patented instruments but merely the licensees of the American Bell Telephone Co. of Massachusetts, under an agreement to turn over to the Western Union all messages for electrical transmission outside of its territory. It was held that the company was violating the Ohio statute against discrimination,^{16a} and the contract could not be used as a shield. The local company had no right to engage in business, unless it acquired the rights which were necessary to discharging its duties to the public; and the Bell company could not do business in Ohio in violation of statute, even though through licensees; and the desired instruments should be supplied.

Hardly a year was gone when the Supreme

⁹ State v. Neb. T. Co., 17 Neb. 126, 52 Am. Rep. 409.

¹⁰ State v. Neb. T. Co., *supra*; State v. Bell T. Co., 36 Ohio St. 296.

¹¹ Title 2, ch. 4 Ohio Stat. §§ 3462, 3471.

¹² State v. Bell T. Co., 10 Cent. L. J. 435.

¹³ 11 Cent. L. J. 360, 22 Alb. L. J. 364.

¹⁴ Louisville Transfer Co. v. Am. Dist. T. Co., Ky. L. J. 144, 24 Alb. L. J. 283.

¹⁵ State v. Bell T. Co., 36 Ohio St. 296.

^{16a} Title 2, ch. 4, Ohio Stat. §§ 3462, 3471.

Court of Connecticut was asked to pass upon a similar state of facts.¹⁶ There was the same defense as in the Ohio case, but the court took an opposite position and said that a *mandamus* cannot issue; for the Bell company is the exclusive owner of the patent, and the Connecticut company has purchased only the right to use the patented articles in a certain way and it is not within the power of the court to enlarge or diminish the purchase. It distinguished the case from that of railroad companies, and proprietors of grain elevators. The defendant is only required by the statute to make an impartial use of such rights and privileges as it possesses. The Ohio case seems to have the better reasoning; while the Connecticut case depends largely upon the exclusive-ownership-of-a-patent theory.

In *State of Missouri v. Bell Tel. Co. (local)*,¹⁷ the general principle of the invalidity of a contract for discrimination was adopted, as in the Ohio case. But Circuit Judge Brewer admitted that if the telephone company refused connection to the Western Union it could refuse the same facilities to the relator—a narrowing down of the doctrine laid down by Judge Thayer in the St. Louis case. And District Judge Treat dissented on the ground that the court had not jurisdiction of the licensor, and distinguished the Ohio case from the Connecticut case in that respect.¹⁸ The Supreme Court of Pennsylvania and the Court of Appeals of Maryland have followed the Ohio case.¹⁹

New York also has begun to make law in this particular branch of the telephone discussion. Upon an application to a special term of the supreme court for a *mandamus* to compel the Hudson River Telephone Company to connect the office of the Postal

¹⁶ *Am. Rapid Tel. Co. v. Conn. T. Co.*, 49 Conn. 352.

¹⁷ 23 Fed. Rep. 539. The Balt. & O. Telegraph company was the relator.

¹⁸ So it is to be noted here that the United States circuit court has decided—*U. S. v. Bell T. Co.*, 29 Fed. Rep. 17—that the Am. Bell Telephone Co. is not doing business in Ohio by allowing its licensees to use its instruments there, and that service upon an officer of one of the local companies is not a good service on it. But *contra*, see *People v. Am. Bell T. Co.*, 3 N. Y. Supp. 733.

¹⁹ *Bell T. Co. v. B. & O. Tel. Co.*, 85 Alb. L. J. 4 3, Cent. Rep. 907, 3 Atl. Rep. 825, where a history is given of the alliance with the Western Union. *Chesapeake & Potomac T. Co. v. B. & O. Tel. Co.*, 85 Alb. L. J. 271, 7 Atl. Rep. 809.

Telegraph Cable Co. with its exchange, Justice Parker, in May, 1887, rendered an opinion which shows close scrutiny of the subject.²⁰ He says the authorities establish the principle that a public servant, as the telephone company is, cannot so use the invention protected by the government, as to withhold from one citizen the advantages which it accords to another; and the relator is entitled to an instrument. But he thinks that the regulation forbidding the subscriber to use the telephone in collecting, transmitting, or delivering any message in respect of which any toll has been or is to be paid to any party other than the exchange is reasonable, for one common carrier cannot demand, as a right, that it be permitted to use a rival common carrier's property for the benefit of its own business. And the second regulation—that the telephone shall not be used for calling messengers except from the central office—is unreasonable and void. However, he thinks a telegraph company might reasonably be required to pay more for the service than individuals. Only once has an individual besought the aid of the courts to compel a telephone company to supply its facilities. And the plucky Nebraska lawyer succeeded.²¹

In the line of previous decisions, we think telephone companies are bound to have suitable instrument and competent servants, and to see that the service rendered to applicants is rendered with the care and skill which the peculiar nature of the undertaking requires.²² Whether the highest degree of care is necessary is yet to be decided. Whether the special contract on nearly all telephone as well as telegraph blanks is reasonable, valid or invalid, one must study the varying opinions of the various States. Telephone companies must exercise reasonable care in the location of their poles in public highways, so as not to incommode public travel, but are not required to provide against extraordinary circumstances.²³

6. Telephone Legislation.—Under the police

²⁰ *People v. Hudson River Tel. Co.*, 19 Abb. N. C. 466 and note, 10 N. Y. S. R. 232.

²¹ *State v. Nebraska T. Co.*, 17 Neb. 126, 52 Am. Rep. 404.

²² *Hocket v. State*, 105 Ind. 250, 5 N. E. Rep. 178; *Graham v. W. U. Tel. Co.*, Allen's Tel. Cases, 573, 581, 19 Am. L. Reg. N. S. 319.

²³ *Sheffield v. Central U. T. Co.*, 36 Fed. Rep. 164; *Penn. T. Co. v. Varnau (Pa.)*, 15 Atl. Rep. 634.

power by which it is customary to regulate the charges of ferry men, common carriers, hack men, bakers, innkeepers, etc., the State legislatures can pass laws fixing the maximum charges for telephone instruments and service.²⁴ And the companies are bound to furnish the organized apparatus or the usual and necessary combination of instruments for the transmission and reception of telephone messages.²⁵ For a State can do whatever is necessary to promote public welfare, not inconsistent with its own organic laws. The use of patented articles must be in subordination to the regulations of a State. The telephone exchange is not a private enterprise or club, but an indispensable instrument of commerce which has been devoted to the public, and, therefore, has become the legitimate subject of legislative control.²⁶ A company doing general telephone business cannot justify a refusal to furnish a telephone connection at the statutory rate on the ground that it has changed its plan and is doing only a *toll* business, with public telephones in charge of agents located in various parts of the city.²⁷ The company's remedy is to withdraw from the State; and the citizens will then be debarred the use of telephones, since the withdrawal is not an excuse for an infringement of the patent.²⁸ Such laws are not an interference with interstate commerce.²⁹ But where a State law imposes a certain tax upon telephone companies in lieu of all other taxes, a city of that State cannot require them to pay a license for the privilege of doing business within its limits.³⁰ And where there are no statutes on the subject, telephone property and lines should be assessed in the mode provided for assessing telegraph lines and property.³¹ The American Bell Telephone Co., does business in New York State, through those companies renting its instruments, as agents, so far as to be liable to taxation as a foreign corpora-

tion, doing business in the State under laws 1881, ch. 361.³²

7. *Evidence of Telephonic Transactions.*—Many contracts are made and many business arrangements are consummated through the telephone. And the decision of cases wherein the telephone is a link in the evidence is bound to give rise to considerable discussion. On the grounds we have so often reiterated, all questions as to offer and acceptance by telephone dispatches, must be decided on the same principles that apply in similar transactions by telegraph.

But how shall statements made through a telephone be proved? *Sullivan v. Kuykendall*,³³ was the earliest and is the most thoroughly considered decision that we have on this subject. A wishing to communicate with B induces the operator at X to call up the operator at Y where B is, and ask B to talk with the operator at X, because A is not accustomed to using the telephone. The operator at Y telephones that B is at the office; and then a conversation takes place between B and the operator at X, who communicates what comes over the wire to A and third persons present, and is informed by A what the reply shall be. It was held that B made the operator at X, his agent (a seeming contradiction to the principles heretofore applied to the communication of contracts by special messenger, mail or telegraph); and, the operator at X testifying to the fact of the conversation but not remembering the substance of it, A and the by-standers were allowed to state what the operator at X reported to them as being said by B. The court said it was not incompetent hearsay evidence, but that the telephone eliminated space and it was as if the parties were talking face to face. It is similar to the agency of an interpreter, and aside from the question of agency, the testimony was competent as a part of the *res gestæ*. There was an able dissenting opinion which has been favorably commented upon.³⁴

In the trial of the "Napoleon of Finance," Fish was allowed by Judge Barrett to testify as to what Ward said to him in a conversation over a telephone line, a fact which was

²⁴ *Hocket v. State*, 105 Ind. 250, 5 N. E. Rep. 178, 55 Am. Rep. 201. But a city ordinarily cannot: *City of St. Louis v. Bell T. Co. of Missouri*, 28 Cent. L. J. 89.

²⁵ *Telephone Co. v. Bradbury*, 106 Ind. 1, 5 N. E. Rep. 721.

²⁶ *Warehouse Cases*, 94 U. S. 118.

²⁷ *Central Union T. Co. v. State*, 19 N. E. Rep. 604.

²⁸ *Am. Bell T. Co. v. Cushman Co.*, U. S. Circuit Ct. N. D. Ill. 36 Fed. Rep. 488; 28 Cent. L. J. 41.

²⁹ *Central U. T. Co. v. State*, *supra*.

³⁰ *Wis. T. Co. v. City of Oskosh*, 62 Wis. 32.

³¹ *Iowa Union T. Co. v. Board of Equalization*, 25 N. W. Rep. 155.

³² *People v. Am. Bell T. Co.*, 3 N. Y. Supp. 738.

³³ Decided in Jan. 1885, 82 Ky. 483, 56 Am. Rep. 601.

³⁴ 24 Am. L. Reg. 442.

³⁵ 22 Cent. L. J. 54.

essential in proving the crime.³⁵ And another witness who stood about six inches from the telephone was allowed to testify as to the conversation, both witnesses testifying that they had had personal conversations over that line with Ward, and at the time in question recognized his voice. The *London Law Times*, prior to the Ward trial, in commenting upon a case where a witness was allowed to testify that he recognized the voice of the prisoner, and that a certain conversation took place, said: "A conversation through a telephone is so different from a conversation face to face, that it appears to us doubtful whether it can be allowed to stand on the same footing for the purpose of evidence." One may imitate another's voice well enough at least to deceive the hearer through a telephone. There should be some further evidence of the identity of the speaker.³⁶ The *Albany Law Journal* assenting says: "*Vox et præterea nihil* is very unsafe evidence." But it does not appear that there was any further evidence of identity in the Ward case than the recognition of the prisoner's voice; that is giving quite a loop hole for wrong. The doctrine of "face to face" in the use of the telephone, it is said, was so strongly accepted at first that notaries public in the West got into the habit of taking affidavits by telephone after they had the signed affidavits in hand. The argument of uncertainty of recognition was answered by saying that notaries are not required by law to be, and are not generally sure of the identity of their affiant. But sanctity of oath is largely due to the presence of the officer. And laziness and inconvenience should not leave a door open to perjury and fraud. JAMES MCCALL.

³⁵ People v. Ward, 3 N. Y. Crim. Rep. 483, 511.

³⁶ 28 Alb. L. J. 422.

MUNICIPAL CORPORATIONS — LEGISLATIVE AND JUDICIAL DUTIES—FALL OF BUILDING—NEGLIGENCE—LIABILITY.

CITY OF ANDERSON V. EAST.

Supreme Court of Indiana, January 26, 1889.

1. *Municipal Corporations—Legislative and Judicial Duties—Fall of Building.*—A municipal corporation is not liable to the owner of a building crushed by the falling of the walls of a burnt building not owned by the corporation, although it had notice nine

days before the walls fell that they were dangerous and likely to fall.

2. *Same—City not Bound to Protect Buildings on Private Grounds.*—The duty of a municipal corporation to keep its streets safe imposes no obligation to protect adjacent private property from injury from dangerous structures owned by citizens.

3. *Negligence—Liability of Owner of Burnt Building for Injuries to Adjoining Structures.*—Where the owner of a burnt building has notice nine days before the fall of the falls that they are dangerous and likely to fall, and neglects to make them secure, and refuses to permit the owner of an adjacent building to do so, he is liable to such owner for injuries caused by the walls falling upon and crushing his building.

4. *Same—Promise of City Marshal.*—The statement of the marshal of a city to the owner of the dangerous walls of a burnt building that he will take charge of them will not absolve the owner from liability for injuries to an adjacent building crushed by the falling of the walls.

ELLIOTT, C. J., delivered the opinion of the court:

The defendants severed in their defenses in the trial court, and here separately assign errors. Consequently there are two branches of the case, involving essentially different questions—one in which the rights of the city of Anderson are involved; and another which involves the rights of the appellant Doxey. It is proper, as well as convenient, to first consider and dispose of that branch of the case in which the rights of the municipal corporation are involved.

The judgment against the city of Anderson rests entirely upon the second paragraph of the complaint, and, if that is bad, the judgment is entirely destitute of foundation. Our first step, therefore, is to ascertain and determine whether the second paragraph of the appellee's complaint states a cause of action against the city of Anderson. That paragraph of the complaint contains these material facts. On the 13th day of November, 1884, the plaintiff was the owner of a building in the city of Anderson. Ten feet distant from the plaintiff's building was a large brick structure, with walls 30 feet in height. That building was owned by the appellant Charles T. Doxey. On the night of November 13, 1884, Doxey's building was burned, but the brick walls remained standing. Doxey's building stood on the line of a public alley 16 feet in width. The cornice of the Doxey building projected over this alley. The cornice and wall of the burnt building fell upon the plaintiff's building, and destroyed it. The city knew that the wall was dangerous, and likely to fall, and was notified of that fact, as was Doxey. Notwithstanding the notice and knowledge, the defendants negligently permitted the walls, weakened and made dangerous by the fire, to remain unsupported for nine days, when they fell, crushing the plaintiff's building.

Our judgment is that no cause of action is stated against the city. A municipal corporation is an instrumentality of government, and is not liable

for a failure to exercise legislative or judicial powers, nor for an improper or negligent exercise of such powers. *Wheeler v. City*, 18 N. E. Rep. 532; *Dooley v. Town of Sullivan*, 112 Ind. 451, 14 N. E. Rep. 566; *City v. Hudnut*, 112 Ind. 542, 13 N. E. Rep. 686; *Faulkner v. City*, 85 Ind. 130; *City v. Timberlake*, 88 Ind. 330; *McDade v. Chester City*, 117 Pa. St. 414, 12 Atl. Rep. 421; *McArthur v. Saginaw*, 58 Mich. 357, 25 N. W. Rep. 313; *Agneu v. Corunna*, 55 Mich. 428, 21 N. W. Rep. 873; *Hines v. Charlotte*, 40 N. W. Rep. 333; *Kiley v. City*, 87 Mo. 103, 56 Am. Rep. 443; *Hubbell v. City of Viroqua*, 67 Wis. 343, 30 N. W. Rep. 847; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857, and note.

The authorities we have collected, to which many more might easily be added, illustrate all phases and postures of the general subject; but in one thing all unite, and that is in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial, or discretionary duty, or in simply performing such a duty in an improper method. The decision in *Kiley v. City*, *supra*, is directly in point, and applies the rule we have stated to a case in principle precisely like the one before us. A recovery can be had against a municipal corporation only where it negligently performs, or negligently fails to perform, a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. There must, in every case, be a duty, since where there is no duty there can be no negligence. It is, indeed, impossible to conceive a case where negligence can exist independent of a duty. It was therefore incumbent upon the appellee to show a ministerial duty, and its wrongful breach. This he has not done. A municipal corporation owes a duty to those who use its streets to exercise ordinary care to make them safe for passage. It is not without hesitation that some of the courts have assented to this rule, and there once was reason for doubt; for, as a municipal corporation is an instrumentality of government, it is difficult to perceive upon what principle it can be sued while the sovereignty of which it forms a part enjoys complete immunity. But the question is now closed. Municipal corporations are liable for a negligent breach of a ministerial duty. They are, however, liable only to one to whom they owe that duty, and to him only when the duty concerns something over which that duty extends. In many of the cases we have cited it is held that municipal corporations owe a duty only to persons using their streets, and to them only owe a duty to keep the streets safe for ordinary travel. In order to create a liability, the breach of duty must be such, many of the cases say, as to make the streets insufficient or unsafe for ordinary travel. We can conceive of no principle, and we know of no authority, upon which it can be held that a municipal corporation is under a duty to protect the property of a citizen from injury from the walls of an

adjacent building belonging to a citizen, which the owner's negligence has permitted to become dangerous. Municipal corporations are not charged with the duty of protecting private property. There is certainly nothing in the statute which imposes such a duty upon them, and if not in the statute it does not exist. The entire current of authority concentrates upon the proposition that, unless the law expressly or by clear implication imposes a duty upon a municipal corporation, none can be imposed by construction. Wharton says: "A duty, however, not imposed specifically on a corporation, cannot be constructively attached so as to make its neglect the subject of a suit." Whart. Neg. § 257.

Three cases are cited by the appellee. The first, that of *City v. O'Connor*, 98 Ind. 168, is not even remotely relevant. This is apparent, without more being said, when it is affirmed that the complaint in that case was to recover damages for a breach of contract. The second case cited (*Grove v. City of Fort Wayne*, 45 Ind. 429), while it carries the principle on which it proceeds to the utmost verge, decides only that a person traveling on a public street may recover for an injury caused by the falling of an overhanging cornice. Conceding that the decision in that case is correct, it by no means justifies the conclusion that a municipal corporation is liable for the destruction of property by the fall of an adjoining building. The decision, as the opinion shows, is based solely on the proposition that municipal corporations "are bound to keep the streets, including the sidewalks, in a reasonably safe condition for ordinary travel." The third case cited (*Lowrey v. City*, 55 Ind. 250), in so far as it has the remotest resemblance to this case, simply announces and enforces the same general proposition. If the plaintiff were here seeking to recover for injuries received while using a street, these decisions would be relevant; but, as he seeks to recover for the destruction of a building standing on his own ground, they are totally irrelevant.

We proceed now to the branch of the case involving the rights of the appellant Doxey. His counsel assert that the first paragraph of the complaint is bad, because it does not charge him with negligence. We cannot concur with them. The facts stated very clearly show that he was guilty of culpable negligence, and that his negligence was the proximate cause of the appellee's injury. It is charged, much as in the second, that the wall was unsafe and dangerous; that Doxey knew this; and that it constituted a public nuisance. In addition to these allegations, it is also averred that the wall was unsafe and dangerous from the 14th until the 22d of November, 1884, and that the defendant Doxey refused to make it safe, or to permit the plaintiff to do so. To the second paragraph it is objected by Doxey's counsel that the general averments of negligence are insufficient. This position rests on an undue assumption, for there are specific averments. But, if there were

not, the objection is not well taken, for it is settled that general averments of negligence are sufficient as against a demurrer. *Railway Co. v. Walker*, 113 Ind. 196, 15 N. E. Rep. 234.

The second instruction asked by Doxey was properly refused, for the reason that there was no evidence to which it was applicable. Mr. Doxey testified that "Mr. Coburn, the marshal of the city, came to me the next morning after the fire, and said they would take charge of or appoint policemen to look after the walls, and have them torn down, if necessary. He says: 'You need not bother anything about them; you have lost enough.' I think those were the exact words." This evidence, and it is the strongest adduced by Doxey, did not warrant an instruction that "Doxey is not liable if the marshal of the city of Anderson and his deputies took charge and control of the premises, preventing any persons from going near the ruins until after the walls fell." Waiving all question as to the authority of the marshal to exclude the owner of the building, and waiving also all question as to the fault of the instruction in not asserting that control was actually taken without the owner's consent, it was properly refused, because the owner could not shift his responsibility onto the municipal corporation. If there had been any testimony showing that the owner was compulsorily excluded by legal authority, a very different question would have been presented; but all that here appears is that the marshal informed Mr. Doxey that he would take charge of the walls, and that Mr. Doxey consented that he might do so. The most that can be said of the testimony of Mr. Doxey is that it proves that he turned the matter over to the control of the marshal, for there was no legal process employed to secure control. At all events, it is quite clear that Doxey did not escape responsibility by acceding to the request of the marshal, for third persons injured by his negligence cannot be denied compensation because he delegated or conceded his duties and rights to a city officer.

The judgment against the city of Anderson is reversed, and that against the appellant Doxey is affirmed.

NOTE.—The opinion of the court in the principal case cites nearly all of the authorities that the writer has been able to discover upon the question of the liability of a city for failure to exercise its powers for the protection of its inhabitants, under circumstances similar to those existing in that case; but additional authorities may be cited in support of the principle underlying that decision, and a statement of the facts involved in the cases referred to may be of importance as showing the varied and extensive application of that principle.

The general rule is well settled that a city, or municipal corporation, is not liable for failure to exercise merely legislative or judicial powers, as to which it is invested with a discretion of its own.¹

¹ 2 Dillon on Munic. Corp. (3d ed.) § 949; *Wilson v. Mayor*, 1 Dento, 556; *Mills v. Brooklyn*, 33 N. Y. 489; *Oole v. Medina*, 37 Barb. 218; *Hill v. Charlotte*, 73 N. C. 55;

Thus, it has been held in many cases that a city is not liable for failure to provide drainage or sewerage.² Nor is a municipal corporation liable for injuries from fire occasioned by failure to furnish an adequate supply of water or to keep its fire engines in repair.³

The case of *Kiley v. City of Kansas*⁴ is "on all fours" with the principal case. It appeared that the brick walls of a burned building on private property on the line of a street were left standing in a dangerous condition for several months, and finally blew down, crushing a house on an adjoining lot and killing a child therein. In an action by the mother for damages for the death of the child, it was held that she could not recover.⁵ In *Western Reserve College v. Cleveland*,⁶ it was held that a city was not liable for the acts of a mob, although its charter made it the duty of the city to "preserve the peace, and prevent riots, disturbances and disorderly assemblages." And in another Ohio case, a city was held not liable for an injury caused by the firing of a cannon in a street by disorderly persons.⁷ In a number of cases, cities have been absolved from liability for injuries caused by "coasting" in the streets, although they had passed ordinances on the subject which they failed to enforce.⁸ In the case of *McDade v. Chester City*,⁹ the city was authorized by its charter to limit or prohibit the manufacture, sale or exposure of fireworks. A fire occurred in a manufactory of fireworks situated on private premises, and the plaintiff was injured while assisting to extinguish the fire; but it was held that he could not recover for his injury from the city. And in another Pennsylvania case, it was held that a county was not liable for failure to exercise powers

Campbell v. Montgomery, 53 Ala. 527; *White v. Yazoo*, 27 Miss. 357; *Dewey v. Detroit*, 15 Mich. 307; *Western College v. Cleveland*, 12 Ohio St. 375; *Kelly v. Milwaukee*, 18 Wis. 88; *Alton v. Hope*, 68 Ill. 167; *Barry v. Lowell*, 8 Allen, 127; *Atchison v. Chellis*, 8 Kan. 608; *Dooley v. Town of Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209; *Lehigh Co. v. Hoffort*, 116 Pa. St. 587; *McDade v. Chester City*, 117 Pa. St. 414; 2 Am. St. Rep. 681. See also note to *Flournoy v. City of Jeffersonville*, 79 Am. Dec. 475; "Municipal Liability for Defective Sewerage," 24 Cent. L. J. 123, 124; *Bryant v. St. Paul*, 21 Cent. L. J. 33, and authorities cited in the opinion in the principal case.

² "Municipal Liability for Defective Sewerage," 24 Cent. L. J. 123, 124; *McClure v. City of Red Wing*, 28 Minn. 189, 194; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Weis v. City of Madison*, 75 Ind. 241, 250; *Child v. Boston*, 4 Allen, 41.

³ *Black v. City of Columbia*, 19 S. C. 412; 2 Am. & Eng. Corp. Cas. 640; *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Sewett v. City of New Haven*, 28 Conn. 368; 9 Am. Rep. 352; *Fisher v. City of Boston*, 104 Mass. 86; 6 Am. Rep. 196; *Ogg v. Lansing*, 35 Iowa, 436; 14 Am. Rep. 730; *Elliott v. Phila.*, 75 Pa. St. 347; 15 Am. Rep. 691; *Howard v. San Francisco*, 51 Cal. 52; *Greenwood v. Louisville*, 12 Bush (Ky.), 298; *Hays v. Oshkosh*, 23 Wis. 214; 14 Am. Rep. 760; *Birkmeyer v. Evansville*, 29 Ind. 187; *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444; *Davis v. Montgomery*, 51 Ala. 139.

⁴ 47 Mo. 108; 56 Am. Rep. 443.

⁵ It is difficult, however, to distinguish this case from that of *Grogan v. Broadway Foundry Co.*, 87 Mo. 321, in which a recovery was sustained under similar circumstances.

⁶ 12 Ohio St. 375.

⁷ *Robinson v. Greenville*, 42 Ohio St. 635; 51 Am. Rep. 357. See also *Borough v. Fitzpatrick*, 94 Pa. St. 121; *Ball v. Town of Woodbine*, 61 Iowa, 63.

⁸ *City v. Timberlake*, 88 Ind. 330; *Faulkner v. City of Aurora*, 85 Ind. 190; 44 Am. Rep. 1; *Pierce v. City of New Bedford*, 130 Mass. 534; 37 Am. Rep. 337; *Shultz v. City of Milwaukee*, 49 Wis. 254.

⁹ 117 Pa. St. 414; 2 Am. St. Rep. 681.

under a statute authorizing it to make certain improvements.¹⁰ So, in Massachusetts, it was held in a recent case that a child attending a public school in a city school house could not recover for injuries received by reason of an unsafe stairway, the duty to provide and maintain school houses being expressly imposed upon the city by statute.¹¹ In Alabama, where a house in a city was destroyed by fire set by sparks from an engine which was, by ordinance, a nuisance subject to abatement, but which the city had neglected to abate, it was held that the owner of the house could not recover against the city.¹² And in Georgia, in a somewhat similar case, it was held that a city was not liable for the destruction of a building by fire caught from a wooden building erected within fire limits in defiance of an ordinance which the city had passed but failed to enforce.¹³ It has also been held in a number of cases that an action will not lie against a municipal corporation for not suppressing a public nuisance, when it is not created or maintained by express authority of the municipality and is not the result of some act done or neglected to be done in the performance of a duty imposed upon the municipality by statute, such as the repair of the streets and the like.¹⁴

On the other hand, where a corporate duty "ceases to be judicial or quasi judicial, and becomes ministerial, then, although there be no statute giving the action, a municipal corporation is liable for the negligent discharge or negligent omission to discharge such duty, resulting in injury to others."¹⁵ Ministerial duties as distinguished from discretionary or quasi judicial duties are said to be such as are "absolute, certain and imperative."¹⁶ A fuller, and perhaps a better definition, is the following: A ministerial act is "one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done."¹⁷ Acts involved in the necessary performance of a duty prescribed by ordinance are generally ministerial.¹⁸ Thus, where the council or

other proper city authorities have adopted a plan and passed an ordinance for the construction of a sewer, the work of carrying out that plan is ministerial in its nature, and the city will be liable for injuries caused by negligence therein.¹⁹ And it is a rule of wide and general application that where municipal improvements are undertaken and improperly executed, a common law liability exists for all damages caused by the unskillful or improper execution of the work and not necessarily incident to the work when properly performed.²⁰

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visors, 85 N. Y. 323; *Henry v. Taylor*, 57 Iowa, 72; *Overseers v. Overseers*, 82 Pa. St. 276.

¹⁰ *Jones v. New Haven*, 84 Conn. 1; *City of Joliet v. Harwood*, 86 Ill. 100; 28 Am. Rep. 18; *Ashley v. Port Huron*, 25 Mich. 296; 24 Am. Rep. 552; *Taylor v. Austin*, 62 Minn. 247; *Evansville v. Decker*, 84 Ind. 325; *Rowe v. City of Portsmouth*, 56 N. H. 291; *Pye v. City of Mankota*, 86 Minn. 373; 1 Am. St. Rep. 671.

¹¹ 2 Dillon Munic. Corp. (3d ed.) § 1050; *City of North Vernon v. Voegler*, 89 Ind. 77; *Brine v. Ry. Co.*, 116 Eng. Com. L. 411; *Sprague v. Worcester*, 13 Gray, 188; *City Council v. Gilmer*, 33 Ala. 116; *O'Brien v. City of St. Paul*, 26 Minn. 331; 33 Am. Rep. 470; *Henderson v. City of Minneapolis*, 32 Minn. 319; 20 N. W. Rep. 522; *Nevins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 393; *City of Pekin v. Newell*, 26 Ill. 520; 79 Am. Dec. 378; *Templin v. Iowa City*, 81 Am. Dec. 455, and note, 456; *City of Greencastle v. Martin*, 74 Ind. 449; *Rice v. City of Evansville*, 106 Ind. 7.

RECENT PUBLICATIONS.

AMERICAN CONSTITUTIONAL LAW, by J. I. Clark Hare, LL.D. In Two Volumes. Boston: Little, Brown & Company. 1899.

In these two volumes on American Constitutional Law will be found matter that is readable in a literary point of view, to say nothing of their practical value as books of the law. They contain much that is of interest to the historian, as well as the lawyer, in the treatment of questions arising out of the first American constitutional convention, of the subject of the English constitution and its growth, and of the adoption of the various amendments to the American constitution, etc. Indeed, the volumes seem to partake as much of a political as of a legal character, and in that regard perhaps may be found their chief merit. There can be nothing more dry and uninteresting than a mere treatise on technical propositions of constitutional law. And indeed we doubt if from such a work a student derives much benefit or value. Constitutional law is less an abstract science than any branch of jurisprudence. It is a result or rather a growth. It came not full-fledged, but was born of conditions of government. It grew and expanded through the natural necessities which arose from popular government and to-day the study of constitutional law is the study of the history of constitutional government in England and its growth in America. To be sure, this may be said to some extent of any branch of the law, but it is pre-eminently so of constitutional law. Therefore, in saying that these volumes contain much on the subject of the political history of England and the United States, we feel that we are commending them to the student of constitutional law. We are informed that the matter is a series of law lectures delivered at the law school of the University of Pennsylvania and therein may be found the reason for the mild criticism with which the

¹⁰ *Lehigh Co. v. Hoffort*, 116 Pa. St. 119; 2 Am. St. Rep. 497.

¹¹ *Hill v. City of Boston*, 132 Mass. 344; 26 Am. Rep. 332. See also note to *Bryant v. St. Paul*, 21 Cent. L. J. 83.

¹² *Davis v. City Council*, 51 Ala. 139; 23 Am. Rep. 545.

Norsyth v. Mayor, 45 Ga. 153; 12 Am. Rep. 576; *Hines City of Charlotte (Mich.)*, 40 N. W. Rep. 333.

¹⁴ *Hubbell v. City of Viroqua*, 67 Wis. 343; 58 Am. Rep. 866, 867; *Little v. Madison*, 42 Wis. 643; *Schultz v. Milwaukee*, 49 Wis. 254, 259; *Norristown v. Fitzpatrick*, 94 Pa. St. 124; 39 Am. Rep. 771; *Cole v. Newburyport*, 129 Mass. 594. See also *Griffin v. N. Y.*, 61 Am. Dec. 700; *Frathers v. Lexington*, 13 B. Mon. (Ky.) 559; 56 Am. Dec. 485.

¹⁵ 2 Dillon's Munic. Corp. (3d ed.) §§ 980, 1048; *Thurston v. St. Joseph*, 57 Mo. 219; *Lloyd v. Mayor*, 5 N. Y. 369; *Richmond v. Long*, 17 Gratt. 230; *McLaughlin v. Municipality*, 5 La. An. 604; *Mayor v. Thompson*, 29 Ark. 569, 574; *Kennedy v. Mayor*, 78 N. Y. 365; *Franklin Mfg. Co. v. Portland*, 67 Me. 46; 24 Am. Rep. 1, and note; *Barton v. Syracuse*, 36 N. Y. 54; *Kobs v. Minneapolis*, 23 Minn. 159; *Roll v. City of Indianapolis*, 53 Ind. 547; *Danbury R. Co. v. Town of Norwalk*, 87 Conn. 109; *Denver v. Capelli*, 4 Colo. 25; *Mayor v. Oulens*, 35 Am. Dec. 398; *Perry v. City of Worcester*, 66 Am. Dec. 431, and note, 436; *City of Vernon v. Voegler*, 23 Cent. L. J. 340.

¹⁶ *Per Denio, C. J.*, in *Mills v. Brooklyn*, 83 N. Y. 439.

¹⁷ *Per Perkins, J.*, in *Flournoy v. City of Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 463, 473.

¹⁸ *Danbury, etc. R. Co. v. Norwalk*, 87 Conn. 109; *Amy v. Supervisors*, 1 Wall. 136. See also *People v. Super-*

work has met, to the effect that the plan is without method and the chapters follow one another with a seeming want of logical connection. Though the book as a whole is well prepared and the style admirable, there is occasionally a tendency to treat subjects at greater length than they deserve, and rather to tire the reader by the very abundance of matter. The subjects of Eminent Domain, Regulation of Commerce, Jurisdiction of Federal Courts are ably treated and in a manner that will be found of good value to the practitioner. We do not need to speak in praise of the mechanical execution of the book. It is sufficient to say that the publishers are Little Brown & Co.

A MANUAL OF CRIMINAL LAW, as Established in the State of Maryland. By Louis Hochheimer, of the Baltimore Bar. Baltimore: Harold B. Scrimger. 1899.

This book is intended primarily for Maryland consumption. And though written by a practitioner of and citing in the main authorities from that State, yet there will be found in many portions of the book decisions of other courts and instructive discussions of general propositions in the domain of criminal law. The author is a prominent member of the Baltimore bar, and is known to the readers of this JOURNAL as the author of some very readable articles published therein.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. AGENCY—Proof. — No other proof of agency is necessary than that the agent's acts justify the party dealing with him in believing he had authority.—*Hopson v. Flint R. Co.*, S. O. Wis., Jan. 29, 1899; 41 N. W. Rep. 529.

2. APPEAL—Assignment of Error. — Error cannot

be successfully assigned upon the admission of evidence by a trial court, which was admitted by the consent of the complaining party, no objection having been made thereto.—*Owaha Belt Ry. Co. v. McDermott*, S. O. Neb., Feb. 6, 1899; 41 N. W. Rep. 648.

3. APPEAL—Bond—Action. — Under Pub. St. R. I. ch. 248, § 24, providing that whenever any one under recognizance shall default, process shall be issued against the persons bound, on default of an appeal-bond binding the principal and surety severally, separate actions may be simultaneously maintained against them.—*State v. Sutcliffe*, S. O. R. I., Jan. 4, 1899; 16 Atl. Rep. 710.

4. APPEAL—Decision—Dismissal. — When a complainant in foreclosure is in due form, and a demurrer thereto is voluntarily withdrawn by defendants, and judgment is entered, and sale made, no error appearing, the appeal will be dismissed.—*Pratt v. Walk*, S. C. Mont., Feb. 2, 1899; 20 Pac. Rep. 641.

5. APPEAL—Jurisdiction. — Under Code Iowa, §§ 3163, 3164, an appeal will be dismissed where the record simply shows that a verdict was rendered in a cause, but does not show that a judgment was ever entered.—*Dickey v. Givens*, S. O. Iowa, Feb. 6, 1899; 41 N. W. Rep. 608.

6. APPEAL—Practice—Record. — Where, on appeal to the appellate court of Illinois, the action of the trial court in refusing certain instructions was sought to be reviewed, but such instructions were not contained in the bill of exceptions, the supreme court will not consider them.—*Chicago M. & St. P. R. Co. v. Yando*, S. O. Ill., Jan. 25, 1899; 20 N. E. Rep. 70.

7. APPEAL—Review. — Under Code Iowa, § 2789, exceptions to instructions alleged for the first time in a motion for a new trial filed by agreement three months after the trial were not in time to enable the court to review them.—*Bush v. Nichols*, S. O. Iowa, Feb. 6, 1899; 41 N. W. Rep. 608.

8. APPEAL—Review—Conflict of Evidence. — Where the evidence is conflicting, findings of the court on law and fact, supported by evidence, will not be disturbed.—*Sylvester v. Blamey*, S. O. Colo., Feb. 1, 1899; 20 Pac. Rep. 621.

9. APPEAL—Review—Harmless Error. — In ejectment, the court found that a patent, under which plaintiff claimed, conveyed an absolute title, but rendered judgment for defendant: *Held*, that the finding as to the effect of the patent did not injure defendant.—*McCormick v. Sutton*, S. O. Cal., Feb. 19, 1899; 20 Pac. Rep. 543.

10. APPEAL—Review—Objections not Made Below. — Objection to the form of a judgment cannot be made for the first time in the appellate court.—*Queen Ins. Co. v. Studebaker Bros. Manuf'g. Co.*, S. O. Ind., Feb. 23, 1899; 20 Pac. Rep. 299.

11. APPEAL—Review—On Rehearing. — Upon a motion for the rehearing of a cause, the supreme court will only consider such alleged errors as were specifically pointed out by counsel upon the original hearing.—*State v. Coulter*, S. C. Kan., Feb. 9, 1899; 20 Pac. Rep. 526.

12. APPEAL—Review—Trial by Court. — Where a trial has been had by the court, and no findings of fact appear in the record, it will be presumed that the facts found supported the judgment.—*Austin v. Ingalls*, S. O. Mont., Feb. 2, 1899; 20 Pac. Rep. 637.

13. APPEAL—Review—Weight of Evidence. — Findings of the court will not be disturbed, their being sufficient evidence to support them.—*Rund v. Sprague*, S. O. Ind., Feb. 23, 1899; 20 N. E. Rep. 304.

14. APPEAL—Review—Weight of Evidence. — The judgment of the trial court upon a question of fact (as to whether a sale of land was made and a bond given for deed) will not be disturbed, unless clearly erroneous.—*Hinds v. Boston*, Ky. Ct. App., Jan. 31, 1899; 10 S. W. Rep. 646.

15. ASSAULT AND BATTERY—Civil Action—Pleading. — A complaint in an action for damages for an assault need not allege the county in which the assault was

omitted.—*Sullivan v. Jones*, S. O. Ind., Feb. 14, 1889; 20 N. E. Rep. 242.

16. BANKS AND BANKING—Insolvency—Set-off.—In an action by the assignee of a bank to recover a balance due from another bank, a check drawn upon the insolvent bank, which came into the hands of the defendant prior to the assignment, should be allowed as a set-off, though the defendant simply holds the check for collection.—*Farmers' Deposit Nat. Bank v. Penn. Bank*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 761.

17. BOROUGH—Opening Streets—Eminent Domain.—Act Pa. May 24, 1878, pl. 1, does not take away the constitutional right of appeal from the award of the viewers of damages from change of grade of streets.—*Borough of Millvale v. Paxon*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 781.

18. BOROUGH—Streets—Vacation.—Under Act Pa. May 8, 1855, (H. L. 422,) and Act May 10, 1871, (P. L. 704,) the quarter sessions in Allegheny county has jurisdiction to vacate the unopened portion of a partially opened street, which was wholly within a township.—*In re Road in Sterritt Tp.*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 777.

19. BRIDGES—Defective Bridges—Liability of Cities.—Pub. St. Mass. ch. 52, § 18, renders a city liable for injuries received on a bridge through want of repair or of sufficient railing, where the injury might have been prevented by reasonable care on the part of a city, provided the city had notice of the defect, or might have had notice by reasonable diligence.—*Butterfield v. City of Boston*, S. J. C. Mass., Feb. 28, 1889; 20 N. E. Rep. 118.

20. CARRIERS—Injury to Passengers—Infants Riding Free.—Children of such an age that they were carried free, if accompanied by adults, are within Pub. St. Mass. ch. 112, § 212, though the latter are riding on free passes.—*Littlejohn v. Fitchburg R. Co.*, S. J. C. Mass., Feb. 27, 1889; 20 N. E. Rep. 108.

21. CARRIERS—Right to Eject.—The fact that deceased was in such condition that he was improperly allowed to board the train as a passenger did not deprive the conductor of the right to eject him, or render the company liable for his death.—*Louisville & N. E. Co. v. Logan*, Ky. Ct. App., Feb. 12, 1889; 10 S. W. Rep. 655.

22. CARRIERS OF PASSENGERS—Contract of Carriage.—A copartnership entered into a contract, with defendant company, the consideration of which was "a ticket, entitling either one of said [firm,] but only one to travel on the trains of said railroad company." Held, that the firm was entitled to only one ticket, which was to be presented whenever any one of the firm took passage on defendant's trains.—*Knopf v. Richmond, F. & P. R. Co.*, Va. Ct. App., Feb. 21, 1889; 10 S. E. Rep. 787.

23. CARRIERS OF PASSENGERS—Relation.—An instruction that, if defendant was engaged in the business of transporting passengers for hire on a railroad operated by him, the law denominates him a "common carrier," is correct.—*Davis v. Button*, S. O. Cal., Feb. 19, 1889; 20 Pac. Rep. 545.

24. CONSTITUTIONAL LAW—Civil Rights.—Barber-shops cannot discriminate against a colored person, and deny him any rights therein to which a white person would be entitled if requiring the services of a barber, except for reasons applicable alike to all persons.—*Messenger v. State*, S. O. Neb., Jan. 30, 1889; 41 N. W. Rep. 638.

25. CONSTITUTIONAL LAW—Deputies—Stenographers.—The word "clerk" in § 24, art. 5, of the constitution, is used in the same sense as the common law, and does not include a stenographer.—*In re Appropriations for Deputy State Officers*, S. O. Neb., Jan. 30, 1889; 41 N. W. Rep. 643.

26. CONSTITUTIONAL LAW—Local Acts—Counties.—The statute approved April 7, 1887, (P. L. 133,) in contravention of art. 4, § 7, par. 11, of the constitution, which provides that the legislature shall not pass a private, local, or special law to regulate the internal affairs of a town or county.—*Board of Chosen Freeholders v. Buck*, N. J. Ct. Err. & App., Feb. 1, 1889; 16 Atl. Rep. 698.

27. CONSTITUTIONAL LAW—Special Laws—Municipal Corporations.—Act Pa. May 23, 1874, is not in conflict with art. 3, § 7, of the constitution, prohibiting any local or special law "regulating the affairs of counties, cities," etc.—*City of Reading v. Savage*, S. O. Penn., Feb. 25, 1889; 16 Atl. Rep. 788.

28. CONSTITUTIONAL LAW—Titles of Laws.—Construction of Const. Pa. art. 3, § 3, providing that no bill shall contain more than one subject, which shall be clearly stated in its title.—*Ridge Ave. R. Co. v. Phila.*, S. O. Penn., Feb. 11, 1889; 16 Atl. Rep. 741.

29. CHATTEL MORTGAGES—Requisites.—A mortgage is not invalid by reason of the omission of words purporting to grant, sell, convey, etc.—*Marsh v. Wade*, S. O. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 578.

30. CONTRACTS—Evidence.—Where the performance of a contract is in issue, a question as to whether one of the parties had ever exhibited "any unwillingness to close up the contract" is properly excluded, as calling for the opinion of the witness.—*Roebtings Co. v. Merchants Co.*, S. O. Iowa, Jan. 30, 1889; 41 N. W. Rep. 569.

31. CONTRACTS—Joint and Several—Actions.—An action was commenced against three persons as a partnership. The case properly proceeded against the parties as individuals. The facts fixed the liability of one of the persons, and a judgment was rendered against that one individually: *Held*, not error, as all contracts and promises are joint and several.—*Smith v. Straub*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 516.

32. CONTRACTS—Measure of Damages.—In an action by plaintiff, who had a contract to erect a bridge, against defendant who failed to keep his promise to advance the necessary money for that purpose, the measure of damages is what the contract would yield less a sum sufficient to compensate its defective execution.—*Appeal of McDowell*, S. O. Penn., Jan. 7, 1889; 16 Atl. Rep. 753.

33. CONTRACT—Construction—Delivery.—Whether the transfer of a paper from one person to another is a delivery of that paper is a question of intention and it may be shown that the transfer was in trust or upon condition.—*Letter v. Pike*, S. O. Ill., Jan. 25, 1889; 20 N. E. Rep. 23.

34. CORPORATIONS—Life-tenants—Scrip Certificates for Profits Earned.—Scrip certificates of indebtedness, representing profits earned by the corporation, and issued to its stockholders, belong to the life-tenants of the stock, and not to the remainder man.—*Appeal of Philadelphia Trust, Safe-Deposit & Ins. Co.*, S. O. Penn., Feb. 11, 1889; 16 Atl. Rep. 734.

35. CORPORATIONS—Notice.—Knowledge of the president of a corporation of an unrecorded mortgage will be imputable to the corporation, he having sold the mortgaged property to the corporation.—*International Wrecking Co. v. McMorran*, S. O. Mich., Jan. 25, 1889; 41 N. W. Rep. 510.

36. COSTS—In Criminal Cases—Discretion of Court or Jury.—Under Rev. St. Ind. 1881, § 1889, the court properly charged that, if the jury found defendant guilty, they might, in their discretion, exempt him from costs.—*State v. Sevier*, S. O. Ind., Feb. 15, 1889; 20 N. E. Rep. 245.

37. COSTS—Violation of City Ordinance—Taxation Against City.—When a prosecution for the violation of an ordinance of a city of the third-class results in favor of the defendant, the fees of the police judge and of witnesses who testified in behalf of the city should be taxed as costs against the city.—*City of Iola v. Harris*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 521.

38. COSTS ON APPEAL.—Where the record on appeal is unnecessarily prolix, a deduction will be made therefrom for the purpose of taxation of costs for printing same.—*Maltby v. Plummer*, S. O. Mich., Feb. 1, 1889; 41 N. W. Rep. 683.

39. COUNTIES—Liabilities—Defective Sidewalks.—A county is not liable for personal injuries caused by a

defective sidewalk under its control.— *Clark v. Lincoln County*, S. C. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 576.

40. CRIMINAL LAW—Appeal by Territory—Questions of Law. — Under Comp. St. Mont. § 386, an appeal does not lie from an instruction to the jury to acquit defendant of larceny on the ground that the evidence showed that defendant had a partnership interest in the property taken.— *Territory v. Laun*, S. C. Mont., Jan. 17, 1889; 20 Pac. Rep. 662.

41. CRIMINAL LAW—Complaint—Violation of City Ordinance. — Liberal rules should be applied to complaints filed in the police courts for the violation of city ordinances, and the strictness of pleading is not required in such cases. — *City of Kingman v. Berry*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 527.

42. CRIMINAL LAW — Indictment Pending Application for Habeas Corpus. — It is not ground for quashing an indictment, that the indictment was found pending the hearing on a *habeas corpus*, allowed on defendant's application in another court. — *Clark v. Commonwealth*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 735.

43. DECEIT—Representations of a Seller. — One who has induced plaintiff's agent to purchase a railroad bond by representing that it was an "A No. 1" bond, is not liable, in an action for fraudulent representations, where the market price of the bond was easily ascertainable.— *Deming v. Darling*, S. J. O. Mass., Feb. 28, 1889; 20 N. E. Rep. 107.

44. DEPOSITS AND ADVANCEMENTS—Advancements. — A deposited sum of his own money in a bank to the credit of his children, making an entry in bank book as follows, "B, (child's name) A trustee: Held, under Pub. St. R. I. ch. 187, § 20, that such deposits were not advancements. — *Petition of Kibinson*, S. O. R. I., Jan. 26, 1889; 16 Atl. Rep. 712.

45. DIVORCE—Alimony—Monthly Allowance. — Under Pub. St. R. I. ch. 187, § 9, an allowance by monthly payments can be decreed upon granting a divorce *a vinculo matrimonii*. — *Sampson v. Sampson*, S. O. R. I., Feb. 9, 1889; 16 Atl. Rep. 711.

46. EJECTMENT—Mesne Profits—Evidence. — In ejectment to compel defendant to remove the mouth of a sewer from plaintiff's wharf lot, upon which there was no wharf, evidence is not admissible, on the question of mesne profits, to show the rental value of the lot if there had been a wharf there. — *Harris v. City of Philadelphia*, S. O. Penn., Feb. 11, 1889; 16 Atl. Rep. 740.

47. ELECTIONS AND VOTERS—Registry Laws—Constitutional Law. — Const. Amends. R. I. art. 7, does not by implication annul the mode of registration previously provided by Pub. St. R. I. ch. 7, § 2. — *In re Constitutional Amendment*, S. O. R. I., Nov. 24, 1888; 16 Atl. Rep. 705.

48. EMINENT DOMAIN—Compensation—Evidence. — Farmers, who reside within the vicinity of a particular farm, who know its capabilities, and who can testify that they know its value, may give their opinions in evidence with respect to its value. — *Kansas City & S. W. R. Co. v. Ehret*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 538.

49. ERROR—Writ of—When Lies—Sale of Decedent's Land. — Const. Colo. art. 6, § 22, and Gen. Laws, ch. 23, § 8, conferring jurisdiction on the supreme court to review by writ of error all final judgments or decrees of county courts, include a decree for the sale of land of a decedent to pay debts. — *Sloan v. Strickler*, S. O. Colo., Jan. 18, 1889; 20 Pac. Rep. 611.

50. ESTOPPEL—In Pais. — In an action of ejectment: Held, that the conduct of defendant when plaintiff purchased the land amounted to an estoppel. — *Shuford v. Snigler*, S. O. S. Oar., Feb. 13, 1889; 8 S. E. Rep. 793.

51. ESTOPPEL—In Pais. — Where a father drives his son out of doors, and his acts show an implied emancipation, he cannot afterwards testify, in a suit brought by him for damages for loss of his son's wages, that it had not been his intention to emancipate the son.— *McCarthy v. Boston & L. R. Crop*, S. J. O. Mass., Feb. 28, 1889; 20 N. E. Rep. 182.

52. EVIDENCE—Expert Testimony. — Expert testimony as to personal injuries is properly based in part on statements made to witness by the injured person.— *Louisville, N. A. & C. Ry. Co. v. Snider*, S. O. Ind., Feb. 21, 1889; 20 N. E. Rep. 384.

53. EVIDENCE—Of Deceased Witness at Former Trial. — The testimony of a deceased witness on a former trial cannot be shown by the statement of facts, signed by the attorneys, and approved by the presiding judge none of whom recollected it. — *Dwyre v. Ripplote*, S. O. Tex., Jan. 25, 1889; 10 S. W. Rep. 688.

54. EVIDENCE—Parol to Vary Writing. — The parties having undertaken to put their agreement in writing, evidence of a contemporaneous oral agreement is inadmissible.— *Wight v. Sampier*, S. O. Ill., Jan. 25, 1889; 20 N. E. Rep. 47.

55. EVIDENCE—Parol to Vary Writing. — A parol agreement that any damages which might be allowed, in pending condemnation proceedings, in favor of the property conveyed, should belong to the grantor, cannot be shown as against a deed executed at the same time.— *Bailey v. Briant*, S. O. Ind., Feb. 20, 1889; 20 N. E. Rep. 278.

56. EXCEPTIONS—Bill of—Contents. — Records and documents neither offered nor read in evidence should not be incorporated in a bill of exceptions, though they were commented on in the argument at the trial.— *In re Moore's Estate*, S. O. Cal., Feb. 18, 1889; 20 Pac. Rep. 588.

57. EXCHANGE—Evidence. — Upon the trial of a cause the issue being whether an oral contract for an exchange of horses was absolute or upon the express condition that the horse in question was sound and healthy. The fact that the horse was diseased, unless known to both parties, could not affect the determination of the issue as to whether the agreement of exchange was absolute or conditional.— *Rollins v. Wibye*, S. O. Minn., Jan. 31, 1889; 41 N. W. Rep. 545.

58. EXECUTION—Forthcoming Bond—Action on Pleading. — In an action upon a forthcoming bond, executed by a claimant of the goods levied on, conditioned that the goods "shall be forthcoming on the determination of" the claim issues in favor of the plaintiff, his recovery is limited to the value of the goods, and he must allege such value in his statement of claim. — *Byrne v. Hayden*, S. O. Penn., Feb. 11, 1889; 16 Atl. Rep. 750.

59. EXECUTION—Sale—Mistake in Name. — An execution sale is not vitiated by the fact that there was a mistake made in the name of the execution plaintiff in the published notice of sale, such error not having prejudiced the sale. — *Horton v. Bassett*, S. O. R. I., Jan. 26, 1889; 16 Atl. Rep. 715.

60. EXECUTION—Sale—Redemption. — Under Code Wash. Ter. 1881, § 376, subd. 1, providing that a person seeking to redeem from a sheriff's sale shall give the purchaser two days' notice of his intention to apply to the sheriff for that purpose, a notice given on the 4th of the month of an intention to apply on the 6th is sufficient.— *Scott v. Patterson*, S. O. W. Ter., Jan. 29, 1889; 20 Pac. Rep. 538.

61. EXECUTORS AND ADMINISTRATORS—Sale of Decedent's Land—Rights of Purchaser. — A purchaser of land at a sale by an administrator under the order of the court, to pay decedent's debts, has no right to cordwood cut and piled and crops growing on the land at the time of his purchase. — *Barrett v. Choen*, S. O. Ind., Feb. 2, 1889; 20 N. E. Rep. 145.

62. FENCES—Adjoining Owners—Occupation of Lands. — Under Gen. St. Colo. ch. 89, § 1, such occupation only is required as makes it advantageous for the purpose thereof to fence the land, whether its owner actually resides thereon or not.— *Muddin v. Haascombe*, S. O. Colo., Feb. 1, 1889; 20 Pac. Rep. 612.

63. GUARDIAN AND WARD—Purchase by Guardian—Resulting Trust. — A guardian purchased land, taking the title in his own name, making the cash-payment, one-third thereof out of his wards' funds, and gave his individual notes for the balance: Held, that

there was a resulting trust in favor of the wards as to one-third of the land. — *Hughes v. White*, S. O. Ind., Feb. 18, 1889; 20 N. E. Rep. 187.

64. HIGHWAYS — Adjournment — Levy on Adjourned Day. — Where highway commissioners meet for determining the rate of taxation on the day fixed by § 18, Starr & C. St. Ill. ch. 121, but adjourn action until a day named, a levy made on the adjourned day is valid. — *St. L. Nat. Stock Yds. v. Baker*, S. O. Ill., Jan. 26, 1889; 20 N. E. Rep. 84.

65. HIGHWAYS — Establishment by Statutory Proceedings. — Where the report of viewers appointed to lay out a road is referred back to them with directions "to agree upon the damages sustained to parties by said road, a change by them in the location of the road is unauthorized, and their report, including such change, will be set aside. — *In re Road in Hempfield Tp.*, S. O. Penn., Oct. 23, 1889; 16 Atl. Rep. 768.

66. HOMESTEAD — Acquisition. — A homestead right cannot be asserted against a lien which attached to the property before it became a homestead. — *Meador v. Meador*, Ky. Ct. App., Feb. 7, 1889; 10 S. W. Rep. 651.

67. HOMICIDE — Appeal — Non-appearance of Counsel. — Upon an appeal to this court the judgment will be affirmed without looking into the record if the appellant's counsel fail to appear or file a brief. — *State v. McGinnis*, S. O. Oreg., Feb. 4, 1889; 20 Pac. Rep. 632.

68. HUSBAND AND WIFE — Marriage Settlements — Statute of Frauds. — The marriage of parties is not such a partial performance of an agreement made between them as will be sufficient to take it out of the operation of the statute, which requires such agreements to be in writing. — *Adams v. Adams*, S. O. Oreg., Jan. 15, 1889; 20 Pac. Rep. 633.

69. INJUNCTION — Laying Railroad Tracks Without Authority. — Injunction will lie to prevent a railroad company from making excavations, laying tracks, and placing switches without right over the land of another. — *Lake Erie R. C. v. Michener*, S. O. Ind., Feb. 16, 1889; 20 N. E. Rep. 254.

70. INSANITY — Holding Insane Person to Bail. — A person found to be insane by the verdict of a jury is exempt, under act Kan., relating to lunatics, from being held to bail and from imprisonment on a criminal charge, so long as such verdict is in force and operative. — *In re Kidd*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 526.

71. INSTRUCTIONS — Joint parties. — Where two defendants jointly except to the giving of certain instructions, the fact that they are incorrect as to one of the defendants only furnishes no reason for a reversal of the judgment rendered against them. — *Marshall v. Newark*, S. O. Ind., Feb. 19, 1889; 20 N. E. Rep. 253.

72. INSURANCE — Adjustment of Loss. — The adjustment of a loss accompanied by a promise to pay, creates a new liability and may be made the basis of a suit at law. — *Saville v. Etina Ins. Co.*, S. O. Mont., Feb. 2, 1889; 20 Pac. Rep. 646.

73. INSURANCE — Mutual Life Associations — Bond to State. — The bond required to be given under the provisions of ch. 131, of the Laws of 1886, is an official bond, and the obligation of the same does not extend beyond the official year for which it was given, or the term of the officers who give it. — *Kaw Life Ass'n v. Lemke*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 512.

74. INSURANCE — Reinsurance — Statute of Frauds. — An agreement to reinsure is not a contract of guaranty and not within the statute of frauds. — *Bartlett v. Fireman's Ins. Co.*, S. O. Iowa, Feb. 5, 1889; 41 N. W. Rep. 601.

75. INSURANCE — Subrogation to Rights of Insurer Against Third Persons. — The refusal of the insured to assign to the insurer his cause of action against a third person, whose negligence caused the loss, in the absence of a covenant to assign, is no defense to an action on the policy. — *Insurance Co. of North America v. Fidelity Title & Trust Co.*, S. O. Penn., Jan. 14, 1889; 16 Atl. Rep. 791.

76. INTOXICATING LIQUORS — Civil Damage Law — Ev

dence. — Under Pub. Acts Mich. 1883, No. 191, that defendant had notice of deceased's habits of intoxication so as to be liable for exemplary damages must be affirmatively proved. — *Larsdore v. Kirchgassner*, S. O. Mich., Jan. 18, 1889; 41 N. W. Rep. 488.

77. INTOXICATING LIQUORS — Illegal Sales — Evidence. — On a trial for maintaining a liquor nuisance, where it appears that there was a mechanical contrivance in the alleged bar-room, to exclude persons who entered the front room, evidence that in other years defendant always exercised great care as to the persons to whom he sold liquor, is not admissible to show the innocent nature of the contrivance. — *Commonwealth v. Keman*, S. J. O. Mass., Feb. 26, 1889; 20 N. E. Rep. 101.

78. INTOXICATING LIQUORS — Illegal Sale — Evidence. — Contracting to sell a gallon of whisky generally, and receiving the price, will not complete the sale. The sale is not completed until separation of the particular gallon from the common stock, and delivery to the carrier. — *Dunn v. State*, S. O. Ga., Feb. 11, 1889; 8 S. E. Rep. 808.

79. INTOXICATING LIQUORS — License. — Where, in an application to a city council for license to sell intoxicating liquors, a member of the council signs the petition therefor as a resident freeholder of the ward in which the license is to be granted, such councilman will be thereby disqualified from voting upon the question of granting or refusing the license. — *Peeters v. Frost*, S. O. Neb., Feb. 6, 1889; 41 N. W. Rep. 627.

80. INTOXICATING LIQUORS — Local Option — Tie Vote. — Under acts of Md. providing for submission of no-license question: Held, that a tie vote is not sufficient to have a change of policy. — *Tennick v. Owings*, Md. Ct. App., Feb. 8, 1889; 16 Atl. Rep. 719.

81. JUDGMENT — Action on Judgment. — An action to recover the amount of a judgment, with interest, in which a summons is issued and served on as a money demand, is an action on the judgment, and not to revive it. — *Mawhinney v. Doane*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 498.

82. JUDGMENT — Entry — Parties not Served. — Where only one of two defendants is served with process, it is error to render personal judgment against both, though they are alleged in the complaint to be partners. — *McCoy v. Bell*, S. O. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 505.

83. JUDGMENT — Res Adjudicata. — In an action to quiet title to land, a general finding of title in the plaintiff is a conclusive decision against the defendants on the question of title, and estops them from asserting a claim of title which existed at the time of judgment. — *Co. Commrs. v. Welch*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 483.

84. JUDGMENT — Res Adjudicata — Parties. — A judgment in an action against two, in which a joint obligation is counted on, is a bar to a subsequent action against one of them for the same cause, counting on his several obligation. — *Wilson v. Buell*, S. O. Ind., Feb. 13, 1889; 20 N. E. Rep. 231.

85. JUSTICES OF THE PEACE — Statute — Construction. — Construction of Rev. St. Ind. 1881, § 1489, as to the entering and signing of a judgment by a justice of the peace. — *Emery v. Royal*, S. O. Ind., Feb. 13, 1889; 20 N. E. Rep. 150.

86. LANDLORD AND TENANT. — A tenant may vacate premises without incurring liability under his lease, where it appears that the house is in such condition that his family became sick from inhaling sewer gas, which penetrates the rooms by reason of defective plumbing. — *Leonard v. Armstrong*, S. O. Mich., Feb. 1, 1889; 41 N. W. Rep. 696.

87. LANDLORD AND TENANT — Infancy. — The execution by a minor of a lease for a share of the crops does not make him a tenant, but a tenant in common with the land-owner in the crops. — *Loomis v. O'Neal*, S. O. Mich., Feb. 1, 1889; 41 N. W. Rep. 701.

88. LANDLORD AND TENANT — Lease — Construction — Injury by Fire. — Where a lease provided that in case

the premises became untenable by fire the rent should cease till the same were rebuilt, injury by fire, rendering occupancy unpleasant, did not exempt the lessees from obligation to pay rent.—*Lewis v. Hughes*, S. C. Colo., Feb. 1, 1889; 20 Pac. Rep. 621.

89. LANDLORD AND TENANT—Leases—Covenants.—An assignee of a lease, which contains a covenant to commence a gas well at a stated time is not liable for the breach thereof, where his assignment is taken after such time.—*Washington Natural Gas Co. v. Johnson*, S. C. Penn., Feb. 18, 1889; 16 Atl. Rep. 799.

90. LIBEL AND SLANDER—Ratification of Publication.—Where a libelous article, indicating that a neighboring ticket broker is not reliable, is conspicuously posted forty days in the ticket-office of a railroad company, the jury may find that the company had knowledge of the character of the notices posted in its ticket-office, and that the libel would not have remained posted so long had not the company authorized or ratified it.—*Fogg v. Boston & L. R. Co.*, S. J. O. Mass., Feb. 28, 1889; 20 N. E. Rep. 109.

91. MALICIOUS PROSECUTION—Want of Probable Cause—Evidence of Character.—In an action for malicious prosecution, plaintiff, in order to prove that the prosecution was without probable cause, may show his good reputation, known to defendant when the prosecution was commenced.—*McIntire v. Levering*, S. J. O. Mass., Feb. 28, 1889; 20 N. E. Rep. 191.

92. MASTER AND SERVANT—Assumption of Risk.—A boy about fourteen years old was employed in a tin-shingle factory, and was injured by having his hand caught under the stamping machine: Held, that no recovery could be had for the injury, it appearing that the machine was not dangerous when properly used, and its character being as obvious to the boy as to an adult.—*O'Keefe v. Thorn*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 737.

93. MASTER AND SERVANT—Negligence.—In an action to recover for personal injuries caused by the negligence of an employer, where the injuries are proved, and the testimony tends to show that they were caused by the negligence of the employer, a verdict will not be set aside as being against the weight of evidence.—*Stevenson v. Ravenscraft*, S. C. Neb., Feb. 6, 1889; 41 N. W. Rep. 652.

94. MECHANIC'S LIENS—Materials Furnished.—Material that is furnished to a contractor for the erection of a particular building is *prima facie* upon the credit of such building.—*Poole v. Union Pac. R. Co.*, S. C. Tenn., Feb. 11, 1889; 16 Atl. Rep. 736.

95. MINES AND MINING.—A mining claim, concerning which all the laws, rules, regulations, and customs applicable have been complied with, is property capable of alienation prior to the issuance of the patent.—*Suessenbach v. First Nat. Bank*, S. C. Dak., Feb. 4, 1889; 41 N. W. Rep. 662.

96. MINES AND MINING—Lien—Enforcement.—Under act Mont. Sept. 14, 1887, § 2, giving a lien for labor on a mine for only forty-five days after such labor was performed, a complaint to enforce such a lien, which shows that the account for such labor was not filed with the county clerk until forty-six days after the labor had ceased, is demurrable.—*Alesina v. Stock*, S. C. Mont., Feb. 2, 1889; 20 Pac. Rep. 642.

97. MORTGAGE—Bill to Redeem—Interpleader.—A bill in the nature of a bill of interpleader is the proper remedy where a mortgagor seeks to redeem and there are conflicting claims to the mortgage money.—*Koppinger v. O'Donnell*, S. C. R. I., Jan. 26, 1889; 16 Atl. Rep. 714.

98. MORTGAGES—Payment of Taxes by Mortgagee—Rights of Sureties.—Defendant gave a mortgage to secure plaintiffs as sureties on an appeal-bond. Pending the appeal plaintiffs paid taxes on the mortgaged premises. The judgment appealed from was afterwards reversed: Held, under Rev. Stat. Ind. 1881, § 6451, that plaintiff could enforce the mortgage to the extent of

the taxes so paid.—*West v. Hayes*, S. C. Ind., Feb. 12, 1889; 20 N. E. Rep. 155.

99. MORTGAGE—Release by Attorney in Fact—Authority.—Where a release of a mortgage is signed by the person releasing the same as "attorney in fact," and there is nothing of record showing that he had any authority to release the same, such a release is insufficient.—*O'Neil v. Douthitt*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 493.

100. MUNICIPAL CORPORATIONS—Defective Streets—Uncontrollable Horse.—One who is injured by being thrown from a carriage, caused by its going down an embankment on the side of an avenue, cannot recover from the city therefor, when it appears that the horse drawing the carriage had become unmanageable about 165 feet from the alleged defect, and had run away.—*Higgins v. City of Boston*, S. J. O. Mass., Feb. 27, 1889; 20 N. E. Rep. 105.

101. MUNICIPAL CORPORATIONS—Ordinances—Public Improvements.—Under Rev. St. Ill. 1874, ch. 24, § 184, an ordinance providing for the construction of a brick sewer, "with necessary man-holes," is not defective because of failure to specify the location of the man-holes.—*City of Springfield v. Sale*, S. C. Ill., Jan. 24, 1889; 20 N. E. Rep. 86.

102. MUNICIPAL CORPORATIONS—Public Improvements—Sewers.—4 Priv. L. Ill. 1869, p. 224, incorporating the town of Lake, authorize the trustees to provide, by special assessment, for a system by which the sewerage of a portion of the town is conducted to a central reservoir, and thence by a pump into a main drain.—*Dressel v. Town of Lake*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 33.

103. MUNICIPAL CORPORATIONS—Vacation of Streets—Jurisdiction of Quarter Sessions.—The powers conferred on the court of quarter sessions by act of June 13, 1886, (P. L. Pa. 558), and act of May 8, 1885, (P. L. 423), to vacate a public road whenever the same shall become useless, are not exercisable in the vacation of any street, in an incorporated borough.—*In re Vacation of Henry St.*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 735.

104. NEGLIGENCE—Injury to Servant.—Plaintiff was injured by an explosion while working in defendant's mine. In an action against defendant for personal injuries: Held, that plaintiff could not recover, there being no evidence of negligence on defendant's part.—*Kelly v. Cable Co.*, S. C. Mont., Feb. 12, 1889; 20 Pac. Rep. 669.

105. NEGLIGENCE—Master and Servant.—Where a statute imposes upon a person a duty designed for the protection of others, if he neglects to perform the duty he is liable to those for whose protection it was imposed for any damages resulting proximately from such neglect.—*Osborne v. McMasters*, S. C. Minn., Jan. 30, 1889; 41 N. W. Rep. 543.

106. NEGOTIABLE INSTRUMENTS—Accommodation Paper—Affidavit of Defense.—A note, signed by an agent of the defendant, was indorsed to the plaintiff, and on its maturity a renewal note was given by the defendant: Held, that an affidavit of defense, in an action on the renewal note, which merely averred want of consideration for the first note, without averring want of authority on the part of the agent was insufficient.—*Camfield v. Ditman*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 739.

107. NEGOTIABLE INSTRUMENTS—Defense—Breach of Warranty.—In an action on a negotiable note: Held, that a breach of warranty in the consideration of the note was a good defense.—*Hays v. Kingston*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 745.

108. NEW TRIAL—Granting on Condition—Amendment.—When a new trial is granted unless a *remittitur* of the excessive damages shall be filed within ten days, and such *remittitur* is not so filed, the court cannot afterwards order that "the record be corrected so as to read" that the *remittitur* may be filed within thirty days.—*Crew v. McCafferty*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 748.

109. OFFICE AND OFFICER—Appointment—Constitu-

tional Law. — Const. Md. art. 2, § 13, providing that "all civil officers appointed by the governor shall be nominated to the senate within fifty days from the commencement of each regular session of the legislature," does not apply to appointments made under laws passed during the same session. — *Merrill v. Board of City School Commrs.*, Md. Ct. App., Feb. 26, 1889; 16 Atl. Rep. 728.

110. PARTITION—Parol Agreement—Part Performance. — A parol agreement for exchange of parts of lots, in performance of which the parts have taken possession, and erected a division fence, is a valid parol partition, and not within the statute of frauds. — *Tate v. Foshee*, S. C. Ind., Feb. 14, 1889; 20 N. E. Rep. 241.

111. PARTNERSHIP — Dissolution — Accounting. — When it is the duty of the partner in possession to sell the concern and he does not do so but carries it on with partnership property, the profits must be divided as before the termination of the partnership. — *Appeal of Plumby*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 728.

112. PARTNERSHIP—Limited Partnership. — By act Pa. March 21, 1886, § 8, if any false statement is made in the certificate in the formation of a limited partnership all the persons interested in the partnership are liable as general partners. — *Tüge v. Brooks*, S. C. Penn., Feb. 11, 1889; 16 Atl. Rep. 746.

113. PARTNERSHIP—Pleading — Promise to Contribute. — A complaint by partners against a copartner, for contribution to the payment of a partnership debt paid by plaintiffs after dissolution, need not allege an express promise by defendant to pay his proportionate part. — *Sears v. Starbird*, S. C. Cal., Feb. 11, 1889; 20 Pac. Rep. 547.

114. PARTNERSHIP—Suit by Partners—Note to Individual Member. — In an action by W and R as partners on a note alleged to have been executed to them, where the note appears to have been executed to W individually, it is error to render judgment thereon in favor of W individually. — *Weinreich v. Johnson*, S. C. Cal., Feb. 20, 1889; 20 Pac. Rep. 556.

115. PATENTS—Evidence. — Testimony of an expert that, under the principles of the patent laws, the use of one device of a series of devices patented as a process is not the use of the process, is inadmissible. — *Hubbard v. Palmer's Admrs.*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 772.

116. PERJURY—Materiality of Oath. — In order to constitute perjury, the false oath must be in some material matter. — *State v. Smith*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 529.

117. PLEADING—Complaint. — A complaint against a railroad company for the alleged intentional killing of plaintiff's cow at a highway crossing, which charges that defendant, "for the purpose of running its train of cars over said cow, willfully," ran its train at an unlawful rate of speed over plaintiff's cow, sufficiently charges that the animal was purposely run upon, and a demurrer is properly overruled. — *Indiana B. & W. Ry. Co. v. Overton*, S. C. Ind., Feb. 2, 1889; 20 N. E. Rep. 147.

118. PLEADING—Demurrer. — Where a demurrer is addressed to an entire pleading containing one good paragraph it should be overruled. — *Plymouth v. Milner*, S. C. Ind., Feb. 14, 1889; 20 N. E. Rep. 235.

119. PLEADING—Pleading and Proof—Written Instruments. — A rule of court that "defendant shall file with his plea sworn copies of any instrument of writing," means, that if defendant has a defense based on a written instrument, he must, in order to give the instrument in evidence, file a sworn copy of it with his plea. — *Dill v. Knapp*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 767.

120. POWER OF ATTORNEY—Construction. — Where the evident purpose of a power of attorney is to enable the attorney to control and convey lands obtained after the execution of such power, it will be so construed. — *Benschoter v. Atkins*, S. C. Neb., Jan. 31, 1889; 41 N. W. Rep. 639.

121. PRACTICE IN CIVIL CASES. — A defendant who demands a bill of particulars before pleading, but goes to trial on notice of issue served before such bill is filed, will be held to have waived the right to insist that the case was not properly on the docket for trial. — *Peninsular Stove Co. v. Usmun*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 608.

122. PRINCIPAL AND AGENT. — Where many employees of the defendant were hired by its foreman and worked through the season: *Held*, that the jury was warranted in finding that he had apparent authority to hire men by the season. — *Tunison v. Detroit, etc. Copper Co.*, S. C. Mich., Jan. 25, 1889; 41 N. W. Rep. 502.

123. PRINCIPAL AND AGENT—Payment to Agent — Liability to Third Parties. — The liability of an agent to repay money paid to him for his principal arises only when a party paying it has notified his agent and made a demand on him before the money was paid over to the principal. — *Cabot v. Shaw*, S. J. C. Mass., Feb. 27, 1889; 20 N. E. Rep. 99.

124. PRINCIPAL AND AGENT—Revocation of Authority. — Where C, empowered to act as agent for defendants in the purchase of wool, telegraphed them with regard to the purchase of a certain lot, a reply that he had better not take it revoked any authority to buy it. — *First Nat. Bank v. Hall*, S. C. Mont., Feb. 2, 1889; 20 Pac. Rep. 638.

125. PRINCIPAL AND SURETY—Liability of Surety. — A surety is liable upon a bond which is not executed by the principal obligor, where the surety knew the principal had not signed, but he himself intended to be bound as surety. — *Goodyear Co. v. Bacon*, S. J. C. Mass., Feb. 28, 1889; 20 N. E. Rep. 175.

126. PRINCIPAL AND SURETY—Release of Surety. — A mortgage creditor, by releasing a levy on property of a grantee of the mortgaged premises, who has assumed payment of the mortgage debt, releases to the extent of the value of such property the mortgagor and his sureties. — *Francoise's Admr. v. Shelton's Ex'r.*, Va. Ct. App., Feb. 21, 1889; 8 S. E. Rep. 789.

127. PUBLIC LANDS—Entry of Coal Lands—Public Policy. — Where a person has entered as much coal land as the statutes of the United States permit, a contract whereby another person is to enter additional coal land, obtain the title, and then convey it to the first, is contrary to public policy. — *Johnson v. Leonhard*, S. C. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 591.

128. RAILROAD COMPANIES—Crossings — Apportionment of Expenses. — St. Mass. 1878, ch. 176, § 2, is condensed in Pub. St. ch. 112, § 183, providing for a jury to revise and determine any matter of fact found in the award, and under the latter statute the jury may also revise and determine such apportionment. — *Boston & A. R. Co. v. City of Newton*, S. J. C. Mass., Feb. 27, 1889; 20 N. E. Rep. 106.

129. RAILROAD COMPANIES—Crossing — Petition. — The lessee of a railroad under a perpetual lease in the owner of that road within the meaning of Gen. St. Conn. § 3489, providing for the petitioning for change of crossing. — *Westbrook v. New York, etc. R. Co.*, S. C. Err. Conn., Jan. 19, 1889; 16 Atl. Rep. 724.

130. RAILROAD COMPANIES—Damages. — No action lies against a railroad company for the inconveniences caused to premises in the vicinity by noises, smoke, etc., arising from properly operating its railroad upon its own lands. — *Carroll v. Wisconsin Cent. R. Co.*, S. C. Minn., Feb. 11, 1889; 41 N. W. Rep. 661.

131. RAILROAD COMPANIES — Fires Set by Locomotive. — Evidence held not sufficient to prove that fire was caused by sparks issuing from the locomotive. — *Bernard v. R. Co.*, Va. Ct. App., Feb. 21, 1889; 8 S. E. Rep. 785.

132. RAILROAD COMPANIES—Killing Stock — Constitutional Law. — Act Wash. T. 1888, §§ 9-7, providing that when stock is killed on a railroad the value shall be ascertained by appraisers in a prescribed manner, and the amount shall thereupon become due and payable,

are unconstitutional as denying the right of jury trial.—*Daores v. Oregon Ry. & Nav. Co.*, 20 Pac. Rep. 601.

133. RAILROAD COMPANIES—Stock-killing Cases.—Under Rev. St. Wis. § 1810, as amended by Laws 1881, ch. 193, an action for killing a colt which went on the track through a fence built years before, but damaged by fire or otherwise, is governed by the last provision of the statute.—*Martin v. Stewart*, S. C. Wis., Feb. 11, 1889; 41 N. W. Rep. 538.

134. RECEIVERS—Appointment—Action to Enforce Lien.—In an action to enforce liens against land, where it appears from affidavits that, owing to defendant's mismanagement, the land is deteriorating, and the fences becoming destroyed, a receiver should be appointed to take charge of the property.—*Bailey v. Bailey*, Ky. Ct. App., Feb. 9, 1889; 10 S. W. Rep. 660.

135. REFORMATION OF INSTRUMENTS—Deeds.—Evidence held insufficient for a reformation of a deed to insert a reservation of the crops.—*Stewart v. McArthur*, S. C. Iowa, Feb. 8, 1889; 41 N. W. Rep. 604.

136. RES ADJUDICATA.—A judgment in a suit for imitating plaintiff's compound, in which she claimed to derive title from another as the inventor, is conclusive in a subsequent suit by her in the same court against the same defendant, in which she alleges that she is the inventor.—*Marshall v. Pinkham*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 529.

137. RESCISSION OF CONTRACTS—Fraudulent Representations.—Equity will not rescind a purchase of land on the ground that the vendor's agent made false statements as to the boundaries when the agent told the vendee that he did not know the boundaries.—*Coughlin v. Richmond*, S. C. Iowa, Feb. 7, 1889; 41 N. W. Rep. 613.

138. SERVICE OF SUMMONS.—Service of summons, issued by a justice of the peace on a non-resident of the county, while there in attendance upon the trial of an action as a party and witness, is unauthorized, and should be set aside on motion.—*Shaver v. Letnerby*, S. C. Mich., Jan. 26, 1889; 41 N. W. Rep. 677.

139. SHERIFFS AND CONSTABLES—Wrongful Levy—Indemnity from Execution Creditor.—A sheriff who under express directions of a creditor attaches property pointed out to him by the latter, may recover indemnity of the attaching creditor after judgment against the sheriff for wrongful levy.—*Standley v. Marsh*, S. C. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 592.

140. SPECIFIC PERFORMANCE—Sufficiency of Contract.—To constitute a contract of sale of real estate, where an acceptance in writing is made on one side and an alleged acceptance in writing on the other is relied upon, the written acceptance must be of the proposition as made.—*Bentz v. Eubanks*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 505.

141. STATE FUNDS—Investment.—State warrants issued in pursuance of an appropriation and secured by a levy of taxes for their payment, are "State securities," within the provisions of § 9, art. 8, of the constitution of this State.—*In re State Warrants*, S. C. Neb., Jan. 30, 1889; 41 N. W. Rep. 636.

142. STATUTES—Construction.—When the word "may" is used in a statute in conferring power upon a court, officer, or tribunal, and the public or a third person has an interest in the execution of the power, the exercise of the power becomes imperative.—*Kohn v. Hinshaw*, S. C. Oreg., Jan. 28, 1889; 20 Pac. Rep. 631.

143. TAXATION—Personal Property—Situs.—Moneys, and notes secured by mortgages on lands in another State, in the hands of an agent therein for loaning, but belonging to a resident of this State, are taxable in the district where the owner resides.—*Drinnel v. Gaylord*, S. C. Wis., Jan. 29, 1889; 41 N. W. Rep. 521.

144. TAXATION—Redemption—Variance in Treasurer's Receipt.—A variance between the treasurer's receipt and the assessment as to the number of acres in a tract sold for taxes and redeemed is immaterial where

the tract redeemed is the same as the one sold.—*Alexander v. Ellis*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 770.

145. TOWNS—Taxation—Replevin.—Under Pub. Acts Mich. 1885, No. 153, §§ 26, 27, where a township treasurer seizes property for taxes by virtue of a warrant annexed to a roll certified to be a copy of the original assessment roll, that the tax-payer cannot maintain replevin for the property so seized, because the warrant is in fact annexed to the original assessment roll instead of a copy.—*West Mich. Lumber Co. v. Dean*, S. C. Mich., Jan. 26, 1889; 41 N. W. Rep. 504.

146. TRADE-MARKS—Jurisdiction of State Courts—Injunction.—The State courts have jurisdiction of a suit to restrain the infringement of a trade-mark.—*Smail v. Sanders*, S. C. Ind., Feb. 22, 1889; 20 N. E. Rep. 296.

147. TRIAL—By the Court—Findings.—In a trial before the district court, without a jury, the court was asked to state its findings of fact and conclusions of law separately, but declined to make such findings and conclusions. The record shows that the refusal was made with the consent of the plaintiff in error: *Held*, that the refusal was not a ground of error.—*Salls v. Barons*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 485.

148. VENDOR AND VENDEE—Contract of Sale—Validity of Title.—A contract to sell and convey land cannot be satisfied where the title is in the United States, and the vendor has merely an equity. The vendee is entitled to a good legal title.—*Ankeny v. Clark*, S. C. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 583.

149. WILLS—Construction—Description of Devisees.—Under a devise to one for life, and on his death to testator's surviving children, the children surviving the life-tenant, and not those surviving testator, are intended as the remainder-men.—*Coveny v. McLaughlin*, S. J. C. Mass., Feb. 28, 1889; 20 N. E. Rep. 165.

150. WILLS—Construction—Trusts.—Construction of a will as to trusts devised.—*Jenks v. Lyman*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 67.

151. WILLS—Trusts—Private Understanding with Devisee.—A court of equity will enforce a private understanding between devisor and devisees that the latter will apply the devised estate to some purpose designated by the testator.—*Shields v. McAuley*, U. S. C. (Penn.), Dec. 24, 1888; 37 Fed. Rep. 302.

151. WITNESS—Competency—Death of Party to Contract.—On bill for specific performance of a parol agreement by complainant's deceased father to convey land to him, complainant was not allowed to testify concerning the contract.—*Taft v. Taft*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 481.

152. WITNESS—Examination—Use of Memoranda.—A witness who makes memoranda of events at the time of their occurrence, is permitted to refer to such receipts and memoranda, in order to refresh his memory.—*Sanders v. Wakefield*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 518.

153. WORK AND LABOR—Evidence.—In an action to recover for work and labor, the defendant on the trial admitted "that the services performed were reasonably worth \$16 per month if there was a contract established, either express or implied." *Held*, that the weight of testimony tended to establish a contract between the plaintiff and defendant for the payment of such services.—*Mader v. Maurer*, S. C. Neb., Jan. 30, 1889; 41 N. W. Rep. 637.

154. WRITS—Service on Non-resident—Personal Judgment.—The court acquires jurisdiction of a person by a summons and petition served upon him while he is commorant within its jurisdiction, though he is resident of another State, and a personal judgment may be taken against him.—*Thompson v. Cowell*, S. J. C. Mass., Feb. 28, 1889; 20 N. E. Rep. 170.

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CURRENT EVENTS.

THOSE interested in a revision of the divorce laws will find much food for reflection and argument, in the report of the labor commissioner to congress, on the statistics of and laws relating to marriage and divorce in the United States. It presents an analysis of the laws relating to marriage and divorce in the several States and Territories. In addition it considers the causes for which divorce is granted in the various States, the duration of marriage before divorce is granted, the residence of divorced parties, etc. One broad conclusion may be drawn from these statistics, namely, that divorce is on the increase. In the twenty years under consideration the whole number of divorces granted has amounted to 328,716. The total number of divorces granted shows a constant increase for every year of the period except one. The number granted per year has grown from 9,937 in 1867 to 25,535 in 1886. The percentage of increase in the number of divorces has been in excess of the percentage of the growth of population. The increase in the population of the United States from 1870 to 1880 amounted to 29.4 per cent.; the increase in the number of divorces for the same period was 79 per cent. There has also been an increase in the proportion of divorces to the number of married couples. In 1870 there were 664 married couples to one divorce, in 1880 there were only 479 married couples to one divorce. In the number of divorces granted during the period Illinois leads, with Ohio, Indiana, Michigan, Iowa, Pennsylvania, New York and Missouri following in the order named. Desertion is assigned as the leading ground for divorce, more than a third of the whole number for the period under consideration being granted for this cause. These statistics are startling, and furnish the strongest argument in favor of a reform of some kind. Divorce laws of the United States are a by-word among other nations and a favorite

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theme of the professional humorist. The evil results from three things: 1st, the laws of some of the States are too lax in the provisions regarding the obtaining of divorces; 2d, from the many, diverse and conflicting divorce laws throughout the United States, and 3d, though in some of the States the law is stringent as to obtaining divorce, in few of them is there any punishment on the guilty one, but on the contrary the law gives him freedom to repeat the experiment.

If the marriage tie is clearly and indubitably the means of wrong to one of the parties contracting, the law may perhaps be justified in releasing him or her from such a connection; but that the guilty party should be released in any way from the consequences of his or her fault is at once unjust and iniquitous, though the decree bear the seal of the highest court of the State. Then, again, the stricter law of one State may be evaded by a temporary residence in another where looser rulings prevail, and the very courts which would have refused a divorce are forced to recognize as valid one obtained elsewhere by a palpable trick. All of these considerations suggest the very urgent need of some reform. In this connection there will be found on page 380 of this issue an interesting case with note, recently decided by the Supreme Court of Tennessee, where they break through, to some extent, the old common law rule that a marriage valid where solemnized is valid everywhere, and make in that State divorce, at least for adultery, mean something in the way of punishment to the guilty party.

THE New York Register suggests the possibility of the federal courts taking jurisdiction of what might be called interstate divorce cases, and thereby build up a national system of divorce instead of so many local systems. The federal courts have declined to take jurisdiction in divorce, some of the judges holding that the citizenship of the wife is necessarily determined by that of her husband, and, therefore, that there cannot be a difference of citizenship such as to enable either party to remove the cause from a State court, or to enable the circuit court of the United States to take original jurisdiction; and other judges reach the same conclu-

sion on the theory that the husband and wife are one, and cannot in the nature of things have separate citizenship. These views are, undoubtedly, in accordance with the old common law, but most of the State courts have long since abandoned them; and if they were sound they would do the grossest injustice to injured wives. They only serve now as a ground for declining federal jurisdiction. It is now well settled that at least from the time of separation under the grievance the wife can have a separate domicile and separate citizenship. It is plain that the other view necessarily includes the power of a husband who has abandoned his wife to change her citizenship at pleasure from State to State wherever he goes, even though she should remain at the place of the matrimonial domicile. If the federal courts were to recognize the modern doctrine, one obstacle to a uniform system of divorce—uniform in those respects in which diversity involves the greatest evils—would be removed.

NOTES OF RECENT DECISIONS.

THE duty of a broker in respect to obeying his employer's instruction and the measure of damages for failure so to do, is well illustrated in the case of *Gallagher v. Jones*, 9 S. C. Rep. 335, decided by the Supreme Court of the United States. It appeared in that case that plaintiff, a banker in Salt Lake City, dealing in stocks for defendant on commission, held a number of shares which he had purchased for defendant, and defendant was indebted to him more than \$4,000 for advances, commission and interest over and above the market value of the stocks then held by him for defendant. On the 13th of the month, defendant telegraphed to plaintiff to sell his stocks and purchase "North Bonanza." Plaintiff did not comply, but responded by mail, declining, in a letter which reached defendant on the 15th. "North Bonanza" in the meanwhile advanced and nearly doubled in price, but very quickly, and within ten days of the instructions to buy, fell again below what it was when the order was given. The court below held that in the absence of any contract or understanding,

the plaintiff was not bound to sell and reinvest, and that he had a right to refuse to sell the securities held by him. The supreme court in reversing this opinion and in laying down the rule of damages to which defendant was entitled, says:

A broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines to continue the agency. In the absence of a special agreement to the contrary it is the principal's judgment, and not his, that is to control in the purchase and sale of stocks. The latter did not ask for any further advances by the order in question; he only directed a conversion, or change of one stock into another. The plaintiff should have given prompt notice that he objected and declined to make the change. Telegraphic communication was used by the defendant, and no reason appears why the plaintiff could not have used the same. The delay caused by using the mail alone was inexcusable under the circumstances. The plaintiff charged ample compensation for his services, and was bound to act faithfully, fairly and promptly. * * * * Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure for damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust. The rule of highest intermediate value as applied to stock transactions has been adopted in England and in several of the States in this country; whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. The cases will be found collected in *Sedgwick on the Measure of Damages*, 479 (vol. 2, 7th ed. 879, note b); *Bayne on Damages*, 83; 1 *Smith's Lead. Ca.*, 7 Am. Ed. 367. The English cases usually referred to are *Cud v. Rutter*, 1 P. Wms. 572, 4th ed., note 2; *Owen v. Routh*, 14 C. B. 327; *Loder v. Kekule*, 3 C. B. (N. S.) 128; *France v. Gaudet*, L. R. 6 Q. B. 199. It is laid down in these cases that where there has been a loan of stock and a breach of the agreement to replace it, the measure of damages will be the value of the stock at its highest price on or before the day of trial. The same rule was approved by the Supreme Court of Pennsylvania in *Bank of Montgomery v. Reese*, 26 Penn. St. 143, and *Musgrave v. Beckendorf*, 53 Penn. St. 810. But it has been restricted in that State to cases in which a trust relation exists between the parties—a relation which would probably be deemed to exist between a stockbroker and his client. See *Wilson v. Whitaker*, 13 Wright, 49 Pa. St. 114; *Huntingdon R. Co. v. English*, 86 Pa. St. 247. Perhaps more transactions of this kind arise in the State of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that State, and may be found laid down in *Romaine v. Van Allen*, 26 N. Y. 309, and *Markham v. Jaudon*, 41 N. Y. 235, and other cases, although the rigid application, of the rule was deprecated by the New York superior court in an able opinion by Judge Duer, in *Suydam v. Jenkins*, 3 Sandf. 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great that the court of appeals of New York was constrained to introduce a material

modification in the form of the rule, and to hold the true and just measure of damages in these cases to be the highest intermediate value of the stock [between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the court of appeals delivered by Judge Rapallo in the case of *Baker v. Drake*, 58 N. Y. 211, which was subsequently followed in the same case in 66 N. Y. 518; and in *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 N. Y. 368; and *Wright v. Bank*, 110 N. Y. 237, 18 N. E. Rep. 79. It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole, it seems to us that the New York rule, as finally settled by the court of appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.

As to who are fellow-servants in the law of negligence, the Supreme Courts of Dakota, Texas, and Rhode Island consider exhaustively in the cases of *Elliott v. C. M. & St. P. Ry. Co.*, 41 N. W. Rep. 758; *St. Louis, A. & T. Ry. Co. v. Welch*, 10 S. W. Rep. 529; and *Brodeur v. Valley Falls Co.*, 17 Atl. Rep. 54. The two first mentioned courts arrive at the same conclusion viz., that section hands and train operators are fellow-servants within the meaning of the law. The Dakota court says:

The question thus presented has frequently been considered by the courts of this country and England, and to the adjudications upon this subject we may turn for such explanation of this term as they may yield, and as demonstrating under what circumstances this rule has been applied. A general collection of all the authorities on this subject at this time would be impracticable, and is not necessary, but a few, selected from the many, as showing the current of authority, and the general application of the principle, will be all-sufficient. It was decided as early as 1841, in South Carolina, that a section foreman who was injured by the negligence of an engineer could not recover against their common employer for the injuries thus sustained, because they were co-employees of a common master, engaged in the same general business. *Murray v. Railroad Co.*, 1 McMul. 385. Soon after, it was determined by the Supreme Court of Massachusetts that an engineer who was in the employ of a railroad company, and was injured by the negligence of a switch-tender, could not recover damages against the company, the negligent employee being also in its employ. *Farwell v. Railroad Co.*, 4 Metc. 49. This decision has since been followed by the courts of that State, and the doctrine applied where a brakeman was injured by the negligence of a track-man, *Holden v. Railroad Co.*, 129 Mass. 268, and in *Clifford v. Railroad Co.*, 141 Mass. 564, where the injuries were sustained by a section-man, and were occasioned by the negligence of an engineer, both in the service of the company. The courts of New York have held a similar rule, and applied it in the instances following: Where a section-man was injured by the negligence of a train-man, *Coon v. Railroad Co.*, 5 N. Y. 492; where a brakeman was injured through the carelessness of an engineer, *Boldt v. Railroad Co.*, 18 N. Y. 432;

where a shoveler was injured by the negligence of train-men, *Henry v. Railroad Co.*, 81 N. Y. 373; where a fireman was killed because of the negligence of a switchman, *Harvey v. Railroad Co.*, 88 N. Y. 481. In Illinois, the rule was applied in the case of a car repairer injured by the negligence of an engineer, *Valtez v. Railway Co.*, 85 Ill. 500; and in Pennsylvania, in the case of a section-man and engineer, *Keyes v. Pennsylvania Co.*, 3 Atl. Rep. 15; in Wisconsin, in the case of a shoveler and conductor, *Heine v. Railroad Co.*, 58 Wis. 525; in Minnesota, in the case of an engineer and station agent, *Brown v. Railway Co.*, 31 Minn. 553; in Indiana, where a section-man was injured through the negligence of an engineer, *Gormley v. Railway Co.*, 72 Ind. 31; and, also, where a track-man was injured by negligence of an engineer, *Capper v. Railroad Co.*, 103 Ind. 306; and in many of the other States. In all of them where the subject has been considered by the courts, except Tennessee, the rule has been applied in like cases; and, finally, the United States Supreme Court, in the case of *Randall v. Railroad Co.*, 109 U. S. 478, has held it to be the established law, and applied it to the case where a switchman was injured through the negligence of an engineer. * * * * * The counsel for the respondent has argued with much ingenuity that the general rule of law as it has been heretofore understood has been so modified by the decision of the court in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 S. C. Rep. 184, as permits a recovery by the plaintiff in this suit. We do not think that the decision in that case supports plaintiff's position. It modifies and limits to some degree the extent to which the rule is applicable, and holds, substantially, that an employee of a railroad company may, under some circumstances, and as to some persons, become a representative of his employer to such an extent as to render his principal liable for his negligent acts; and that a conductor of a railroad train, having a right to command its movement and control the other persons employed upon it, as to such persons may cease to be a fellow-servant, while he remains in charge of such train, and may, under some circumstances, during such time, become a representative of the company. This decision modifies the rule as laid down in *Sherman v. Railroad Co.*, 17 N. Y. 153, and other like cases. But we do not understand it overrules the general rule of law that where several persons are employed in the same general service, by a common employer, and one is injured by the negligence of the other, the employer is not responsible. And see *Naylor v. Railroad Co.*, 33 Fed. Rep. 801, where it was held that an engineer and switchman were fellow-servants.

THE Texas court after reviewing the same authorities says:

We confess that the reasoning upon which the rule has been adopted is not very satisfactory. It is said that when the servant accepts the employment of the master he impliedly assumes the risk of the negligence of his fellow-servants. The argument seems illogical. It amounts to saying that the law is that he cannot recover because he takes the risk, and that he takes the risk because the law is so. By a parity of reasoning, we might assume that he takes the risk of his master's own personal negligence, and that, therefore, the master would not be liable to a servant for such negligence. A more reasonable ground is that of public policy. It is frequently asserted as the true basis of the doctrine, and is founded upon the theory that it is calculated to make servants in a common employment watchful of each other, and thereby to promote

carefulness in the performance of their duties. If this is to be taken as the true ground, the rule should be confined to those servants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows. But, however unsatisfactory may be the reasons for the doctrine, it is too well established, and its limits, in so far as the question before us is concerned, are too well defined, to permit us to intrench upon it. We feel constrained, both by the former opinions of this court and the great weight of authority elsewhere, to hold that the employees who were operating the train which caused the injury in this case were the fellow-servants of the plaintiff. If we could hold it an open question, our ruling might be otherwise; but we consider the doctrine too firmly established to be changed, except by the action of the legislature.

THE Rhode Island court, hold that the overseer of the slashing room in a cotton mill is a fellow-servant with the second foreman of the machine shop, and after quoting *Farwell v. Railroad Co.*, 4 Metc. 49, says:

The reasons here set forth are a strong answer to the position taken in the Illinois cases. *Railroad Co. v. Moranda*, 98 Ill. 302. They show an obvious impracticability in trying to gauge the liability of an employee, in a complex business, by the independence of its different branches, or by the intercommunication of those employed. Not only would it be almost impossible, in many cases, to separate the work into distinct departments, and to discern their dividing lines, but incidental duties, changing the relations of workmen to each other, would vary also the master's liability. He would thus be liable for the negligence of a servant at one time or place, and not at another. Without a personal supervision of all his help in all their work, he could not know when he was responsible and when he was not. Moreover, such a rule would govern the liability of a master when the ground work upon which the rule is founded did not exist. For, if the test of liability be that of the separate and independent duties of the servants, they may nevertheless be so near each other as to be able to exert a mutual influence to caution; or, if it be that of association, they may still be in the same department, but unable from their duties or position, to exert such influence. But, aside from these considerations, we do not think the rule is correct in principle. The principle upon which the determination of *Farwell v. Railroad Co.* proceeded is the same that has been generally followed in England and in this country, namely, that the rights and liabilities of both master and servant are those which grow out of their contract relation. The master impliedly agrees to use due care for the safety of his servant, in providing suitable places and appliances for work; and, as is universally conceded, the servant agrees to assume the ordinary risks of his employment. The most common risks of service spring from the negligence of fellow-servants. When one works with others, he knows that his safety depends on the exercise of care by those around him, as their safety depends also upon his own caution. No man can enter into an employment without a thought of this. Negligence, therefore, among workmen, is a breach of the duty which each owes to the others, and not a breach of the master's duty, if he has exercised the care that is required of him.

THE question, upon which there are few authorities, whether, in an action for malicious

prosecution, the plaintiff, to prove the want of probable cause can show that he was, to the knowledge of defendant, of good reputation, was decided in the affirmative by the Supreme Court of Massachusetts in, *McIntire v. Levering*, 20 N. E. Rep. 101. The court says:

There is some conflict of authority as to the competency of evidence of the reputation of the plaintiff in a trial of an action for malicious prosecution. There are many cases in which it is held that in actions of this kind, as in actions of slander, the general bad reputation of the plaintiff may be shown in mitigation of damages. There are also decisions that in suits for malicious prosecution such reputation may be shown to meet the allegation of want of probable cause. *Bacon v. Towne*, 4 Cush: 241; *Pullen v. Glidden*, 68 Me. 569; *Barron v. Mason*, 31 Vt. 189; *Rodriguez v. Tadmire*, 2 Esp. 721; *Gregory v. Thomas*, 2 Bibb. 286; *Bostick v. Rutheford*, 4 Hawks, 83; *Gregory v. Chambers*, 78 Mo. 294; *Rosenkrans v. Barker*, 115 Ill. 381. But the cases do not go so far as to permit proof of particular instances of bad conduct. In determining whether there is probable cause for a prosecution for the commission of a crime, the known character or general reputation of the person suspected is always an element of some importance. In a suit of this kind, where the prosecution complained of was for an offense implying moral turpitude, the plaintiff's general reputation at the time of the prosecution, if the defendant was where he would be likely to know it, is always involved in the issue, and the defendant may properly be permitted to show that it was bad. We see no good reason why the plaintiff should not be permitted, on the other hand, to show affirmatively that it was good. It is true that every one is presumed to be of good character until the contrary appears, and this presumption ordinarily saves the necessity of proof. Indeed, in civil cases, as a general rule, evidence of reputation is not competent upon a question as to liability for a particular act. But whenever character is in issue the rule is different. One charged with a crime is not obliged to rest upon a presumption of good character. *In favorem libertatis* he may prove the fact, if he can, by a weight of evidence far more effective than any mere presumption. A plaintiff in a suit for a malicious prosecution upon a criminal charge has the burden of proving that the prosecution was without probable cause. In defending against the prosecution he would have had the right to show his good reputation, although his character was not attacked otherwise than incidentally by the prosecution itself. The same incidental attack upon his character necessarily appears in the suit for the malicious prosecution. To prove that the attack was originally made without probable cause, we think he should be permitted to show his good reputation, known to the defendant when the prosecution was commenced. In several of the States there are adjudications to this effect: *Woodworth v. Mills*, 61 Wis. 44; *Blizzard v. Hays*, 46 Ind. 106; *Israel v. Brooks*, 23 Ill. 575; *Miller v. Brown*, 3 Mo. 127; *Scott v. Fletcher*, 1 Overt. 488.

LAW OF THE DOMICILE.

1. Object.
2. Capacity to Contract—Personal Status.
3. Assignment for the Benefit of Creditors.
4. Contract by Master of Vessel.
5. Personal Property.
6. Character Determined by Domicile of Owner.
7. Pledged Property—Where to be Redeemed.
8. Wills of Personal Property.
9. Married Women.

1. *Object.*—The design of the present article is not to treat of the whole law of domicile, but simply to give a summary of the law of domicile as affecting contracts, determining the character, descent and distribution of property, and the like. It is a general and well established rule, that the law of the place where a contract is made is to govern as to its nature, the obligation and interpretation of it;¹ unless the contract is to be performed in another country, in which case it is to be governed by the law of the place of performance.²

2. *Capacity to Contract—Personal Status.* The ability of a party to contract depends upon the law of the domicile when the question is one of personal ability or disability.³ Thus, the capacity of a person to execute an instrument, affecting his personal property in another jurisdiction, is to be determined by the law of the domicile.⁴ And where a husband and wife residing in Mississippi, made, in that State, a contract transferring lands, in Louisiana, from the husband to the wife, it was held, that her capacity to take lands

¹ *City of Braclford*, 29 Fed. Rep. 373; *Brooks v. New York, etc. R. Co. (Pa.)*, 1 Cent. Rep. 125; *Roach v. St. Louis Type Foundry (Mo. App.)*, 13 West. Rep. 186; *Nat. Bank of Tenant v. Tenant (Pa.)*, 1 Cent. Rep. 596; *Marvin Safe Co. v. Norton (N. J.)*, 5 Cent. Rep. 343; *Peabody v. Maguire*, 79 Me. 572; 12 Atl. Rep. 630; 5 N. Eng. Rep. 694; *Matthews v. Paine*, 47 Ark. 55; *Sparrow v. Kohn (Pa.)*, 1 Cent. Rep. 352; *Brown v. Browning (R. I.)*, 3 N. Eng. Rep. 584.

² *Pittsburg & St. Louis R. Co. v. Rothschild, (Pa.)* 4 Cent. Rep. 109; *Shoe & L. Nat. Bank v. Wood, (Mass.)*, 3 N. Eng. Rep. 119; *Marvin Safe Co. v. Norton (N. J.)*, 5 Cent. Rep. 341; *Nat. Bank of America v. Indiana Banking Co. (Ill.)*, 1 Wett. Rep. 354; *Dixon v. Blondin (Vt.)*, 2 N. Eng. Rep. 777.

³ See *Valt v. Brown*, 42 Hun (N. Y.), 394; *Matthews v. Murchison*, 17 Fed. Rep. 760; *United States v. Garlinghouse*, 4 Ben. (U. S.) D. C. 194; 11 Int. Rev. Rec. 11; *Petrie v. Voorhees*, 3 C. E. Gr. (N. J. Ch.) 285. Burgundus declares that in all matters of contract, the *lex domicilii* must prevail: *Burgundus*, 3 Tr. Cons. Cour. Floan. § 43. See *Story Conf. L.* § 431; *Whrton Conf. L.* § 92.

⁴ *Kohnes Estate*, 1 Pars. (Pa.) 399. See *Volt v. Brown*, 42 Hun (N. Y.) 394.

from the husband must be determined by the law of Mississippi; but the effect of the contract on the lands must be determined by the law of Louisiana.⁵ But it has been held by a federal court that the capacities and incapacities of an individual are to be determined by the law of the place where the person is and not by that of his domicile.⁶

3. *Assignment for the Benefit of Creditors.*—The statutory title of foreign assignees in bankruptcy or insolvency can have no recognition solely by virtue of the foreign statute, but the comity of nations allows effect to such title when they can be enforced without prejudice to the rights of creditors, and when the foreign statutes are not in conflict with the laws or its public policy of the State where the title is sought to be enforced.⁷ The validity of an assignment for the benefit of creditors, is to be tested by the law of the assignor's domicile.⁸ But a receiver appointed in another State has no extraterritorial power. The principles of comity do not apply to such a case.⁹ In Maine, a general assignment for

⁵ *Kelly v. Davis*, 28 La. An. 773. See *Laronden's Succession*, 39 La. An. 952; 3 South. Rep. 216; *Tillotson v. Prichard (Vt.)*, 12 Atl. Rep. 302; 6 N. Eng. Rep. 513; *Otis v. Gregory*, 111 Ind. 504; 13 N. E. Rep. 39; 10 West. Rep. 791; *Swamp v. Hufnagle*, 111 Ind. 452; 9 West. Rep. 629.

⁶ *Polydore v. Prince*, 1 Ware (U. S.), D. C. 402, citing and reviewing *Medway v. Needham*, 16 Mass. 157; 8 Am. Dec. 131; *West Cambridge v. Lexington*, 1 Pick. (Mass.) 506; 11 Am. Dec. 231; *Putnam v. Putnam*, 8 Pick. (Mass.) 433; *Commonwealth v. Green*, 17 Mass. 515; *Saul v. His Creditors*, 17 Mart. (La.) 596; *Case of Francesco*, 9 Am. Jur. 490; *Butler v. Hopper*, 1 Wash. C. C. 499; *Ex parte Simmons*, 4 Wash. C. C. 396; *Lunsford v. Coquillon*, 14 Mart. (La.) 40; *Rankin v. Lydia*, 2 A. K. Marsh. (Ky.) 470; *The Slave Grace*, 2 Hagg. Adm. 105-114; *Scrimshire v. Scrimshire*, 2 Hagg. Consist. 407; *Compton v. Bearcroft*, *Buller's N. P.* 114; *Stewart v. Somerset*, 1 Black. Com. 425n; *Somerset v. Stewart*, *Loft's Rep.* 1; *Stewart v. Somerset*, 11 State Trials, 340; 20 How. St. Trials, 1; *Forbes v. Cochran*, 2 Barn. & Cress. 448; *Williams v. Brown*, 3 Bos. & Pull. 69; *Shanley v. Harvey*, 2 Eden, 127, quoted in 2 Hagg. Adm. 116.

⁷ See *In re Wait's Accounting (N. Y.)*, 1 Cent. Rep. 14; *Harvey v. Watson (N. H.)*, 1 N. Eng. Rep. 482; *Glenn v. Dodge (D. C.)*, 3 Cent. Rep. 283; *Van Winkle v. Armstrong (N. J.)*, 4 Cent. Rep. 53; *Kimball v. Lee (N. J.)*, 4 Cent. Rep. 332; *Moore v. Church*, 70 Iowa, 208; *Weider v. Moddow*, 66 Tex. 372.

⁸ *Livermore v. Jenches*, 21 How. (62 U. S.) 126; bk. 16, L. ed. 702; *Wickham v. Dillon*, 2 West. L. Mo. 511; *Caskie v. Webster*, 2 Wall. Jr. C. C. 131; *D'Ivernois v. Leavitt*, 23 Barb. (N. Y.), 63; *Ockerman v. Cross*, 54 N. Y. 29; 40 Barb. (N. Y.) 465; *Moore v. Willett*, 35 Barb. (N. Y.) 633; *Smith's Appeal*, 104 Pa. St. 381.

⁹ *Day v. Postal Tel. Co. (Md.)*, 6 Cent. Rep. 441.

the benefit of creditors, by a debtor domiciled in another jurisdiction, will not protect his property, found in that State, from the attachment of a resident creditor.¹⁰ But this rule only applies to such property as is found within the jurisdiction of the State at the time of the assignment.¹¹

4. *Contract by Master of Vessel.*—A contract made by the master of a vessel in a foreign country is governed by the law of the owner's domicile, so far as respects the liability.¹² Thus, it has been held that the liability of an English vessel on which goods are shipped in England on an ordinary bill of lading, is to be determined according to the law of the flag.¹³ And a contract of affreightment, made in a foreign port by the master of a vessel owned in Massachusetts, for the delivery of the cargo in Pennsylvania, is governed by the law of the former State.¹⁴

5. *Personal Property.*—Personal property has no locality; the law of the owner's domicile is to determine the right to its possession,¹⁵ as well as the validity of its transfer or alienation, unless there be some positive or customary law of the country where it is found to the contrary.¹⁶ The fiction of law, that the domicile of the owner draws to it his personal estate, wherever it may happen to be, must yield whenever, for the purpose of justice, the actual *situs* of the property ought to be examined.¹⁷ Thus, by the laws of Illinois, an attachment of personal property there will take precedence of an unrecorded mortgage, executed in another State, where record is not necessary, though the owner, the attaching creditor, and the mortgagee, be all residents of such other State; and effect must be given in the latter, to the judgment in the attachment suit.¹⁸ A title

to personal property acquired under the laws of the domicile, is available in any other State.¹⁹ And a deed of personal property, valid by the law of the place where the parties resided, and there duly recorded, protects their title when they afterwards remove into another State to reside.²⁰

6. *Character Determined by Domicile of Owner.*—The law appertaining to the domicile of the owner determines the character of personal property.²¹ Thus a transfer of stock is governed by the *lex fori* as to the form of the transfer, but the rights of the parties under it are determined by the *lex domicilii*.²² It has been held that a transfer of the stock of a bank located in another State, if good by the law of the owner's domicile, passes the equitable title to it, unless the law of the State where the corporation is located prohibit such transfer.²³ Contracts respecting public funds or stock, bank stock, and other property of that incorporeal nature, which owes its existence to and is regulated by peculiar and local laws, must be made and carried into execution according to those laws.²⁴

7. *Pledged Property — Where to be Redeemed.*—Where property is pledged as security for a debt, the domicile of the creditor is the place at which a redemption must be made.²⁵ And if a pledge or trust of personal property be valid by the law of the domicile, it will be protected, on a subsequent removal of the parties, into another State.²⁶

8. *Wills of Personal Property.*²⁷—It is now the universal rule recognized by the common law that the succession of personal property is governed exclusively by the law of the

Bank (Ill.), 7 West. Rep. 681; *Faulkner v. Hymber* (Mass.), 2 N. Eng. Rep. 181.

¹⁹ *Shelby v. Guy*, 11 Wheat. (U. S.) 361.

²⁰ *Bank of the United States v. Lee*, 18 Pet. (U. S.) 107; 5 Cranch C. C. 319.

²¹ *The Kosciusko*, 11 N. Y. Leg. Obs. 38.

²² *Burr v. Sherwood*, 3 Bradf. (N. Y.) 85.

²³ *Black v. Zacharie*, 3 How. (U. S.) 483.

²⁴ *Dow v. Gould, etc. Co.*, 31 Cal. 629.

²⁵ *Stoker v. Cogswell*, 25 How. (N. Y.) Pr. 267.

²⁶ *Reid v. Gray*, 37 Pa. St. 508.

²⁷ Those interested in history of the question of succession to property and testamentary disposition thereof, can consult with profit Bentham's Chapter on "Succession." See 1 Bentham's Works, 334, and Maine's chapters on "The Early History of Testamentary Succession," and "Ancient and Modern Ideas Respecting Wills and Successions." See Maine's Ancient Law, chs. VI, VII, pp. 166-237. And Morgan's "Three Rules of Inheritance." See Morgan's Ancient Society, 525-554.

²⁸ See *Emery v. Union Soc.*, 79 Me. 384; 9 Atl. Rep.

¹⁰ *The Watchman*, 1 Ware (U. S.), 232.

¹¹ *The Watchman*, *supra*.

¹² *Pope v. Nickerson*, 3 Story C. C. 465.

¹³ *The Titania*, 19 Fed. Rep. 101.

¹⁴ *Pope v. Nickerson*, 3 Story C. C. 465.

¹⁵ See *Smith's Appeal*, 117 Pa. St. 30; 11 Atl. Rep. 394; 20 W. N. C. 192; 9 Cent. Rep. 595; *Blane v. Drummond*, 1 Brock. C. C. 62.

¹⁶ *Speed v. May*, 17 Pa. St. 91; 55 Am. Dec. 540; *Black v. Zacharie*, 3 How. (U. S.) 483; *Oakey v. Bennett*, 11 How. (U. S.) 83; *Harvey v. Richards*, 1 Mason C. C. 381.

¹⁷ *Green v. Van Buskirk*, 7 Wall. (74 U. S.) 139; bk. 19 L. ed. 109, reversing s. c., 2 Keyes (N. Y.) 119; 34 Barb. (N. Y.) 457.

¹⁸ *Green v. Van Buskirk*, *supra*. As to foreign attachments and the law governing them, see *Steell v. Goodwin* (Pa.), 4 Cent. Rep. 659; *May v. First Nat.*

place where the testator was domiciled²⁸ at the time of his death.²⁹ And the validity of a bequest of personal property depends upon the *lex domicilii*.³⁰ But the succession to personal property is governed by the law of the actual domicile of the intestate at the time of his death, no matter what was the country of his birth or his former domicile, or the actual *situs* of the property at the time of his death.³¹

A will of personal property must be executed according to the law of the testator's domicile, at the time of his death, or it will not pass personal property in a foreign country, though executed with all the formalities required by the laws of that coun-

891; 4 N. Eng. Rep. 452; Hutton v. Hutton (N. J.), 2 Cent. Rep. 216; Richardson v. Lewis (Mo. App.), 4 West. Rep. 267; Williams v. Nichol, 47 Ark. 254. By the law of domicile, as applied to succession, is meant, not the general law, but the law which the country of the domicile applies to the particular case: Duprey v. Wurtz, 53 N. Y. 556.

²⁸ Richardson v. Lewis (Mo. App.), 4 West. Rep. 267. See Lawrence v. Kitteridge, 21 Conn. 577; 56 Am. Dec. 885; Holecomb v. Phelps, 18 Conn. 127; Thomas Succession, 85 La. An. 19; Olivier v. Townes, 14 Mart. (La.) 90; Suarez v. Mayor, etc. of New York, 2 Sandf. Ch. (N. Y.) 173; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460; 8 Am. Dec. 581; 20 Johns. (N. Y.) 229; 11 Am. Dec. 269; Parsons v. Lyman, 20 N. Y. 103; 28 Barb. (N. Y.) 564, reversing 4 Bradf. (N. Y.) 268; Graham v. Public Admr., 4 Bradf. (N. Y.) 127; Law Rep. 386; Public Admr. v. Hughes, 1 Bradf. (N. Y.) 125; Burr v. Sherwood, 3 Bradf. (N. Y.) 85; Mercure's Estate, 1 Tuck. (N. Y.) 288; Guier v. O'Daniel, 1 Binn. (Pa.) 349n; DeSobry v. DeLalstre, 2 Harr. & J. (Md.) 191; 3 Am. Dec. 173; Blake v. Williams, 6 Pick. (Mass.) 266, 814; 17 Am. Dec. 372; French v. Hall, 9 N. H. 137; 32 Am. Dec. 341; Shultz v. Pulver, 3 Paige Ch. (N. Y.) 182; Decouche v. Savatier, 3 Johns. Ch. (N. Y.) 190; 6 Am. Dec. 478; Harvey v. Richards, 4 Cow. (N. Y.) 517n; 1 Mason C. C. 381; Ennis v. Smith, 14 How. (U. S.) 400; Pipon v. Pipon, Amb. 25; Thorne v. Watkins, 2 Ves. 35; Sill v. Worawick, 1 H. Black, 680, 691; Bruce v. Bruce, 2 Bos. & Pull. 229n; Hunter v. Potts, 4 T. R. 182; Potter v. Browne, 5 East, 180; Birtwhistle v. Baydill, 5 Barn. & Cress. 438, 450-455; 9 Bligh, 82-88; 2 Clark & Finn. 571; Enokin v. Wylie, 10 H. L. Cas. 1; Crispin v. Doglioni, 9 Jur. (N. S.) 633, affirmed L. R. 1 H. L. 304; Partington v. Attorney-General, L. R. 4 H. L. 104; Yates v. Thompson, 3 Clark & Finn. 554; Thornton v. Curling, 8 Sim. 310; Price v. Dewhurst, 8 Sim. 279, 299; Preston v. Melville, 8 Clark & Finn. 1, 12; Moore v. Budd, 4 Hagg. Ecc. 346, 352; *In re Ewin*, 1 Tyrw. 151; 1 Rose Bank Cas. 478; Phillips v. Hunter, 2 H. Black, 402, 495; Schultz v. Dambmann, 3 Bradf. (N. Y.) 379.

²⁹ Knox v. Jones, 7 N. Y. 389; Desparde v. Churchill, 53 N. Y. 192; Dupuy v. Wurtz, 53 N. Y. 556.

³¹ Russell v. Madden, 95 Ill. 485. Accordingly, one dying in the State of Sonora, Mexico, leaving no issue, nor father, his mother would succeed to the whole estate, to the exclusion of his brothers and sisters. Russell v. Madden, *supra*.

try.³² And jurisdiction over the estate of a decedent, belongs exclusively to the forum of the domicile, where the assets are situate.³³ The succession to and distribution of personal property, is regulated by the law of the owner's domicile, not by the *lex loci rei sitæ*.³⁴

9. *Married Women*.—The status of a married woman and her capacity to carry on business in a foreign State are determined by the law of her domicile.³⁵ But it is said that the forms of contract she must use and the manner in which she must sue are to be determined by the *lex loci actus*,³⁶ and the forms of conveyance used are to be determined by the *lex rei sitæ*.³⁷ Personal property given to a married woman is received under the law of her actual domicile and not of her matrimonial domicile.³⁸ And a purchase of personal property by a wife, in a State where the common law prevails, vests the same in her husband; it is governed by the law of the domicile.³⁹ The mere removal by husband and wife from another State of personal property to which the husband's marital rights had attached by the law of their formal domicile, will not change the

³² Desesbats v. Berquier, 1 Binn. (Pa.) 336; 2 Am. Dec. 448; Guier v. O'Daniel, 1 Binn. (Pa.) 349n; Flannery's Will, 24 Pa. St. 502; Carey's Appeal, 75 Pa. St. 201.

³³ Van Dyke's Appeal (Pa.), 31 Leg. Int. 69; 6 Leg. Gaz. 70.

³⁴ Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460; 8 Am. Dec. 581; Vroom v. Van Horne, 10 Paige Ch. (N. Y.) 549; 42 Am. Dec. 943; Mills v. Fogal, 4 Edw. Ch. (N. Y.) 559; Suarez v. New York, 2 Sandf. Ch. (N. Y.) 173; Parsons v. Lyman, 20 N. Y. 103; 28 Barb. (N. Y.) 564, reversing s. c., 4 Bradf. (N. Y.) 268; Graham v. Public Admr., 4 Bradf. (N. Y.) 127; 19 Law Rep. 386; Public Admr. v. Hughes, 1 Bradf. (N. Y.) 125; Burr v. Sherwood, 3 Bradf. (N. Y.) 85; Mercure's Estate, 1 Tuck. (N. Y.) 288; Grote v. Pace, 71 Ga. 281; Hutton's Exrs. v. Hutton (N. J.), 2 Cent. Rep. 216; Richardson v. Lewis (Mo. App.), 4 West. Rep. 267.

³⁵ Hill v. Pine River Bank, 45 N. H. 300. See Gibson v. Sublett, 82 Ky. 596; Volght v. Brown, 42 Hun (N. Y.), 394; Costo v. DeDernalles, 1 C. & P. 268; Ry. & Mood. 102; Story Conf. L. § 136; Pothier, Traite, des Oblig. par. 2, ch. VI, § 8; Savigny, 137; Boullenois, i, 437-439; Foelix, i, 188, No. 89. Yet it has been held that where a married woman, having a separate estate in lands in Missouri, made a contract in another State, her capacity to make the contract and its validity are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract against her separate estate there: Johnston v. Gawtry, 11 Mo. App. 322.

³⁶ Ilderton v. Ilderton, 2 H. Black, 145; Bar. Priv. Intr. L. § 53; Wachter, ii, 180.

³⁷ Sell v. Miller, 11 Ohio St. 331.

³⁸ Gidney v. Moore, 86 N. C. 484.

³⁹ Davis v. Zimmerman, 67 Pa. St. 70.

ownership of the property.⁴⁰ Bringing a wife's property from Mississippi into Alabama could not convert an equitable title into a legal one.⁴¹

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⁴⁰ Gluck v. Cox, 75 Ala. 810; Bush v. Garner, 73 Ala. 162; Cahalan v. Monroe, 70 Ala. 271.

⁴¹ Gluck v. Cox, 75 Ala. 810.

MARRIAGE — VALIDITY — CONFLICT OF LAWS—EVASION OF LAW OF DOMICILE.

PENNEGAR V. STATE.

Supreme Court of Tennessee, January 29, 1889.

Under a statute providing that a divorced party "defendant, who has been guilty of adultery shall not marry the person with whom the crime was committed during the life of the former husband or wife," a marriage between such persons, domiciled in one State, celebrated in another State, whither the parties go solely to evade the statute, is void, when they return immediately to the State of their domicile.

FOLKES, J., delivered the opinion of the court:

The defendants were indicted for lewdness, tried and convicted, and have appealed in error to this court. The record discloses the following facts: E. U. Hovey was divorced from her husband, John Hovey, by a decree of the circuit court of De Kalb county, upon the petition of the husband, charging her with adultery with William Pennegar. The decree adjudges the charge fully proven, and the divorce was granted the husband solely upon such charge. The divorced wife and the partner in guilt shortly after the divorce went to Jackson county, State of Alabama, where they were married to each other, and on the next day after their marriage returned to De Kalb county, in this State, the place of their former and present residence, where they have been living and cohabiting openly and publicly, as man and wife, all within twelve months before the indictment found in this case; the divorced husband, John Hovey, still living.

Section 3332, Mill. & V. Code, enacts: "When a marriage is absolutely annulled, the parties shall, severally, be at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the life of the former husband or wife." The marriage, being prohibited by statute, is void, if solemnized in this State. 1 Bish. Mar. & Div. §§ 46, 223; Carter v. Montgomery, 2 Tenn. Ch. 225; Owen v. Bracket, 7 Lea, 448. In the last case cited this court held the woman not entitled to homestead where the marriage was had in this State in violation of the statute quoted above. It is admitted that there is nothing in the laws of Alabama prohibiting the guilty divorced party from marrying the para-

mour. The question, therefore, presented in this record is whether citizens of this State, prohibited by the statute referred to from marrying, can, by crossing over into a sister State, where such marriages are not inhibited, claim the benefit of the marriage there contracted, when they return at once to this State, having left it for the manifest purpose of evading our statute. The question is of first impression in this State, and one not free from difficulty, by reason of certain well established principles, universally recognized in the law of marriage, which apparently would sustain such marriage, chief of which is that which says: "A marriage, valid where solemnized, is valid everywhere." Adjudged cases are to be found which, under the supposed application of this rule, have sustained marriages identical with the one at bar in all of its essential facts, while others of equal respectability have reached a different result; to some or both of which we will refer later on. Before doing so, let us see what are the general principles controlling in cases of this character. Marriage is an institution recognized and governed to a large degree by international law, prevailing in all countries, and constituting an essential element in all earthly society. The well being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property, alike demands that one State or nation shall recognize the validity of marriage had in other States or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular State demands otherwise. It may be said, therefore, to be a rule of universal recognition in all civilized countries that in general a marriage valid where celebrated is valid everywhere. We say "in general," because there are exceptions to the rule as well established as the rule itself. These exceptions or modifications of the general rule may be classified as follows: First, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; second, marriages which the local law making power has declared shall not be allowed any validity, either in express terms or by necessary implication. To the first class belong those which involve polygamy and incest; and in the sense in which the term "incest" is used, are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters. The second class, *i. e.*, those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: First, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other States generally, but in the State of the domicile of the parties, even where they have left their own State

to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, of "valid where performed, valid everywhere." To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive State policy, as affecting the morals or good order of society.

It is not always easy to determine what is a positive State policy. It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a State policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead dower, and the rights of property, in the face of the conclusions of approved text-writers, and the concurrence of the adjudications in numerous cases, relating not only to forms or ceremonies and qualifications of the parties, but also to prohibited degrees of relationship, not incestuous in the common opinion of Christian countries, and relating to marriages between persons of different race and color. Each State or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the State concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium* of "valid where solemnized, valid everywhere." The legislature has, beyond all possible question, the power to enact what marriages shall be void in its own State, notwithstanding their validity in the State where celebrated, whether contracted between parties who were in good faith domiciled in the State where the ceremony was performed, or between parties who left the State of domicile for the purpose of avoiding its statutes, when they come or return to the State; and some of the States have in terms legislated on the subject. Where, however, the legislature, as in our own State, has not deemed it proper or necessary to provide in terms what shall be the fate of a marriage valid where performed, but has in the particular case contented itself with merely prohibiting such marriage, the duty is devolved upon the courts of determining, from such legislation as is before it, whether the marriage in the other State is valid or void when the parties come into this State.

If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such marriage valid here; but if the statutory prohibition is expressive of a decided State policy as a matter of morals, the courts must adjudge the marriage void here, as *contra bonos mores*. Thus, in *State v. Bell*, 7 Baxt. 9, this court held that a marriage between a white

person and a negro, valid in Mississippi, where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage. This case is distinguishable from the case at bar, not only by reason of the domicile in Mississippi, but also in that we have a highly penal statute on the subject of marriages between whites and blacks, passed in 1870, in amendment of the act which prohibited such marriage theretofore, and by the very pronounced convictions of the people of this State as to the demoralization and debauchery involved in such alliances. The decision in the above case is so manifestly in keeping with sound principles now well established that it need not be here fortified by citation of authority; but we pause to call attention to a case relied on by counsel for defendants, holding not only that such a marriage, solemnized in Rhode Island (where it was legal), between persons domiciled there, would be valid in Massachusetts, but that it was valid in the latter State where the parties had left Massachusetts, and gone into Rhode Island, for the express purpose of evading the Massachusetts law prohibiting such marriages, and returned to Massachusetts. *Medway v. Needham*, 16 Mass. 157. This was certainly carrying the doctrine of "valid where performed, valid everywhere," to an extreme limit. The case has been much criticised—more so, indeed, than it deserves, as it seems to us; for while, to our mind, the result is startling, it is not out of harmony, in its argument, with the principles we have stated. The learned judge delivering the opinion, in speaking of the exception to the general rule, says: "Motives of policy may likewise be admitted into the consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a State where they were held unlawful and void, in countries where they were not prohibited, and the parties return to live in defiance of the religion and laws of their own country. But it is not to be inferred from a toleration of marriages which are prohibited merely on account of political expediency; that others, which would tend to outrage the principles and feelings of all civilized nations, would be countenanced." So that the difference between this case and *State v. Bell*, 7 Baxt. 9, is a difference in the "motives of policy" and ideas of "political expediency." We do not think, therefore, that the case is open to the criticism passed upon it by the lord chancellor in *Brook v. Brook*, 9 H. L. Cas. 193, which case is itself, with equal propriety, criticised by Gray, C. J., in *Com. v. Lane*, 113 Mass. 458, which contains a very able and elaborate review of the subject under consideration. Though unable to concur in some of the argument, and especially with the dictum that "a marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere, according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have

gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the State shall have no validity here." Of course we refer to so much of the above as we have italicised, for it is the purest *dictum*; it being a case where there was no proof of an intent to evade the laws of Massachusetts, as shown by the judge himself, who concludes the opinion as follows: "Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another State, according to its laws, at least without proof that the parties went into that State, and were married there, with the intent to evade the provisions of the statutes of this commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment is in due form." This case being an indictment for polygamy, where a wife, having obtained a divorce on account of the husband's adultery (in which case he was prohibited from marrying again without leave of the court), the husband married another woman in another State without proof that the second wife ever resided in Massachusetts prior to the marriage, and without proof of a purposed evasion of Massachusetts law.

Recurring for a moment to *Medway v. Needham*, it may well be that, recognizing and applying the same general principles, the courts in different States may reach different results in the same class of cases, according as the general and fixed sentiment of the public in the respective States may differ in matters of public policy, and, if not, of "political expediency." What might be deemed a mere regulation in one State might be regarded as a matter actually affecting the morals and good order of society in another; so that what is pointed out as a reproach to the law by reason of the conflict in the reported cases from different States and nations is in fact evidence of the universality of the general principles recognized as fundamental by all enlightened courts; the different results reached being due to the statutory enactment of the different States as construed by the courts thereof, who interpret the meaning, intent, and scope of each particular statute on the subject of marriage in the light of the known policy of the State, deviating from the general principles of the international law of marriage only so far as they are constrained to do so by the terms of legislative enactment, or by the manifest and distinctive policy of the State, as understood by the courts. Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at bar, is expressive of a decided State policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, nor the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another State for the purpose of

avoiding our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibiton, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto, as upon the inherent right of the rule itself.

After what has been already said in the earlier part of this opinion, it is doubtless unnecessary to say that in reaching the conclusion just announced we do not intend in the slightest degree to encroach upon the principle which recognizes as valid marriages had in other States, where the parties have gone to such other States for the purpose of avoiding our own laws in matters of form, ceremony, or qualification merely; but, confining ourselves to the facts of this case, we hold that where citizens of this State withdraw temporarily to another State, and there marry, for the purpose and with the intent of avoiding the salutary statute in question, passed in pursuance of a determined policy of the State, in the interest of public morals, peace, and good order of society, such parties, upon their return to this State and cohabiting as man and wife, are liable to indictment in the courts of this State for lewdness.

The case of *Dickson v. Dickson*, 1 Yerg. 110, has no concern with the point adjudged in the case at bar. That case merely decides that a person divorced in Kentucky for adultery, and not by the laws of that State permitted to marry again, might contract a valid marriage in this State prior to the act of 1835, which for the first time prohibited such marriages; and, having come to this State in good faith, married, and continued to reside here up to the time of her husband's death, she was held entitled to dower. The only instruction to be drawn from this case is that, notwithstanding our statute, these parties might have contracted a marriage in Alabama, where there is no similar statute, had they remained there in good faith, which would be valid in that State.

Putnam v. Putnam, 8 Pick. 433, is a case deciding directly contrary to the conclusion we have reached, and the facts in that case were identical with this. It is extremely brief, is unsatisfactory to us from every point of view, and is predicated entirely upon the case of *Medway v. Needham*, 16 Mass. 157, decided 10 years before, which the court said was "binding upon us and the community until the legislature shall see fit to alter it." While speaking of *Medway v. Needham*, the opinion continues: "The court were aware of all the objections to the doctrine maintained in that case, and knew it to be *vezata questio* among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely, the extreme danger and difficulty of vacating a marriage which, by the laws of the country where it is entered into, was valid." It is manifest that the effort to

fortify *Medway v. Needham* by assuming that it is based on the law of England must fail if the house of lords are competent to testify as to the state of the law in England on the subject, for we find that in *Brook v. Brook*, 9 H. L. Cas. 219, the lord chancellor, in speaking of the case of *Medway v. Needham*, as we have already seen, says: "It is entitled to but little weight, and is based upon decisions which relate to form and ceremony of marriage;" and adds: "If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier, and entering another State in which this marriage is not prohibited, to celebrate a marriage forbidden by their State, and, immediately returning to their own State, to insist on their marriage being recognized as lawful." This is, in our opinion, the true doctrine, and we have quoted so much to show that the highest English court does not hold to the principle upon which it is claimed by the Massachusetts court the *Medway Case* is based. But with due deference we must be permitted to say that the decision in the case of *Brook v. Brook* goes further than we think the principle announced requires,—further at least than we would be inclined to go,—when, as was done in that case, it was held that, while both were resident in England, the man marrying his deceased wife's sister in Denmark, where such marriage was legal, and returning to England, the marriage was void there, because a marriage between parties so related was contrary to the laws of England. Such a marriage would, we think, not fall within any of the exceptions to the general rule. It certainly cannot be said to be incestuous in the estimation of Christendom, and it would seem that under the policy of many of the States of this Union such a marriage is not immoral, nor tending to any social evil affecting the welfare of society. But, after all, it must be admitted that it was for that court to determine whether or not the law infringed was indicative of a decided and essential public policy in England; and the courts of that country would doubtless be as slow to approve our estimate of the public policy which condemns the marriage of the divorced adulterer, since the clause prohibiting such marriage was, upon the argument of Lord Palmerston, that the guilty party was preserved from ruin by such a marriage, stricken from the divorce bill in the house of commons, as we are to accept their opinion that a marriage between a man and his deceased wife's sister is contrary to good morals.

We return for a moment to *Putnam v. Putnam*, *supra*, to note that the court in this case closes its opinion with this language: that "if it shall be found *inconvenient* or repugnant to *sound principles* [the italics are ours] it may be expected that the legislature will explicitly enact that marriages contracted within another State, which, if entered into here, would be void, shall have no

force within its commonwealth." The legislature did shortly thereafter so enact; whether because the doctrine laid down in the case was inconvenient, or because repugnant to sound principle, does not appear. In our view of the law, both considerations might well have moved the legislature. *Stevenson v. Gray*, 17 B. Mon. 193, is a case holding the doctrine of *Putnam v. Putnam*, and, after what we have said about the latter case, need not be further noticed here.

Van Storch v. Griffin, 71 Pa. St. 240, does not sustain the contention of counsel on the point decided, as there is nothing in the case to show that the parties went from one State to the other for the purpose of evading the laws of the one. It merely holds that the decree of divorce in New York, which forbade the respondent from marrying again during the life of the libelant, had no extraterritorial effect; so that when it is said in the opinion about going from one State to the other for the purpose of evading the law of the State granting the divorce is *dictum*, pure and simple.

In full accord with the conclusion we have reached in the case at bar is *Kinney v. Com.*, 30 Grat. 858, where it was held that a marriage between a negro and a white person, had in the District of Columbia, for the purpose of evading the law of Virginia, was void upon their return. To the same effect, see *State v. Kennedy*, 76 N. C. 251; *Scott v. State*, 39 Ga. 321; *Dupre v. Boulard*, 10 La. Ann. 411. The intention to evade the law by going into another State was made the test of its validity in North Carolina, as will be seen by reference to the two cases of *State v. Kennedy*, 76, N. C. 251, above cited, and *State v. Ross*, Id. 242,—both marriages between a white person and a negro. In *Kennedy's Case*, such intention being shown, the marriage was held void; while in *Ross' Case*, it being shown that there was no intent to return to North Carolina, though the parties afterwards did so, the defendant was held not guilty of fornication. This was, however, by a divided court, and is contrary to our own case of *State v. Bell*, 7 Baxt. 9.

We conclude this opinion, already too long, by a reference to *Williams v. Oates*, 5 Ired. 535, where Chief Justice Buffin, in delivering the opinion of the court in a case very similar to our own, says: "Now, if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws and their operation on its own citizens as not to allow them to be evaded by acts in another country, purposely to defraud them." See also, *Whart. Conf. Laws*, §§ 136, 181, 182.

Let the judgment of the circuit court be affirmed.

NOTE.—The following general rule announced by the Supreme Judicial Court of Massachusetts¹ upon the validity of marriages contracted in other States and countries is believed to be essentially correct:

"By that law [*jus gentium*] the validity of a marriage depends upon the question whether it was valid

¹ *Commonwealth v. Lane*, 118 Mass. 458.

where it was contracted; if valid there, it is valid everywhere.² The only exceptions admitted by our law to that general rule are of two classes: 1st. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries. 2d. Marriages which the legislature of the commonwealth has declared shall not be allowed any validity, because contrary to the policy of our own laws.³ The first class includes only those void for polygamy or for incest. To bring it within the exception on account of polygamy, one of the parties must have another husband or wife living. To bring it within the exception on the ground of incest, there must be such a relation between the parties contracting as to make the marriage incestuous according to the general opinion of Christendom; and by that test the prohibited degrees include, beside persons in the direct line of consanguinity, brothers and sisters only, and no other collateral kindred.⁴ * * * A marriage abroad between persons more remotely related, not absolutely void by the law of the country where it was celebrated, is valid here, at least until avoided by a suit instituted for the purpose, even if it might have been so avoided in that country; and this is so whether the relationship between the parties is one which would not make the marriage void if contracted in this commonwealth, as in the case of a marriage between a widower and his deceased wife's sister, or one which would invalidate a marriage contracted here, as in the case of a marriage between aunt and nephew.⁵

A marriage, valid where contracted and where the parties are domiciled, is valid in another State to which the parties subsequently remove, though it would not have been valid if entered into in such latter State, provided that it is not within the degrees of consanguinity above mentioned, and that the statutory prohibition of the latter State is not plainly intended to apply to marriages contracted elsewhere. This rule has been applied to uphold marriages between white and colored persons,⁶ and between aunt and nephew.⁷ A marriage prohibited by a decree of a court of the domicile of the parties is valid, if contracted in another State to which the parties resort to evade the law, where there is no intention of returning to the former State.⁸ As to the validity of marriages between persons who go into another State or country to celebrate such marriages, in evasion of the laws of their domicile, expecting to return thereto, the authorities are in conflict. In an English case, Lord Campbell said:

"There can be no doubt of the general rule that 'a foreign marriage, valid according to the law of the country where it is celebrated, is good everywhere.' But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although

the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such in essentials as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated."⁹

In that case, a marriage celebrated in Denmark between a man and the sister of his deceased wife, was held void in England, though valid in Denmark.

Where the marriage is celebrated in another State to avoid the law of the parties' domicile in a matter affecting the form of entering into the contract only, the marriage is good upon the return of the parties to their domicile;¹⁰ and this rule applies where resort is had to the other State to avoid the necessity of securing the consent of parents or guardian, where such consent is not an essential element of the capacity of the parties to contract marriage.¹¹ If the prohibition of the law extends to the capacity of the parties to enter into the marriage contract, a marriage abroad between English parties is void in England;¹² and the rule obtains in a number of States in this country as to marriages celebrated abroad or in sister States.¹³ On the other hand, it is held in a number of States that a marriage between citizens thereof, celebrated in another State, whither the parties resort to avoid the law of their domicile in a matter affecting their capacity to marry, is valid everywhere.¹⁴ The rule has been applied to such marriages between whites and blacks,¹⁵ and between a man and the widow of his deceased uncle.¹⁶

"If a man who has been unlawfully married in this commonwealth, and whose wife has obtained a divorce *a vinculo* here because of his adultery, so that he is prohibited by our statutes from marrying again without leave of this court, is married without having obtained leave of the court, and being still a resident of this commonwealth, to another woman in another State, according to its laws, and afterwards cohabits with here in this commonwealth," his second marriage is valid here, and he is not liable to indictment for polygamy.¹⁷

⁹ Brook v. Brook, 9 H. L. Cas. 305.

¹⁰ Story's Conf. Laws (8th ed.), 124a, and cases cited. *Contra*: Holmes v. Holmes, 1 Abb. (U. S.) 525.

¹¹ Compton v. Bearcroft, Bull. N. P. 114; 2 Hagg. Cons. 444; Steele v. Braddell, Milw. 1; Simonin v. Mallac, 2 Sw. & Tr. 67; Story's Conf. Laws (8th ed.), § 79a, 112a. *Contra*, if such consent is of the capacity of a party to contract by English rule: Sussex Peerage Case, 11 Cl. & F. 85, 142; Sottomayor v. DeBarros, 3 P. D. 1.

¹² Brook v. Brook, 9 H. L. Cas. 198; Sottomayor v. DeBarros, 3 P. D. 1 (C. A.). Compare Compton v. Bearcroft, 2 Hagg. Cons. 430. A marriage, celebrated in Germany, between a German naturalized in England and a German woman, the sister of his deceased wife, was held void: Mette v. Mette, 1 Sw. & Tr. 416.

¹³ Dupre v. Boulard, 10 La. Ann. 411; State v. Kennedy, 76 N. C. 251; Kinney's Case, 80 Gratt. (Va.) 858; True v. Ranney, 1 Fost. (N. H.) 52.

¹⁴ Putnam v. Putnam, 8 Pick. (Mass.) 433; Commonwealth v. Hunt, 4 Cush. (Mass.) 49; Greenwood v. Curtis, 6 Mass. 379; Ponsford v. Johnson, 2 Blatchf. (U. S.) 51; Danell v. Danell, 4 Bush (Ky.), 51; Ross v. Ross, 129 Mass. 247; Van Voorhis v. Van Voorhis, 86 N. Y. 18; 1 Bish. Mar. & Div. § 355.

¹⁵ Medway v. Needham, 16 Mass. 157. See also State v. Ross, 76 N. C. 242.

¹⁶ Stevenson v. Gray, 17 B. Mon. (Ky.), 193.

¹⁷ Commonwealth v. Lane, 118 Mass. 453; S. P. Van Voorhis v. Brintwall, 83 N. Y. 18.

² Redgrave v. Redgrave, 38 Md. 93; Johnson v. Johnson's Admr., 39 Mo. 72.

³ Sutton v. Warren, 10 Metc. (Mass.) 451.

⁴ 1 Bishop Mar. & Div. § 377.

⁵ Sutton v. Warren, *supra*.

⁶ Ross v. Ross, 129 Mass. 243; Succ. Caballero v. Executor, 24 La. An. 573; Pearson v. Pearson, 51 Cal. 120.

⁷ Sutton v. Warren, *supra*.

⁸ Dickson v. Dickson, 1 Yerg. (Tenn.), 110; Reed v. Hudson, 13 Ala. 570; Fuller v. Fuller, 40 Ala. 301; Van Storch v. Griffin, 71 Pa. St. 240; West Cambridge v. Lexington, 1 Pick. (Mass.) 503.

It is also a general rule that a marriage void where celebrated is void everywhere.¹⁸ But to this rule the following exceptions must be noted:

"If the parties are sojourning in a foreign country, and under the local law there is no way by which they can enter into a valid marriage, they may marry in their own forms, and it will be recognized at home as good."¹⁹

"If in the place of celebration there is a special law differing from the general, permitting foreigners to marry in a way peculiar to themselves and making the marriage good, they may avail themselves of it, and their marriages, if not contrary to the law of their domicile, will be valid also at home."²⁰

"An invading army carries with it the law of the country to which it belongs; and if, while hostilities are progressing a marriage is celebrated within its lines, it need not conform to the law of the invaded country."²¹

To the foregoing exceptions may be added marriages in foreign States in special ways provided by the law of the domicile of the parties,²² and marriages of subjects in foreign states who are by the fiction of law considered to be resident at home.²³

CHARLES A. ROBBINS.

¹⁸ *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 418; *Butler v. Freeman*, Amb. 801; *Kent v. Burgess*, 11 Sim. 361; *McCulloch v. McCulloch*, Ferg. App. 257; 3 Eng. Ec. 419; *Lacon v. Higgins*, D. & R. N. P. 38; 3 Stark. 178; *Roche v. Washington*, 19 Ind. 53; *McDeed v. McDeed*, 67 Ill. 545; *Hutchins v. Kimmell*, 31 Mich. 126; *Blaisdell v. Bickum*, 189 Mass. 250; 2 Kent Com. 93. But see *City v. Williamson*, 10 Phila. 176; *Story's Conf. L.* (8th ed.) 218 and note.

¹⁹ *Loring v. Thorndike*, 5 Allen (Mass.) 257; 1 Bish. Mar. & Div. § 392, and cases cited.

²⁰ *Id.* §§ 393, 396.

²¹ *Id.* § 399.

²² *Stew. Mar. & Div.* 110; *Loring v. Thorndike*, 5 Allen, 257.

²³ *Stew. Mar. & Divorce*, 111. As a marriage at an ambassador's: *Id.* or on a war ship: *Id.*

RECENT PUBLICATIONS.

THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES. By Robert S. Blackwell. Fifth Edition. Revised and Enlarged by Frank Parsons. Two Volumes. Boston: Little, Brown & Co. 1889.

This is the fifth edition of a work which first made its appearance more than twenty-five years ago, and which is as well known to-day as any American text book in existence, with the possible exception of the treatises of Washburn, Story, and Greenleaf. Indeed, the fact that the demand for it has been such as to exhaust four editions, is the best evidence of its value and permanency. It may be regarded as the standard text-book on tax-titles, though the smaller work by Mr. Black lately published contains the principles of the subject more concisely stated. This edition is by Mr. Frank Parsons, who, in order to accommodate the supply of matter, was obliged to put it into two volumes, each of nearly 600 pages. The text of the old edition has been broken up into convenient distinctly-named sections, and the old notes, with their scattered disintegrated wealth, have been digested and incorporated with the text, and the sections so numbered and arranged as to be of easier reference. The subject of this book is growing in importance. The development and growth of the west and northwest, with the at-

tendant real estate transactions, is sure to furnish a great deal of litigation on the subject of tax-titles, and therefore to make this book invaluable to the pioneer real estate lawyer. The only practical objection that will be urged against it, is that the subject is largely statutory, and the laws of each State differ more or less in the procedure necessary to sell land for taxes. But, as a matter of fact, the author has anticipated this objection and treated of the validity of tax-titles from all points of view, and in a manner sufficiently comprehensive to include all the various phases of statutory enactment and the procedure from the listing and valuation of land and the levy of the tax down to the sale, confirmation and redemption.

TREATISE ON PRIVATE CORPORATIONS. The Effect of the clause of the Constitution of the United States that forbids a State to pass a "Law Impairing the Obligation of Contracts" upon the Police Control of a State over Private Corporations. By Wm. Wharton Smith, of the Philadelphia Bar. Philadelphia: Rees Welsh & Co., Law Publishers, 19 South Ninth Street. 1889.

The name of this book, or more properly speaking booklet, is misleading. One who opens its pages with the expectation of disclosing "a treatise on private corporations," will find instead a rather desultory and disconnected discussion or brief, on a limited scale, of the subject of police power and the right of a State to pass laws regulating and controlling private corporations. To be sure the author, on its title page, seeks to rectify the obvious error in its name by stating what the books really treats of, but an author ought, as far as possible, to convey that information to the public, by his selection of a name for his book, and not seem to obtain readers or purchasers by false pretenses. This book has sixty-three pages. It is divided into twelve chapters, with nothing at their head to indicate the subjects of which they treat. We have read the book and find it quite interesting, and, as far as it goes, valuable, and we are tempted to exclaim with the fellow who ordered beef steak at a restaurant and received a piece hardly discernable by the naked eye—"We like the sample."

PRIVILEGED COMMUNICATIONS AS A BRANCH OF LEGAL EVIDENCE. By John Frellinghuysen Hageman, Counsellor at Law, Princeton, New Jersey. The trade supplied through Honeyman & Co., Publishers of the New Jersey Law Journal, Somerville, N. J. 1889.

We have no doubt that this book will be heartily welcomed by the profession. It treats of a branch of the law of evidence which is but lightly considered in existing text-books on the subject, and we know of no single volume on the subject of confidential or privileged communications. The subject is of growing importance, especially that which relates to journalistic privileges and the rights of mercantile agencies, both of which subjects are fully treated in this book. The tendency of the law makers in many of the States to pass satisfactory libel laws, and the questions likely to arise as to what should or should not be regarded as privileged, will make this book of especial value, in informing legislators as to what the law now is. The judges of the courts, we conceive, will also find this book useful, in pointing out to them, in the hurry of trial, the proper paths in the midst of many perplexing ways. The subjects of communications between attorney and client, doctor and patient, husband and wife are well treated as well as the subject of judicial privileges, that is of a witness, jurors, and grand jurors.

The book has something over three hundred pages, beautifully printed in clear type and its mechanical execution is very good.

QUERIES ANSWERED.

QUERY NO. 17.

[To be found in Vol. 28, Cent. L. J. p. 344.]

See *Herman Chat. Mort.*, 145, 361; *Day v. Munson*, 14 Ohio St., 488; *Goodbar & Co. v. Dunn*, 61 Miss., 624. From these it would appear that A and C would get the whole of the proceeds and that B would get nothing. We don't say we agree with these cases.

D. M. & A.

Another Answer. According to the statutes of Ohio B would take \$10,000, and C would take \$10,000, *Stanseil v. Roberts*, 13 Ohio St., 148. In this State A's mortgage is not superior to B's.

G.

Another Answer. Supposing land sells for \$20,000, as between A and B. A would be entitled to the first \$10,000 and B the second. As between B and C, B would be entitled to the first and C to the second. B being entitled to the second \$10,000 as against A and the first as against C would in any event have to be paid, and C having no notice of A's mortgage would take before and consequently A would get nothing.

A. D.

WEEKLY DIGEST

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1. **ABATEMENT**—Assignment for Benefit of Creditors. — The right of action by a creditor against his debtor is not barred by the latter's assignment, nor are his rights affected in proceeding to judgment by reason of having filed his claim with the county clerk in the assignment proceedings. — *Detroit Stove-works v. Osmon*, S. C. Mich., Feb. 8, 1889; 41 N. W. Rep. 845.

2. **ADVERSE POSSESSION**. — If one by mistake inclose the land of another, and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted, possession as owner for the statutory period will work a disseizin and his title will be perfect. — *Lery v. Yerga*, S. C. Neb., Feb. 13, 1889; 41 N. W. Rep. 773.

3. **APPEAL**—Review—Weight of Evidence. — Where the evidence is conflicting, and there is no evidence to support the verdict, it will not be disturbed. — *Iser v. Bland*, S. C. Ind., Feb. 23, 1889; 20 N. E. Rep. 808.

4. **APPEAL**—Review—Objections Waived. — Objections to instructions not urged in the briefs of counsel will not be considered. — *Marts v. Putnam*; S. C. Ind., Feb. 20, 1889; 20 N. E. Rep. 270.

5. **APPEAL**—Practice—Time of Taking. — Though the judiciary is an independent department of the government, deriving its powers from the constitution, and not from the legislature, yet the legislature may limit the time for taking appeals. — *Smythe v. Boswell*, S. C. Ind., Feb. 19, 1889; 20 N. E. Rep. 263.

6. **APPEAL**—Bond—Possession of Land. — Where the possession of land occupied by the defendant as tenant of the plaintiff was awarded to the latter by the judgment of a justice, a bond given by the defendant on an appeal to the circuit court will cover rents accruing pending the appeal, under Rev. St. Ind. § 5236. — *Stults v. Zahn*, S. C. Ind., Feb. 12, 1889; 20 N. E. Rep. 154.

7. **APPEAL**—Trespass—Evidence of Title. — One not in the actual possession of certain land, and not having title by prescription, must show a grant from the State in order to recover for trespasses committed on such land. — *Parker v. Waycross & F. R. Co.*, S. C. Ga., Feb. 20, 1889; 8 S. E. Rep. 671.

8. **ASSAULT AND BATTERY** — Dangerous Weapon. — To point an unloaded gun at another, at a distance of from thirty to seventy yards, whereby such other is put in fear, and flees, is not an assault with a dangerous weapon. — *State v. Godfrey*, S. C. Oreg., Jan. 28, 1889; 20 Pac. Rep. 625.

9. **ASSIGNMENT FOR BENEFIT OF CREDITOR** — Conflict of Laws. — An insolvent debtor, resident of the State of Illinois, made a general assignment for the benefit of his creditors. The assignment included real estate owned by the insolvent in this State. The assignor, with the approval of the court in Illinois, sold the land in Kansas: *Held*, the purchaser at such a sale got no title, the land not having been sold in accordance with the provisions of an act to regulate voluntary assignments for the benefit of creditors. — *Thompkins v. Adams*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 530.

10. **ASSIGNMENT FOR BENEFIT OF CREDITORS** — Action to Set Aside. — Under Gen. St. S. C. § 2016, a simple contract creditor may maintain an action to set aside an assignment, and for the appointment of a receiver, on the ground that the assignee is insolvent and incompetent. — *Regenstein v. Pearlstein*, S. C. S. Car., Feb. 27, 1889; 10 S. W. Rep. 850.

11. **ASSIGNMENT FOR BENEFIT OF CREDITORS** — Statement of Assets. — Under Rev. St. Mo. § 362, an assignor for the benefit of creditors must file with the deed of assignment a verified statement setting forth the nature and value of the estate and effects assigned: *Held*, where the assigned property consisted of manufactured clothing, fixtures, and accounts, difficult of exact valuation, that a statement of value at "about \$3,500" was sufficient. — *State v. Adler*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 824.

12. **ATTACHMENT** — Exemplary Damages. — In an action for seizure of goods under a wrongful attach-

ment, an instruction that, if the jury find that the attachment was malicious, and without probable cause, they should give exemplary damages, is not error. — *Mayer v. Duke*, S. O. Tex., Jan. 18, 1889; 10 S. W. Rep. 565.

13. ATTACHMENT—Surviving Partner—Dissolution.—Under Probate practice act Mont. § 229, an attachment on property in the hands of defendant as surviving partner could not be dissolved on the ground that he was a trustee thereof, or a personal representative of the deceased partner. — *Kruger v. Spieth*, S. C. Mont., Feb. 12, 1889; 20 Pac. Rep. 664.

14. BANKS AND BANKING—Collection of Checks.—A national bank became the agent of plaintiff bank to collect its checks and drafts, under an arrangement by which no debt was created from the agent to the principal on account of checks received for collection until such checks were paid: *Held*, that a right which the agent had, when such checks were collected, of mingling the proceeds with its own money, and making itself the debtor of the plaintiff therefor, terminated when it became insolvent. — *Manufacturers' Nat. Bank v. Continental Bank*, S. J. C. Mass., Feb. 28, 1889; 20 N. E. Rep. 198.

15. BASTARDY—Evidence.—In an action for bastardy the defendant may show that other persons have had sexual intercourse with the complaining witness about the time that the child is claimed to have been begotten, by the testimony of such persons themselves.—*People v. Kaminsky*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 833.

16. BONDS.—It is no defense to an action by the State to the use of a county, on a county treasurer's bond, that the bond names no obligee. The requirement of Mansf. Dig. Ark. § 1187, that the treasurer shall execute a bond to the State, is not a matter of substance. — *State v. Wood*, S. O. Ark., Feb. 2, 1889; 10 S. W. Rep. 624.

17. BOND—Breach.—*Held*, in action on bond of express messenger for money stolen from safe of the company that bondsmen were liable even though the rules of the company only required the messenger to put the money in the safe there however being other negligent acts by him.—*Frank v. Southern Express Co.*, S. O. Ga., Feb. 11, 8 S. E. Rep. 862.

18. CARRIERS OF PASSENGERS — Station Accommodations. — As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platforms where passengers taking passage on their cars would naturally or ordinarily be likely to go. — *Union Pac. Ry. Co. v. Sue*, S. O. Neb., Feb. 21, 1889; 41 N. W. Rep. 801.

19. CERTIORARI—Local Option. — The action of the board of county commissioners in calling an election under the local option law is not such judicial action that an appeal will lie therefrom, but *certiorari* is the proper remedy. — *Champion v. Board of County Commissioners*, S. C. Dak., Feb. 13, 1889; 41 N. W. Rep. 759.

20. CHATTEL MORTGAGES. — A mortgage executed on June 10, to secure a valid debt to the mortgagees, without their knowledge was retained by the mortgagor until June 18, when he filed it for record, and telegraphed the mortgagees that he had done so, and they then accepted it without inquiring its date or amount: *Held*, that the mortgage took effect only from the day of its acceptance. — *Merrill v. Denton*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 828.

21. CHATTEL MORTGAGES—Foreclosure Before Justice of the Peace. — In an action before a justice of the peace to foreclose a mortgage, an answer which sets up as a defense a failure of consideration, and that the mortgage was obtained by fraud and duress, is sufficient, though the facts constituting the alleged duress are not set out. — *Riggs v. Wilson*, S. O. S. Car., Feb. 23, 1889; 8 S. E. Rep. 848.

22. CIVIL RIGHTS.—Construction of Rev. Stat. U. S. 5508, providing for prosecution of any one going in

disguise upon the premises of another with the intent to prevent or hinder free enjoyment of right secured by the constitution of the U. S.—*United State v. Ringeling*, S. O. Mont., Feb. 2, 1889; 20 Pac. Rep. 643.

23. COLLISION—Between Steamer and Row boat.—A row-boat is not a "vessel," within the steering and sailing rule, (rule 21, Rev. St. U. S.) requiring that every steamer, when approaching "another vessel," so as to involve risk of collision, shall slacken her speed, or, if necessary, stop or reverse; and a steamer is not bound to change her course for a row-boat.—*Fischer v. Camden & P. Steam-boat Ferry Co.*, S. O. Penn., Feb. 4, 1889; 16 Atl. Rep. 643.

24. CONSTITUTIONAL LAW—Lien of License. — Rev. St. Mont. § 816, making license fees a first lien on all property held or used in any of the trades, but making no provision for giving notice to the owner of such property of the seizure and sale thereof, is unconstitutional, as depriving persons of property without due process of law.—*Chauvin v. Valiton*, S. C. Mont., Feb. 12, 1889; 20 Pac. Rep. 658.

25. CONTRACTS—Breach—Nominal Damages.—Where plaintiff, having made a contract to saw a lot of timber for defendant, purchased a saw-mill for that purpose, and defendant subsequently refused to let plaintiff perform the contract, but it appeared that, during all the time that the mill was owned by the latter, it was employed in sawing for others at prices equal to what plaintiff would have received under his contract with defendant, the plaintiff was entitled to only nominal damages.—*Fraser v. Clark*, Ky. Ct. App., Feb. 16, 1889; 10 S. W. Rep. 806.

26. CONTRACTS — Under Seal—Use of Scroll. — To render a private writing an instrument under seal, according to the Code, it is only necessary that it recite in the body that a seal is used or contemplated, and that a scroll, or any other mark intended as a seal, be annexed or affixed.—*Stansell v. Corley*, S. C. Ga., Jan. 9, 1889; 8 S. E. Rep. 868.

27. CONTRACTS — Sufficiency of Consideration. — A contract entered into by third parties by which they agree that if a certain railroad contractor will go on with his work they will make up the deficiency of funds of the railroad company is founded upon a consideration and is valid. — *Brownlee v. Lowe*, S. O. Ind., Feb. 22, 1889; 20 N. E. Rep. 301.

28. CONTRACTS—Burden of Proof.—In an action on a bond given to secure the performance of a contract to furnish a military station such quantity of grain as may be required, the breach assigned being failure to carry out any of the stipulations of the agreement, plaintiffs have the burden of showing demand and failure to perform. — *United States v. Corwin*, (U. S. S. C.) Feb. 4, 1889; 9 S. O. Rep. 318.

29. CORPORATIONS—Stockholders' Liability.—A complaint in the nature of a creditors' bill, by a judgment creditor of a corporation against the assignee for the benefit of creditors of a stockholder, which sets out judgments in favor of plaintiff recovered against the corporation while the subscriptions of defendants' assignor were unpaid, and alleges that executions were issued thereon and returned *nulla bona*, sufficiently shows an indebtedness of the corporation to plaintiff to entitle him to maintain his action against defendant.—*Samainego v. Stiles*, S. C. Ariz., Feb. 18, 1889; 20 Pac. Rep. 607.

30. CORPORATIONS—Directors — Rights of Stockholders. — Where a sale of corporate property to pay debts, though made by persons who are directors both of the selling and purchasing corporations, realizes more than the value of the property, stockholders in the former have no ground of complaint. — *Manufacturers' Sav. Bank v. O'Reilly*, S. C. Mo., Feb. 18, 1889; 10 S. W. Rep. 865.

31. CORPORATIONS—Assignment of Stock. — A subscriber to the capital stock of a corporation who has, in good faith, transferred his shares to another, which

transfer has been accepted by the corporation, before an assessment is made, is not liable for the unpaid subscription.—*Stewart v. Walla Walla Print. & Pub. Co.*, S. O. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 605.

52. CORPORATIONS—Consolidation—Stock.—Consolidation of two corporations and *pro rata* division of stock among stockholders: *Held*, not prohibited by Civil Code Cal. § 809.—*Kohl v. Lillenthal*, S. C. Cal., Feb. 18, 1889; 20 Pac. Rep. 401.

53. COUNTIES—Tax Collectors—Additional Bonds.—Under Rev. St. Tex. art. 4788, providing that the commissioners' court may require a tax collector to furnish a new bond, whenever such a proceeding is deemed advisable by the court, a tax collector may be required to give a new bond without first having been cited to appear and show the cause.—*Poe v. State*, S. O. Tex., Feb. 8, 1889; 10 S. W. Rep. 737.

54. COUNTIES—Officers—Sales to County.—Pen. Code Tex. art. 250, imposing a penalty on any county officer who shall become interested "in the purchase or sale of anything made for or on account of such county," renders such officer liable for selling a mule to the county.—*Rigby v. State*, S. O. Tex., Jan. 19, 1889; 10 S. W. Rep. 760.

55. COURTS—Office and Officer.—Courts cannot control or interfere with an executive officer of the State in his official acts, even though they are such that the duty to perform them might have been entrusted to some other officer.—*State v. Braden*, S. O. Minn., Feb. 11, 1889; 41 N. W. Rep. 817.

56. CRIMINAL LAW—Seduction.—Under Rev. St. Mo. §§ 1259, 1912, making it a felony to "seduce and debauch" an unmarried female of good repute, under promise of marriage, it is error, on a trial for such an offense, to instruct that as to the promise of marriage there must be evidence to corroborate that of the woman, which may be supplied from the circumstances of the case, as the degree of proof required by the statute is ignored by such an instruction.—*State v. Reeves*, S. O. Mo., Feb. 4, 1889; 10 S. W. Rep. 843.

57. CRIMINAL LAW—Insanity—Basis of Opinion.—Testimony of defendant's father that the defendant's brother was insane was properly disallowed, it not being shown that witness was an expert, and no facts being stated as ground for the opinion.—*Grubb v. State*, S. O. Ind., Feb. 16, 1889; 30 N. E. Rep. 257.

58. CRIMINAL LAW—Amendment.—On a trial for an information for stealing "one yoke of cattle" it is not error to permit the information to be amended by inserting after the description a separate description of each steer, where the evidence only tends to connect the defendant with the larceny of one of the steers.—*People v. Price*, S. O. Mich., Feb. 8, 1889; 41 N. W. Rep. 853.

59. CRIMINAL LAW—Burglary.—Under the law the breaking or entering into a prosecution for burglary must be actual and not constructive.—*McGrath v. State*, S. C. Neb., Feb. 20, 1889; 41 N. W. Rep. 780.

60. CRIMINAL LAW—Abortion—Accessory.—Under Pen. Code N. Y. § 29, an indictment charging that defendant committed abortion will sustain a conviction on proof that he was absent at the time, but aided and advised its commission.—*People v. Biven*, N. Y. Ct. App., Jan. 15, 1889; 19 N. E. Rep. 638.

61. CRIMINAL LAW—Amendment of Recognizance.—The trial court has no jurisdiction to amend a recognizance which has been given to perfect an appeal therefrom.—*Kortiz v. State*, Tex. Ct. App., Jan. 16, 1889; 10 S. W. Rep. 757.

62. CRIMINAL LAW—Perjury—Materiality.—The materiality of a false statement, charged as perjury, is a question for the court, and a special instruction submitting the question to the jury was properly refused.—*Smith v. State*, Tex. Ct. App., Jan. 16, 1889; 10 S. W. Rep. 751.

63. CRIMINAL LAW—Accomplice.—Sufficiency of evidence to convict defendant as accomplice in a mur-

der.—*Dugger v. State*, Tex. Ct. App., Jan. 23, 1889; 10 S. W. Rep. 763.

64. DESCENT AND DISTRIBUTION.—*Held*, that § 1, statute of descents cannot be held to apply only to legitimate intestates.—*Keeler v. Dawson*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 700.

65. DESCENT AND DISTRIBUTION—Real Estate.—*Held*, in an action to determine the respective interests of the parties in the estate of the mother, that the surviving father is the sole heir of the children who died prior to the death of the mother, and that the shares which they would have taken had they outlived the mother descended to him.—*Dellashmutt v. Parrent*, S. O. Kan., Feb. 9, 1889; 20 Pac. Rep. 504.

66. DIVORCE—Death of Party.—In simple divorce proceedings, aimed at no independent relief, after the death of one party no decree can be made relating back to his life-time.—*Wilson v. Wilson*, S. O. Mich., Feb. 1, 1889; 41 N. W. Rep. 817.

67. DURESS.—Under the evidence court held there was duress in obtaining signature of a woman to a mortgage of her homestead, her son being threatened with prosecution for embezzlement.—*McCormick Machine Co. v. Hamilton*, S. C. Wis., Feb. 19, 1889; 41 N. W. Rep. 727.

68. EJECTMENT—Adverse Possession—Tenant in Common.—Where defendant in ejectment denies plaintiff's title, he cannot object that, he and plaintiff being tenants in common, and plaintiff having given notice to be let into possession, the court erred in charging the jury that adverse possession by plaintiff, and those under whom he claims, for the statutory period, would create a good title.—*Allen v. Sallinger*, S. C. N. Car., Feb. 26, 1889; 8 S. E. Rep. 913.

69. EMINENT DOMAIN—Taking Private Property.—Such delay caused by the occasional occupation by defendant's trains of the space in the street where the tracks of the two companies cross, at the same time when such space is needed by plaintiff for its trains, is not a taking or damaging of private property, inasmuch as both have an equal right to the use of the highway.—*Kan. City, St. Joe & C. B. R. R. Co. v. St. Joe Trans. Co.*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 826.

70. EMINENT DOMAIN—Compensation—Evidence.—Where land owned by defendants, the valuation of which could not be ascertained from any current rate of price, was condemned by plaintiff, owning an adjoining tract, for the purpose of a reservoir, evidence was admissible as to the value of defendant's land as "a reservoir site," although such tract was of no value for such purpose, except when used in connection with plaintiff's tract.—*San Diego Land & Town Co. v. Neale*, S. O. Cal., Dec. 31, 1888; 20 Pac. Rep. 872.

71. EMINENT DOMAIN—Injury to Growing Crop.—In an action for damages for land taken by defendant company for a right of way, defendant is liable for damages to the growing crop outside the right of way, which are actually sustained by reason of the construction of the road; and such damages are not 'remote, speculative, or contingent.'—*Haltip v. Wilmington & W. R. Co.*, S. C. N. Car., March 4, 1889; 8 S. E. Rep. 926.

72. EMINENT DOMAIN—Municipal Corporations—Injunction.—Where the proposed filling in the grade of a street results in throwing the dirt over upon complainant's abutting lots to a depth of thirty feet, and along their entire width, burying a portion of her dwelling, and closing up the front door and lower windows, this is taking of private property for public use, within the meaning of the constitution.—*Vanderlip v. City of Grand Rapids*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 677.

73. EQUIT—Cancellation of Deed—Mistake.—Where plaintiff seeks to recover the proceeds of lands which he alleges he owned and quitclaimed, by mistake as to his ownership, to defendant, and which defendant afterwards sold, the value of plaintiff's title is immaterial. If the deed was fairly obtained without mistake or fraud, plaintiff cannot vacate it; especially where

the parties cannot be restored to their former positions. — *Taylor v. Cayce*, S. O. Mo., Feb. 4, 1889; 10 S. W. Rep. 832.

54. EQUITY—Jurisdiction—Pleading. — Under the Oode provisions abolishing forms of actions, and providing that the complaint shall state the facts constituting the cause of action in ordinary and concise language, both legal and equitable relief may be granted in the same action. — *Ely v. New Mexico & A. R. Co.*, (U. S. S. O.) Jan. 23, 1889; 9 S. O. Rep. 298.

55. EQUITY—Mistake—Specific Performance. — Affirmative or defensive relief, such as the circumstances of the case may require, may be granted from the consequences of a mistake of any fact which is a material element in the transaction, and which is not the result of a mistaken party's own violation of some positive legal duty, if there be no adequate remedy at law. — *Thwing v. Hall & Duckey Lumber Co.*, S. C. Minn., Feb. 20, 1889; 41 N. W. Rep. 815.

56. EQUITY—Cancellation of Deed. — In an action to cancel a deed of a married woman, evidence is admissible to show that the private examination of the wife was taken by the clerk outside of his jurisdiction. — *Ferebee v. Hinton*, S. O. N. Car., Feb. 25, 1889; 8 S. E. Rep. 922.

57. ESTOPPEL—Corporations—Ultra Vires. — Where notice of purchases of stock of a corporation is given to the directors and stockholders, and the purchaser regularly votes the stock, and expends large sums for the benefit of the corporation under resolution of the stockholders, the minority stockholders cannot complain, seven to fifteen years after the several purchases were made, that the purchaser being the majority stockholder, has procured the mismanagement of the corporation. — *Alexander v. Searcy*, S. O. Ga., Jan. 23, 1889; 8 S. E. Rep. 680.

58. ESTOPPEL—Title. — The declaration of one from whom a party obtains title to property, made after the transfer of title, and in derogation thereof, is inadmissible for the purpose of defeating such title. — *Williams v. Elkendary*, S. O. Neb., Feb. 6, 1889; 41 N. W. Rep. 771.

59. EVIDENCE—Opinion Testimony. — A farmer, who has lived within 200 or 300 feet of a railroad culvert all his life, and who has, without objection, described it, and testified that it was too small for the amount of water that had to pass through it, may testify concerning the result of an examination made by him as to its capacity to carry away waters accumulated in time of freshet, though he has no knowledge of engineering. — *McPherson v. St. Louis I. M. & S. Ry. Co.*, S. O. Mo., Feb. 4, 1889; 10 S. W. Rep. 846.

60. EVIDENCE—Res Gestæ. — In an action by mortgagee to recover mortgaged property of the sheriff, the defense being that the mortgage was fraudulent and void, and that in making it a low valuation was put on the goods in order to cover them up from creditors: Held, error to allow evidence of what plaintiff's agent did and said three days after giving the mortgage as to the valuation. — *First Nat. Bank v. North*, S. C. Dak., Feb. 11, 1889; 41 N. W. Rep. 736.

61. EXECUTION LEVY—Lien. — In North Carolina, as against an assignee for the benefit of creditors, the lien of a levy of an execution on personal property is not lost because the officer, making the levy does not retain possession of it. — *Sawyer v. Bray*, S. C. N. Car., Feb. 18, 1889; 8 S. E. Rep. 886.

62. EXECUTION—Equitable Title. — An execution issued on an ordinary judgment at law, if levied on a mere equity in real estate, the debtor not being in possession and the legal title being in the name of another, will not pass the title of such equitable owner to the purchaser. — *Dworak v. More*, S. C. Neb., Feb. 13, 1889; 41 N. W. Rep. 777.

63. EXECUTORS AND ADMINISTRATORS—Sale of Lands—Discharge of Liens. — Under Rev. St. Ind. 1881, § 2435, the proceeds of land sold to discharge a lien should be applied to the lien in preference to the general expense

of administration. — *Eyher v. Foster*, S. O. Ind., Feb. 21, 1889; 20 N. E. Rep. 294.

64. EXECUTORS AND ADMINISTRATORS. — Under Rev. Stat. Wis. §§ 3268, 3800, the executors of a deceased executor cannot be compelled to settle the latter's account. — *Reed v. Wilson*, S. C. Wis., Feb. 19, 1889; 41 N. W. Rep. 716.

65. EXECUTORS AND ADMINISTRATORS. — Questions under the facts of the allowance of certain fees, in excess of regular ones, to the executor for extra services. — *In re Mabley's Estate*, S. C. Mich., Feb. 15, 1889; 41 N. W. Rep. 835.

66. EXEMPTION—Purchase Money. — Money loaned one for the express purpose of enabling him to make a purchase of certain property, and so used by him, is "purchase money" of said property, within the meaning of Rev. St. Wis. § 2962, subd. 20, providing that no property shall be exempt from execution for the purchase money thereof. — *Houlehan v. Rassler*, S. O. Wis., Feb. 19, 1889; 41 N. W. Rep. 720.

67. FEDERAL JURISDICTION—Equity. — The federal courts will take equity jurisdiction of a bill by non-resident heirs at law against resident heirs to compel an accounting of the property of their intestate in the hands of the defendants, and for a distribution of the estate, notwithstanding the remedy of complainants under the probate law of the State. — *Rich v. Bray*, U. S. C. O. (Mo.), Jan. 14, 1889; 37 Fed. Rep. 273.

68. FOREIGN INSURANCE COMPANIES—Mandamus. — The State auditor is clothed with authority to issue certificates to foreign insurance companies, to transact business in this State, and it is his duty to issue certificates to none but solvent companies, which have complied with the statute of this State in all respects, and his action in the premises will not be controlled by mandamus unless there is a wilful disregard of duty. — *State v. Benton*, S. O. Neb., Feb. 20, 1889; 41 N. W. Rep. 738.

69. FRAUDULENT CONVEYANCES — Conveyance to Wife — Action to Set Aside. — As against the husband's creditors, it will be presumed that the land purchased by the wife is paid for with the money to which the husband is entitled, and is liable for his debts, in the absence of allegation and proof that the money with which she paid for the land was her separate estate. — *Treadway v. Turner*, Ky. Ct. App., Feb. 26, 1889; 10 S. W. Rep. 816.

70. FRAUDULENT CONVEYANCES — Change of Possession—Province of Jury. — Where the purchaser for a valuable consideration of certain personality immediately leaves it to the vendor, who continues in its possession, the question as to whether the transaction is fraudulent, so as to prevent the vendee from asserting title to the personality as against the one who becomes a creditor of the vendor several months after the purchase, is one of fact. — *Ditman v. Rauls*, S. O. Penn., Feb. 18, 1889; 16 Atl. Rep. 819.

71. GAMING—Gambling Contracts — Sales for Future Delivery. — Contracts for the sale of personal property, to be delivered at a future day, if the parties intend the property shall be delivered and paid for, are valid, though the seller have not the goods nor other means of getting them than to go into the market and buy them; but when the real intention of the parties is merely to speculate on the rise and fall of prices, and the property is not to be delivered, the transaction is against public policy, and void. — *Kahn, Jr. v. Walton*, S. C. Ohio, Jan. 8, 1889; 20 N. E. Rep. 213.

72. GAMING. — Section 214 of the Criminal Code, as amended in 1875, made any person who played at any game whatever for money or property, or who made any bet or wager with another, liable for money or property lost by such game, bet, or wager, and a civil action may be maintained against him to recover the same. — *Perry v. Gross*, S. C. Neb., Feb. 21, 1889; 41 N. W. Rep. 799.

73. GUARDIAN AND WARD — Petition to Set Aside Settlement. — Facts held sufficient to set aside a settlement by a guardian. — *Wainwright v. Smith*, S. O. Ind., Feb. 22, 1888; 20 N. E. Rep. 297.

74. **HIGHWAYS—Obstructions.**—Under Rev. St. Wis. § 1828, relating to obstructions in a highway, and § 1830, *et seq.*, relating to encroachments, when defendant is notified by the supervisors to remove his fence as being an encroachment on the highway, and denies the encroachment, the supervisors should proceed according to the statute to determine whether an encroachment had been made. — *State v. Pomeroy*, S. C. Wis., March 12, 1889; 41 N. W. Rep. 726.

75. **HOLIDAYS—Depositions.**—Rev. St. Wis. § 2676, as amended by ch. 142, Laws 1886, providing that no court shall be opened or transact any business on any legal holiday, does not render inadmissible in evidence a deposition taken in another State on a day made a legal holiday by the laws of Wisconsin. — *Green v. Walker*, S. C. Wis., Feb. 19, 1889; 41 N. W. Rep. 534.

76. **HUSBAND AND WIFE—Wife's Separate Property—Assignment to Secure Husband's Debt.**—An assignment by a married woman of her separate property, made prior to act S. C. 1887, p. 819, and executed to secure a note given for a debt of the husband, which she had signed as surety, is void. — *Livingston v. Shingler*, S. C. S. Car., Feb. 16, 1889; 8 S. E. Rep. 842.

77. **INJUNCTION—Taxation.**—A court of equity will not enjoin the collection of a tax for mere errors or irregularities in the proceedings of the taxing officers, the remedy at law being ample in such cases; but where a tax is void such tax-payer may, if not guilty of laches, invoke the aid of such court to protect his rights. — *Tougalin v. City of Omaha*, S. C. Neb., Feb. 21, 1889; 41 N. W. Rep. 796.

78. **INSANITY—Parent and Child.**—There is no liability at common law or by statute against the children of insane persons for the maintenance of such persons in the State hospital for the insane. — *Richardson County v. Smith*, S. C. Neb., Feb. 13, 1889; 41 N. W. Rep. 775.

79. **INSURANCE—Mutual Benefit Society—Damages.**—Substantial damages may be recovered in an action at law on a certificate entitling the beneficiary to 80 per cent. of an assessment to be levied and collected on the death of the insured, when the company has refused to make any assessment, and denied liability, and it appears that an assessment, if made, would produce a substantial sum. — *Jackson v. Northwestern Mut. Relief Assn.*, S. C. Wis., Feb. 19, 1889; 41 N. W. Rep. 708.

80. **INSURANCE—Mutual Benefit Societies.**—Court of equity has power to decree dissolution of mutual benefit societies for violation of statute in conduct of its affairs. — *Chicago Mut. Life Assoc. v. Hunt*, S. C. Ill., Jan. 25, 1889; 20 N. E. Rep. 55.

81. **INSURANCE—Waiver.**—Evidence sufficient to show waiver by insurance company of further proofs of loss. — *Ligon v. Equitable Life Ins. Co.*, S. C. Tenn., Feb. 23, 1889; 10 S. W. Rep. 768.

82. **INTEREST—Accounts Between Partners.**—The rule that interest should not be allowed on partnership accounts until after a balance is struck, on a settlement between the partners has no application where a partner has withdrawn greatly more than he was entitled to from the firm assets, applying it to his own use, to the detriment of his copartners. — *Masonic Sav. Bank v. Bangs*, Ky. Ct. App., Jan. 24, 1889; 10 S. W. Rep. 633.

83. **INTOXICATING LIQUORS—Constitutional Law.**—An act incorporating an agricultural society, which provides that it shall be unlawful for any person to sell, or offer for sale, any liquors, tobacco, or other refreshments within one-half mile of the grounds of said society during the week of their annual fair, except persons doing regular business within the prohibited territory, is not unconstitutional as conferring any special rights or privileges. — *State v. Stovall*, S. C. N. Car., Feb. 23, 1889; 8 S. E. Rep. 900.

84. **IRRIGATION—Appropriation of Water.**—The prior appropriator of the flow of any water over the public lands of the United States has, by a local custom which is recognized by the United States, a vested right

therein, which cannot be defeated by one who, having consented to such appropriation, subsequently files a homestead entry and obtains a patent for the land. — *Tenney Ditch Co. v. Thorpe*, S. C. Wash. Ter., Jan. 29, 1889; 20 Pac. Rep. 588.

85. **JUDGMENT—Res Adjudicata.**—Where in an action on a promissory note, the defendant files a counterclaim setting out that the note was given as a part of the purchase price of land, and asking for a rescission of the contract of sale on the ground of fraud, and judgment is rendered granting the relief, the latter is not thereby precluded from bringing an action for purchase money paid under such contract. — *Wright v. Anderson*, S. C. Ind., Feb. 16, 1889; 20 N. E. Rep. 247.

86. **JUSTICES OF THE PEACE—Trial out of District.**—Where a magistrate issued an attachment, went outside of the limits of his jurisdiction, and tried a claim filed against the property attached, he had neither jurisdiction of the person of the claimant nor of the subject-matter of the suit, and jurisdiction could not be conferred upon him by an agreement of the claimant to that effect. — *Block v. Henderson*, S. C. Ga., Feb. 15, 1889; 8 S. E. Rep. 877.

87. **LANDLORD AND TENANT—Tenancy from Year to Year—Expiration.**—In South Carolina, the rule announced in *Floyd v. Floyd*, 4 Rich. Law, 23, that "a tenancy from year to year of a farm used for agricultural purposes looks to the end of the calendar year for its termination," must be held to apply equally to a tenancy from year to year of premises consisting of a city house and lot. — *Wilson v. Rodeman*, S. C. S. Car., Feb. 28, 1889; 8 S. E. Rep. 855.

88. **LIBEL AND SLANDER—Mitigation of Damages.**—The fact that the slanderous words were used by defendant in the heat of passion and under strong provocation may be shown in mitigation of damages. — *Rückle v. Stenius*, S. C. Mich., Feb. 1, 1889; 41 N. W. Rep. 687.

89. **LIMITATION OF ACTIONS—Account Current.**—Under Rev. St. Wis. § 4226, providing that the cause of action for the balance due on a mutual and open account current accrues at the time of the last item proved therein, an account in which A charges B with a number of items extending through a considerable time, but in which B has no credits, is not a mutual and open account current. — *Dunn v. Howard*, S. C. Wis., Feb. 19, 1889; 41 N. W. Rep. 707.

90. **LIS PENDENS—Adverse Possession.**—An action of ejectment is not *lis pendens* as to one not a party, and who is in possession under a bond for deed from the defendant in ejectment, and such possession may ripen into an adverse title so as to defeat a writ of possession issued on the judgment therein. — *Wallace v. Arnold*, Ky. Ct. App., Feb. 2, 1889; 10 S. W. Rep. 647.

91. **MALICIOUS PROSECUTION.**—In an action against a corporation and its agents for malicious prosecution, a corporation and its agents are jointly and severally liable for the wilful acts of the agents within their authority or ratified, done with malice, and without probable cause. — *Gulf C. & S. F. Ry. Co. v. James*, S. C. Tex., Feb. 12, 1889; 10 S. W. Rep. 744.

92. **MANDAMUS—From Supreme Court to Court of Appeals.**—The Supreme Court of Missouri has no appellate jurisdiction over the Kansas City court of appeals, but the constitution gives it "superintending control over the courts of appeals by mandamus, prohibition, and certiorari." Held, that mandamus, will lie to compel the Kansas City court of appeals to reinstate and hear the appeal in the case. — *State v. Kansas City Ct. App.*, S. C. Mo., Feb. 18, 1889; 10 S. W. Rep. 854.

93. **MARRIAGE—Solemnization—Customs.**—A marriage contracted according to the customs of an Indian tribe need not be contracted in the territory of the tribe in order to be valid. — *La Riviere v. La Riviere*, S. C. Mo., Feb. 18, 1889; 10 S. W. Rep. 840.

94. **MASTER AND SERVANT—Negligence.**—Defendant held not liable for damages to servant by fall of embankment where servant had knowledge of the danger

and was on his guard. — *Songstad v. Burl. C. R. & N. R. R.*, S. O. Dak., Feb. 9, 1889; 41 N. W. Rep. 755.

95. MASTER AND SERVANT—Fellow-servants. — The engineer and fireman in charge of the passenger train were not fellow servants of the section hand. — *Sullivan v. Mo. Pac. Ry. Co.*, S. O. Mo., Feb. 1889; 10 S. W. Rep. 852.

96. MECHANIC'S LIENS — Jury Trial. — In a suit to enforce a mechanic's lien, a jury trial is not demandable as a matter of right, under Code Civil Proc. Dak. § 286, nor under the constitution of the United States, providing that in suits at common law the right of jury trial shall be preserved. — *Gull River Lumber Co. v. Keefe*, S. O. Dak., Feb. 14, 1889; 41 N. W. Rep. 743.

97. MORTGAGES—Assignment—Merger. — A mortgage assigned to the owner of the premises, subject to a life interest reserved to the assignor, is not merged in the fee. — *Cox v. Ledward*, S. O. Penn., Feb. 25, 1889; 16 Atl. Rep. 836.

98. MORTGAGES—Foreclosure—Redemption. — Notwithstanding Gen. St. Ky. ch. 63, art. 8, § 3, the lien of a mortgage is extinguished by sale under the judgment, and the mortgagee cannot have a resale after redemption, to recover the balance of the judgment not satisfied by the first sale. — *Mahbbsen v. Arndt*, Ky. Ct. App., Jan. 29, 1889; 10 S. W. Rep. 642.

99. MORTGAGES—Recording — Priorities. — Under Code N. C. § 1254, declaring that no mortgage shall be valid to pass any property as against creditors or purchasers for valuable consideration from the mortgagor until registration of such mortgage, a mortgage not recorded till after the recording of a subsequent one in the absence of fraud is invalid as against it, though the later mortgagees had actual notice of the earlier mortgage. — *Hinton v. Leigh*, S. C. N. Car., Feb. 26, 1889; 8 S. E. Rep. 890.

100. MUNICIPAL CORPORATIONS—Ordinances—Validity. — Under Rev. St. Ind. § 8106, providing that the common council of a city shall have power by ordinance to regulate and restrain certain pursuits, or to prohibit them without license, an ordinance prohibiting a certain pursuit without license, and not fixing a uniform license fee, but providing that the council should establish it in each instance, is void. — *Bills v. City of Goshen*, S. C. Ind., Feb. 1, 1889; 20 N. E. Rep. 115.

101. MUNICIPAL CORPORATIONS — Constitutional Law. — If a part of a territory of a municipal corporation is separated from it by annexation to another, unless some other provision is made in the act authorizing the separation, the old corporation remains subject to all its liabilities, and retains all its property, including that which, upon the change of boundaries, happens to fall within the limits of the other corporation. — *City of Winona v. School Dist.*, S. O. Minn., Jan. 11, 1889; 41 N. W. Rep. 553.

102. MUNICIPAL CORPORATIONS — Injunctions. — A court of equity will not interfere, at the suit of a taxpayer, to enjoin *ultra vires* proceedings by a city to establish a system of water-works, when the city has done nothing further in that direction than to pass a resolution directing the mayor and clerk to take steps for the letting of a contract for the construction of such works. — *Pedlick v. City of Ripon*, S. O. Wis., March 12, 1889; 41 N. W. Rep. 706.

103. NEGLIGENCE—Dangerous Premises. — The owner of a lot abutting on a public street in a city has no right to erect a building on it with a roof so constructed that ice and snow collecting on it will naturally and probably fall into the adjoining sidewalk below, thereby exposing foot-passengers to bodily injury. — *Hannem v. Pence*, S. O. Minn., Jan. 30, 1889; 41 N. W. Rep. 657.

104. NEGLIGENCE. — When a part of a building falls without apparent reason, the owner is not relieved from liability for resulting damages because he used reasonable care in obtaining plans and employing a contractor to do the work. — *Wilkinson v. Detroit Steel & Spring Works*, S. O. Mich., Jan. 25, 1889; 41 N. W. Rep. 491.

105. NEW TRIAL — Newly-discovered Evidence. — An affidavit for a new trial on the ground of newly-discovered evidence, held insufficient as not showing proper diligence. — *Ward v. Voris*, S. O. Ind., Feb. 19, 1889; 20 N. E. Rep. 261.

106. NOTICE—Bona Fide Purchasers. — The record of a conveyance of a block of a certain number, according to a recorded plat, which is referred to, is sufficient to put a subsequent purchaser of the tract including such block on inquiry, though on the plat as recorded the blocks are not numbered. — *Schwieser v. Woodruff*, S. O. Mich., Jan. 25, 1889; 41 N. W. Rep. 511.

107. PARTNERSHIP—Dissolution. — On suit for goods sold partnership, the retiring partner cannot defend by proving there was an agreement between him and his partner by which the latter was to pay the debts unless assent of plaintiff is shown. — *Ayer v. Kinner*, S. J. O. Mass., Feb. 26, 1889; 20 N. E. Rep. 153.

108. PARTNERSHIP—Limitation of Actions. — A claim by surviving partners against the estate of a deceased partner for contribution to firm debts paid by them upon the settlement of the partnership transactions, after the decedent's estate is fully administered and distributed, is not barred by failure to present it within the time fixed by Rev. St. Wis. § 844. — *Logan v. Dixon*, S. C. Wis., Feb. 19, 1889; 41 N. W. Rep. 713.

109. PAYMENT — Burden of Proof. — In action for goods sold where defendant pleads payment: Held error to charge that plaintiff must establish by preponderance of evidence that goods were not paid for. — *Doolittle v. Gavigan*, S. O. Mich., Feb. 8, 1889; 41 N. W. Rep. 846.

110. PRINCIPAL AND AGENT — Undisclosed Principal — Secret Instructions. — Where one conducts a business in his own name, but really as the agent for an undisclosed principal, the latter cannot resist liability for goods sold to the agent on credit, on the ground that he had given secret orders to the agent not to buy on credit. — *Hubbard v. Tenbrook*, S. O. Penn., Feb. 25, 1889; 16 Atl. Rep. 817.

111. PRINCIPAL AND SURETY—Release of Surety. — A mere indulgence of a principal debtor by the creditor will not operate to discharge a surety. — *Edwards v. Dargan*, S. O. S. Car., Feb. 23, 1889; 8 S. E. Rep. 858.

112. PUBLIC LANDS—Grant. — Where land is patented to a railroad company as public land, under a grant providing for its disposal as agricultural land, without any reservation in the grant, the patent is a conclusive determination by the government that the land is agricultural. — *Gale v. Best*, S. O. Cal., Feb. 18, 1889; 20 Pac. Rep. 550.

113. QUIETING TITLE—Pleading—Demurrer to Answer. — In actions to quiet title, there is no prejudicial error in sustaining a demurrer to paragraphs of the answer, setting up the statutes of limitations. — *O'Donahue v. Creager*, S. O. Ind., Feb. 19, 1889; 20 N. E. Rep. 267.

114. RAILROAD COMPANIES—Railroad Aid Bonds—Validity. — Construction of (3 Starr & C. St. Ill. ch. 113, § 18, p. 1886,) as to power of town council to grant extension of time for the completion of a railroad and the validity of bonds issued in aid thereof. — *Eddy v. Nolen*, S. O. Ill., Jan. 26, 1889; 20 N. E. Rep. 83.

115. RAILROAD COMPANIES—Fires—Damages. — If, through the negligence of a railroad company, sparks and cinders, alive with fires, escape from its engine, and set fire to a house, the company is liable for all the loss of life, as well as property destroyed by such fire, without contributory negligence on the part of the party injured. — *Rafnowski v. Detroit, B. C. & A. R. Co.*, S. C. Mich., Feb. 8, 1889; 41 N. W. Rep. 847.

116. RAILROAD COMPANIES—Stock Killing. — Under facts defendant held not liable for killing stock in track due care having been used. — *Gay v. Fremont, etc. Co.*, S. O. Dak., Feb. 9, 1889; 41 N. W. Rep. 757.

117. RAILROAD COMPANIES—Negligence. — Where property is injured by a train of cars in a city, in a suit against the railroad company to recover damages, the ordinance of the city limiting the speed of trains to six

miles an hour within the corporate limits is proper evidence to go to the jury on the question of negligence.—*Union Pac. Ry. Co. v. Rassmussen*, S. O. Neb. Feb. 20, 1889; 41 N. W. Rep. 779.

118. RECEIVER—Appointment.—A receiver will not be appointed to collect and apply to judgment debts against a husband, notes which are admitted to have been given for land which was the separate estate of the wife, and payable to the husband alone by mere mistake of the latter. — *Rodman v. Harvey*, S. O. N. Car., Feb. 26, 1889; 8 S. E. Rep. 888.

119. REPLEVIN—Complaint—Verification. — Rev. St. Ind. 1881, § 1547, providing that "whenever any plaintiff shall, by complaint in writing, verified by affidavit," set forth certain facts, he may have a writ of replevin, does not require verification by plaintiff in person. A verification by his attorney is sufficient.—*Hall v. Durham*, S. O. Ind., Feb. 21, 1889; 20 N. E. Rep. 282.

120. REVIEW—Writ of.—Though the Massachusetts statutes do not set any time within which a writ of review must be brought, they impliedly require promptness, and, a bond having been given conditioned that the obligor "shall forthwith prosecute a review to final judgment," proceedings begun more than a year thereafter are too late.—*Quinn v. Brennan*, S. J. C. Mass., Feb. 28, 1889; 20 N. E. Rep. 184.

121. SALE—When Title Passes—Fraudulent Representations. — Where plaintiffs sold certain logs to one M, who falsely represented himself to be the agent of the defendant, the intention of the plaintiffs being to sell to the defendant, the latter acquired no title to the property on subsequently purchasing the same from M.—*Peters Box & Lumber Co. v. Leash*, S. O. Ind., Feb. 21, 1889; 20 N. E. Rep. 298.

122. SEDUCTION.—There is no substantial difference between seducing and debauching, as a ground of action for loss of service.—*Stoudt v. Shepherd*, S. O. Mich., Feb. 1, 1889; 41 N. W. Rep. 696.

123. TAXATION—Evidence — Materiality. — Under Rev. St. Ind. 1881, § 5813, evidence that the valuation placed on the land by the auditor was less than its actual value is inadmissible. — *Board of Commissioners v. Seann*, S. O. Ind., Feb. 20, 1889; 20 N. E. Rep. 276.

124. TELEGRAPH COMPANIES — Delay in Transmitting Message.—Plaintiffs sued defendant telegraph company for delay in transmitting the message: *Held*, that the language of the message was sufficient, of itself, to indicate to the operator the urgency of the message, so as to bring such matter into the contemplation of the parties in sending the message. — *Western Union Tel. Co. v. Sheffield*, S. O. Tex., Oct. 26, 1888; 10 S. W. Rep. 752.

125. TENANCY IN COMMON. — A tenant in common who has had sole possession of land, but has received no rent therefor from third persons, in the absence of any agreement to pay rent, is not liable for the use and occupation of the land to a co tenant who has never demand possession.—*Belknap v. Belknap*, S. O. Iowa, Jan. 30, 1889; 41 N. W. Rep. 568.

126. TENANCY IN COMMON—Conveyance. — Where tenants in common of a tract of land have laid it off into town lots, one tenant may convey his interest in a single lot to a stranger.—*Shepherd v. Jernigan*, S. O. Ark., March 2, 1889; 10 S. W. Rep. 765.

127. TRESPASS — Liability of Joint Trespassers. — All joint trespassers are liable civilly for the injuries inflicted by their unlawful acts.—*Sharpe v. Williams*, S. C. Kan., Feb. 9, 1889; 20 Pac. Rep. 497.

128. TROVER AND CONVERSION—Pleading — Sufficiency of Complaint.—In an action for the conversion of certain property, a complaint alleging that the plaintiff was appointed receiver to take into his possession such property and that the defendants had converted it to their own use, not alleging that plaintiff ever had possession of the property, is not sufficient. — *Kehr v. Hall*, S. O. Ind., Feb. 20, 1889; 20 N. E. Rep. 279.

129. TRUSTS—Bona Fide Purchasers.—Where there

is nothing upon the face of a deed from a trustee to a purchaser showing that the sale was made in violation of or contrary to the power contained in the deed of trust, a subsequent purchaser, who has no notice in fact of any irregularity in the sale by the trustee, will be protected as an innocent purchaser.—*Strelitz v. Hartman*, S. O. Neb., Feb. 27, 1889; 41 N. W. Rep. 804.

130. TRUSTS—Trustees—Commissions. — A trustee should not be allowed commission on sums which he has invested in his own business, securing them on his own property, without the knowledge of the *cestui que trust*, especially when there is evidence that he agreed to make no charges therefor. — *Harris v. Sheldon*, S. O. Penn., Jan. 28, 1889; 16 Atl. Rep. 828.

131. VENDOR AND VENDEE—Vendor's Lien.—Plaintiff conveyed land to defendant company for right of way and depot purposes, and took the notes of citizens of the county through which the railroad ran for the purchase price, payable when the right of way and depot grounds should be laid off and established. The right of way and depot were established by defendant, but the purchase price was not paid by the citizens: *Held*, that plaintiff had no lien on the land for the purchase money. — *Springfield & M. R. Co. v. Stewart*, S. C. Ark., March 2, 1889; 10 S. W. Rep. 767.

132. WARRANTY—Damages. — Where horses sold are warranted as being sound and free from disease, damages for a breach of the warranty may include loss suffered from the communication of a contagious disease to the other animals, with which the diseased horses are placed in the ordinary course of business.—*Joy v. Bitzer*, S. C. Iowa, Jan. 30, 1889; 41 N. W. Rep. 575.

133. WARRANTY—Damages. — A pork-packer who sells unsound meats of his own curing to a dealer, the latter paying for them without an opportunity to examine them, is liable for the damage resulting, though he did not expressly warrant their quality. — *Copas v. Anglo-American Provision Co.*, S. O. Mich., Feb. 1889; 41 N. W. Rep. 690.

134. WILLS — Construction. — Where testator bequeathed his library to the mayor of the city, presidents of two colleges and their successors in trust: *Held*, that the intention was to vest the property in persons who might from time to time occupy the official positions mentioned and not in the corporations of which they were the heads. — *Catman v. Grace*, N. Y. Ct. App., Jan. 29, 1889; 19 N. E. Rep. 839.

135. WILLS—Construction—Testamentary Trust.—A devise to testator's wife of all his property, "to have and use as she may think best and proper for herself and my children," creates a trust in the devisee for the benefit of herself and children. — *Elliott v. Elliott*, S. C. Ind., Feb. 19, 1889; 20 N. E. Rep. 264.

136. WITNESS—Impeachment of Character.—A witness in a criminal case who resided in Georgia, formed here a bad general character, removed to another State while bearing such character, and has resided there ever since, may be impeached by proof of such bad character left behind in Georgia, though there be no evidence touching the character formed or borne by the witness in the State to which he removed.—*Watkins v. State*, S. O. Ga., Feb. 18, 1889; 8 S. E. Rep. 875.

137. WRITS — Service on Non-residents. — A non-resident, who comes into the State for the sole purpose of attending and testifying in an action in which he is defendant, is exempt from the service of summons in a suit of the plaintiff in that action.—*Wilson v. Donaldson*, S. C. Ind., Feb. 16, 1889; 20 N. E. Rep. 260.

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CURRENT EVENTS.

WE have the highest regard for the editor of the *Advocate*, a semi-monthly legal journal, published at St. Paul, and we are free to say that, from time to time, we have found in its columns much of interest and value. We were particularly pleased with the editorial on "Libel Legislation," which appeared in its issue of April 1—the more so, perhaps, because a part of it was our own and appeared word for word in our editorial columns of an earlier date. The editor of the *Advocate* doubtless forgot to use quotation marks with what he copied of our article. He is welcome to make use of anything we say, if he deems it of sufficient interest and importance, but human nature is weak and man is vain and frivolous, at the best, and where one has, with great effort and labor, evolved from his inner consciousness, what he believes to be a great thought, he wants to have folks know it's his, especially when it goes away from home, and without reference to whether it is in fact a creditable offspring. Does'nt he, *Mr. Advocate*?

On page 402 of this issue will be found an interesting case from the Alabama court, on the subject of the negotiability of certificates of stock. It is there held, in accordance with the weight of authority in this country, that certificates of stock in a corporation are not negotiable. The subject has been lately brought to the attention of the English courts, in connection with the question of negotiability of American railroad shares, and business men in the former country seem to be not a little alarmed at the recent decisions in the cases of *The London & County Banking Co. v. The London & River Plate Bank*, 20 Q. B. Div. 232, and *Williams v. The London Chartered Bank of Australia*, 38 Ch. Div. 388, wherein it is practically held that American railroad share

certificates are not negotiable. It seems that, by a custom heretofore observed in the Stock Exchange, such shares are treated as if they were negotiable securities, and it was sought in one of the above cases to establish negotiability by proof of such custom, but Mr. Justice Manisty took the position that if the right of suing upon an instrument does not appear upon the face of it to be extended beyond one particular individual (referring to the blank endorsement of the original holder), no usage of trade, however extensive, will confer upon it the character of negotiability. Therefore, the English capitalist is becoming alarmed at the thought that he is practically dependent, in the purchase of American railroad shares, upon the good faith and honesty of the seller. An attempt is being made by a company called "The English Association of American Bonds and Shareholders," to confer the character of negotiability upon such securities, by a series of registrations in the name of the association and the issue of a new certificate, which upon its face is declared a negotiable instrument. Whether such an arrangement will be effectual in making shares legally negotiable within the decision of Mr. Justice Manisty remains to be seen. Probably at some future time the nature of the certificates of the association will be considered in the courts, and it will be interesting to see how far the attempt to create negotiable securities out of securities which are not negotiable has been successful.

THE Indiana legislature at its last session passed an act, intended to relieve the supreme court of that State, providing for a commission or an additional court, to be selected by the legislature to whom should be assigned for consideration and decision cases before the supreme court. It will doubtless be remembered that the contest upon this act partook largely of a political character, and in connection with its passage and enforcement certain sensational scenes were enacted, which, by many, were thought not to comport with the dignity of the subject. This act has now been declared unconstitutional by the supreme court, upon the ground that the people have a right to the courts established by and under the constitution, and this constitutional right the legislature can

neither alter nor abridge. Constitutional tribunals can not be changed by legislation, and the supreme court is a constitutional tribunal. It can be composed of judges only, for only judges can constitute a court. No part of the judicial duties of that court can be assigned to any other person than one of the duly chosen judges. The legislature has no power to change its organization, nor can that body under the guise of creating commissioners divide the duties of the judges, nor authorize it to be done. Under the constitution, as amended, the legislature may establish courts, but it cannot destroy the constitutional courts, nor can it change their organization, nor redistribute their powers, for these courts owe their organization to the constitution, and as the constitution has ordained that they shall be organized, so they shall be. In other words, that judicial power distributed by the constitution is beyond legislative control.

NOTES OF RECENT DECISIONS.

A question of the liability of stockholders came before the Supreme Court of the United States in *Bank of Fort Madison v. Alden*, 9 S. C. Rep. 332. There, a number of persons owning timber lands formed a corporation for the manufacture and sale of lumber, and the lands were conveyed to a trustee for the benefit of the corporation according to an agreement by which each member was to receive stock in proportion to his individual interest in the lands, the trustee accepting such lands in full payment of the shares issued. A creditor of the corporation sought to enforce the liability against a stockholder on the ground that the land conveyed by him in payment for his stock was worth much less in cash than the value of the stock, and hence that his subscription to the land was unpaid to the extent of the deficit. The court held that the creditor, having had full knowledge of the facts, could not maintain such an action, and says:

The parties who became stockholders had, pursuant to a previous agreement, conveyed their lands to a trustee, in trust for the corporation formed, upon an understanding that stock should be issued to them in proportion to their individual interests in the property. The subscription was made upon this arrange-

ment, and the parties acted with full knowledge of the conditions on which the property was to be transferred to a trustee, and the stock was to be issued to them. There was no attempt to pass off the property as different or more valuable than it was. There was no deception or misrepresentation of any kind in the case. No demand, therefore, against the estate of the deceased Waterman can be sustained upon the assumption that by the conveyance of his land he had not paid up all that he contracted or was bound to pay by his subscription. There was no credit given by the bank to the company upon any representation of a different set of facts than that which actually existed. The bank was owned by two of the stockholders of the company, Brewster and Smith, who had participated in, and had been well advised of, all that was done by the company. They held all the shares of the bank, and were respectively its president and cashier. Such being the case, the answer to the claims of the bank is found in the decision of this court in *Colt v. Amalgamating Co.*, 119 U. S. 343, 7 S. C. Rep. 281. There the holder of a judgment against the corporation, being unable to obtain its satisfaction upon execution, and finding the company was insolvent, brought suit to compel the stockholders to pay what he claimed to be due and unpaid on the shares held by them. He contended that the valuation put upon the property taken for such stock was illegally and fraudulently made at an amount far above its actual value, but the court said: "If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account."

The question of infantile negligence or degree of care required of children, was considered by the Supreme Courts of Indiana and Ohio in *Brazil Block Coal Co. v. Young*, 20 N. E. Rep. 423, and *Cleveland Rolling Mill Co. v. Corrigan*, 20 N. E. Rep. 466. The Indiana court says:

The authorities do make a distinction, and with sound reason, between children and adults. Persons of tender years must not be set to work in dangerous places by their employers, without due warning and instruction. Indeed, it is not always that warning and instruction will absolve the master. *Hill v. Gust*, 55 Ind. 45; *Bisford v. Johnston*, 82 Ind. 426; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Engine Works v. Randall*, 100 Ind. 293; *Railroad Co. v. Pitzer*, 109 Ind. 179, 6 N. E. Rep. 810, and 10 N. E. Rep. 70; *Railroad Co. v. Fort*, 17 Wall. 558; *Coombs v. Railroad Co.*, 102 Mass. 572; *Sullivan v. Manufacturing Co.*, 113 Mass. 396. "Notice of danger," says Dr. Wharton, in dis-

causing this question, "is not enough. The child must have sufficient instruction to enable him to avoid the danger." Whart. Neg. § 216. Not very different is the opinion of Mr. Wood, who says: "But in the case of young children a mere warning is not the measure of the master's duty. He must instruct him as to the methods of working with and about it, and it is negligence *per se* for him to put such a person to work with or in the vicinity of dangerous machinery until he has been made to understand the methods of using it as well as the hazards incident to its use." Wood, Mast. & Serv. § 350. The authorities to which we have referred do establish the doctrine that the master's duty is much broader in cases where young children are employed than in cases where the employees are of full age, but they do not fully determine the question before us, for that question is whether, conceding the duty to exist, any breach is shown. We suppose it to be clear that when a plaintiff charges a defendant with a negligent breach of duty he must state facts from which actionable negligence can be inferred, for the general rule is that negligence cannot be presumed. This general rule is uniformly applied to employers and employees, and it is presumed that the employer has done his duty. *Railway Co. v. Sanford*, *supra*; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. Rep. 380. This presumption is, in effect, a *prima facie* case in favor of the employer. *Railway Co. v. Thompson*, 107 Ind. 442, 8 N. E. Rep. 18, and 9 N. E. Rep. 356. To defeat the presumption of duty performed it is necessary to state facts rebutting that presumption, otherwise there can be no cause of action. A violation of duty must therefore be shown, otherwise the complaint must be adjudged to be bad. This is so because culpable negligence cannot be presumed in aid of a complaint. *Railway Co. v. Brannagan*, 75 Ind. 490; *Railway Co. v. Greene*, 106 Ind. 279, 6 N. E. Rep. 603. The averment that there was no contributory negligence absolves the plaintiff from fault, but it does not show actionable negligence on the part of the defendant. It is one thing to show the plaintiff free from fault, and quite another to show the defendant in fault. The averment that the plaintiff and his son were free from negligence is not sufficient to cover the question here presented. *Railway Co. v. Sanford*, *supra*. The question here is, does the complaint show such fault on the part of the employer as to vest the employee with a cause of action? In order to show the defendant guilty of an actionable tort the complaint should have averred one of three things: First, that the plaintiff's son was too young to be put to the service he was required to perform; or, second, that neither he nor the plaintiff had notice or knowledge of the augmented danger caused by the master's neglect; or, third, that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction.

The Ohio court says:

We have found no decision of this court upon the subject of the contributory negligence of infants, or the measure of care required of them in such cases. Elsewhere the cases are conflicted. Each of three different rules on the subject has found judicial sanction. One rule requires of children the same standard of care, judgment and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these two extremes a third and more reasonable rule has grown into favor, and is now supported by the great weight of authority, which is that a child is held to no greater

care than is usually possessed by children of the same age. Authors and judges, however, do not always employ the same language in giving expression to the rule. In *Beach*, *Contrib. Neg.* § 46, it is thus expressed: "An infant plaintiff who, on the one hand, is not so young as to escape entirely all legal accountability, and, on the other hand, is not so mature as to be held to the responsibility of an adult, is, of course, in cases involving the question of negligence, to be held responsible for ordinary care; and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child." The decisions enforcing this rule—that children are to be held responsible only for such degree of care and prudence as may reasonably be expected of them, taking due account of their age and the particular circumstances—are very numerous. "It is well settled," says Mr. Justice Hunt, in *Railroad Co. v. Stout*, 7 Wall. 657, "that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. * * * The care and caution required of a child is according to his maturity and capacity only; and this is to be determined, in each case, by the circumstances of that case." In 1 *Shear. & R. Neg.* § 73, it is said to be "now settled by the overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such care and discretion as is reasonably to be expected from children of his age." "A child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising." *Whit. Smith, Neg.* 411. This rule appears to rest upon sound reasons, as well as authority. To constitute contributory negligence in any case, there must be a want of ordinary care, and a proximate connection between such want of care and the injury complained of; and ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use under similar circumstances. Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. Hence ordinarily prudent men reasonably expect that children will exercise only the care and prudence of children; and no greater degree of care should be required of them than is usual, under the circumstances, among careful and prudent persons of the class to which they belong. We think it a sound rule, therefore, that, in the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and, while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

The non-enforceability of a subscription to a church fund is well illustrated in the case of *Presbyterian Church v. Cooper*, 20 N. E. Rep. 352, decided by the New York Court of Appeals. There it was held that where defendant's intestate signed a subscription paper by which the signers agreed to pay to the trustees of plaintiff church the amounts set opposite their names, on condition that a certain fixed sum was subscribed, the fact

that other persons signed such subscription on the faith of the signature of the decedent constituted no consideration for the promise of the latter. The court says:

It has sometimes been supposed that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise would not in a legal sense be beneficial to the promisors entering into the engagement. This seems to have been the view of the chancellor, as expressed in the *Hamilton College Case*, when it was before the court of errors (2 Denio, 417); and *dicta* of the judges will be found to the same effect in other cases. *Trustees v. Stetson*, 5 Pick. 508; *Watkins v. Eames*, 9 Cush. 527. But the doctrine of the chancellor, as we understand, was repudiated when the *Hamilton College Case* came before this court (1 N. Y. 581), as have been also the *dicta* in the Massachusetts cases, by the court in that State, in the recent case of *Church v. Kendall*, 121 Mass. 528. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors, and a failure to carry out, as between themselves, their mutual engagement. It is in no proper sense a case of mutual promises as between the plaintiff and defendant. If any action would lie at all, it would be one between the promisors for breach of contract. * * * Such consideration must therefore be found other than that expressly stated in the subscription paper in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services rendered by one party at the request of another would constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or the trustees did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view. Leaving out of the subscription paper the affirmative statement of the consideration (which for reasons stated may be rejected), it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property, upon a condition precedent limiting their liability. Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in the *Hamilton College Case*, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. * * * The cases of *Barnes v. Perine*, 12 N. Y.

18, and *Roberts v. Cobb*, 106 N. Y. 600, cited and distinguished.

Probably the most important case to banks and bankers, involving the question of application of deposits, that has lately appeared, is *Grissom v. Commercial Nat. Bank*, 10 S. W. Rep. 774, decided by the Supreme Court of Tennessee. There the defendant bank contended for the right, without further orders to apply certain moneys on deposit to plaintiff's credit, to the payment of plaintiff's note made payable there, taking the position that it has the power to treat a note so made as the equivalent of a check, and as a direction, therefore, on the part of the maker to pay same on his general account as a depositor. The court enter into a long and exhaustive review of the authorities, and conclude that the bank has no such authority in the absence of a usage or of instructions. They say:

The question is presented for the first time in this State, although it has received the attention of text writers, and been passed upon by the courts of other States, where we find a conflict of opinion. Under such circumstances it is our duty to determine the question for ourselves, upon reason and principle, and with a due regard for considerations of public policy and convenience, provided that, in doing so, we do not place our State in antagonism to the current of authority in this country. We recognize the fact that it is of prime importance that the several States in this Union should, as far as may be, without doing violence to well settled principles of State jurisprudence, endeavor to bring about and maintain as much certainty and uniformity of decision on questions of commercial law as can be accomplished. In response to this idea, we would, upon the question now before us, yield much of the strong conviction we entertain thereon in the endeavor to place ourselves in line with the current of authority, if a strong and steady current could be found, which would not threaten to engulf and destroy distinctions which have been long and well settled in this State. While we must concede that the weight of text-book authority is in support of defendant's contention, we are unable to discover that the weight of judicial decision is in the same direction. Moreover, we are constrained to believe that the contrary view is more in harmony with well settled adjudications in this State upon principles presenting analogous questions, and that the current of adjudged cases is certainly as strong in the same direction. Let us see, in the first place, what is the relation between depositor and banker. It is merely that of debtor and creditor, where the deposit is not a special one. The money deposited in the ordinary course of business is at once blended with the general funds of, and becomes the property of, the bank. The depositor has only a debt against the bank, payable on demand, upon the presentation and surrender of the draft or order addressed to and directing the bank in unequivocal terms to pay the amount of such draft to the person therein named, or to bearer. This order is commonly known in commercial and banking parlance as a "check." * * *

* * Is the liability of indorsers and sureties to depend upon the pleasure of the bank whether or not it will appropriate the deposits of the maker to the payment of his notes? If the banks should pay checks drawn on the day of the maturity of a note of the maker in favor of itself or of a third party, to the exhaustion of the drawer's deposits, is it to be liable to the holder of the note for not having withheld sufficient funds to pay the latter? And is a twin suit to be born out of the same transaction between the holder and the sureties or indorsers as to whether or not they have been thereby discharged; they, perhaps, having given notice to the bank that unless deposits sufficient are held they will claim their discharge? If the bank should, under such notice, deem it safe to withhold deposits sufficient for the note, is it to then encounter a suit with the holder of a check unpaid? Is the maker of a note, where there has been a total failure of consideration, giving him a good defense to the note as against the payee or purchaser, not in due course of trade, to be held liable to the bank, which, in the absence of deposits, has gone forward and paid the note for the maker, advancing the money therefor under the proposition, authorizing the bank to treat the note made payable months before at its house as equivalent to a check, or request to pay? On the other hand, if the bank should fail to pay a note so made payable where there were deposits sufficient, whereby the note is protested, is the bank to become a defendant to a suit for damages for injury to the credit and business of the maker, upon the authority of the proposition, to the effect that the note so made constituted the bank the maker's agent to protect his credit out of the latter's deposits? Illustrations of the inconvenience and hardships of the rule which we are urged to establish could be multiplied almost indefinitely, and are such as to readily suggest themselves to thoughtful men, acquainted with the practical affairs of commercial life. To hold a note payable at a particular bank as tantamount to a check on the bank, is to confound distinctions heretofore established and well settled in the adjudications of this State between notes and checks. A "check" is defined to be a "written order on a bank directing it to pay a certain sum of money." A "note" is the "written promise to pay another a certain sum of money at a certain time." One is payable on presentation, the other is payable on a day certain. One is entitled to days of grace, the other is not. One is an order on a third party, the other is the undertaking of the party himself. One is an appropriation of so much money in the banker's hands, the other is a *promise* to pay. On the check, ordinarily, no right of action accrues until after presentment for payment; on the note, a right of action against the maker exists without such presentment. *Blair v. Bank*, 11 *Humph.* 88; *Mulherrin v. Hannum*, 2 *Yerg.* 81; *Springfield v. Green*, 7 *Baxt.* 301; *Bank v. Merritt*, 7 *Helsk.* 190; *Brown v. Lusk*, 4 *Yerg.* 216. For these and other considerations we cannot yield our assent to the doctrine urged by the defendant, and upon which the case was decided in the court below. We hold, therefore, that there is no implied authority for a bank to pay to a third party a note made payable at its place of business simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instructions to so apply the deposits.

The opinion is so long it is impossible for us to do more than group the authorities cited *pro* and *con*. Those sustaining the de-

cision of the court are: *Wood v. Saving Co.*, 41 *Ill.* 267; *Bank v. Patton*, 109 *Ill.* 479; *Scott v. Shirk*, 60 *Ind.* 160; *Bank v. Bank*, 132 *Mass.* 151; *Gordon v. Merchler*, 34 *La. Ann.* 604; 1 *Edw. Bills* (3d Ed.), § 195; *Newmark on Bank Deposit*, 120. Those apparently in conflict with the court's opinion, or at least holding that it is the privilege of the bank to apply or not, as they please, such deposits to pay note of depositor, are: *Lozier v. Horan*, 55 *Iowa*, 75; *Thatcher v. Band*, 5 *Sandf.* 130; *Bank v. Bank*, 46 *N. Y.* 88; *Bank v. Newton*, 8 *Bradw.* (Ill.) 563; *Bolles on Banks*, § 403; 2 *Morse on Banking*, § 557; *Pratt's Banking Law*, 44; *Mendeville v. Bank*, 9 *Cranch*, 9; *Indig v. Bank*, 80 *N. Y.* 106; *Bank v. Henninger*, 10 *Pa. St.* 496; *Daniel on Negotiable Instruments*, § 326a; *Roberts v. Tucker*, 16 *Adol. & E. (N. S.)* 578; *Kymer v. Laurie*, 18 *Law J. Q. B.* 218.

An interesting question of trade-mark came before the Supreme Court of Minnesota in *Cigar Makers' Protective Union v. Conhaim*, 41 *N. W. Rep.* 943. The Cigar Makers' Union having many thousands of members, adopted or agreed upon a certain symbol or device to be used by their several members, by placing it on boxes of cigars made by such members; such device not indicating by what persons the cigars are made, but only that they are made by some member of one of such unions, the right to use the device belonging equally to each of all the members, and continuing only while the person remains a member. It was held (two of the judges dissenting) that it was not a valid trade-mark. The court says:

The right in trade-marks, or the exclusive right to use certain symbols or devices placed upon goods offered for sale, is property. Hence the law affords a remedy to the owner against one who violates the right. A trade-mark consists of a word, mark, or device adopted by a manufacturer or vendor to distinguish his productions from other productions of the same article. *Hostetter v. Fries*, 17 *Fed. Rep.* 630. The theory on which the right to it, as property, is based, is that a man may have acquired a reputation excellence in the manufacture or preparation of a certain article for sale, which reputation may be the source of profit to him. In the enjoyment of this reputation, and of the benefit and pecuniary advantages thereof, he ought to be protected as he ought to be and is in the advantages of the good will of a business established by him; and so that the purchasing public may know the origin of such articles when offered for sale, and that they are of his manufacture or preparation, he may adopt and place on them, as the index of their origin, some device or symbol not used by others

upon similar articles, which by such adoption, and by use in connection with his articles, come to be known as representing that the articles on which they are placed are made or prepared by him, just as his signature to a business paper in an assurance to others that he executed it. It has, indeed, been likened to his business autograph. The wrong for which a remedy is given consists in misrepresenting to the public, by the use of his trade-mark, goods or wares of another as having been made by the true owner of the mark, and thereby depriving him to a greater or less extent of the benefit of the good will of his establishment, and the reputation that he has given the articles made by him. *Stokes v. Landgraff*, 17 Barb. 608. It is essential that the symbol or device shall be adopted to distinguish the productions of the manufacturer or vendor from those of others, and it must so distinguish them. "The trade-mark must either by itself, or by association, point distinctly to the origin or ownership of the article to which it is applied." *Canal Co. v. Clark*, 18 Wall. 811. It must indicate, to those familiar with its use and purpose, by or for whom the article was made, produced, or prepared for sale. If such be not its purpose and meaning, it fails of being a legal trade-mark. The right to it cannot exist as a mere abstract right, independent of or disconnected from the business in which it is used. It is not property except as an incident to such business. It cannot be transferred, except with the business. *Spring Co. v. Spring Co.*, 57 Barb. 528; *Crucible Co. v. Guggenheim*, 2 Brewst. 321; *Lockwood v. Bostwick*, 2 Daly, 521; *Derringer v. Plate*, 29 Cal. 292; *McVeagh v. Cigar Factory*, *American Trade-mark Cases*, 970. In this particular it resembles the good will of a business. One having acquired the right to a trade-mark in the business of manufacturing or preparing a particular article for sale may sell the trade-mark with the business, but not separate from it. Apply the foregoing definition and essentials of a legal trade-mark to the facts of this case, and it is apparent that the device in question cannot be a trade-mark, and the right to use, as such right is shown by the complaint, is not property, but a mere personal privilege; or, rather, the use of it on cigars is only an advertisement of the fact that the person using it is a member of one of the cigar makers' unions. Clearly, to indicate what person, firm, or corporation made the cigars in any box on which the mark is placed, is not the purpose of its adoption and use. Its purpose is only to indicate membership in the union. The complaint claims for the international and local unions the right to the trade-mark, and right to confer the privilege of using it on those they admit to membership, but it does not appear that they were ever, as unions, engaged in manufacture or trade, or that they were formed for any such purpose. The case comes just to this: The cigar-makers have formed themselves into associations, and, to secure to the members whatever benefit in their business the fact of membership may give them, they agree on a certain device to be placed on their productions as a sign of membership. We might suppose any other association of persons, a church, the order of Free Masons or Odd Fellows, to agree that its several members shall put a particular device on articles manufactured by them for sale, so that the members may mutually assist each other by means of such device. Now, the right to use such a device, being got merely by joining the association, and not depending at all on the person having earned a reputation or good will for the manufacture of the particular article, could not be regarded as a lawful trade-mark. Such a case would not materially differ from this. It is true the

members of the unions are all engaged in the same kind of business, to-wit, the making of cigars. But they are not engaged in business together. The business and business interests of one are as distinct from those of another as though they followed entirely different kinds of business. In these particulars the device is wanting in the essential characteristics of a legal trade-mark: First. It is not adopted nor used to indicate by what person the articles were made, but merely to indicate membership of a certain association. Second. Its use is not enjoyed as an incident to any business, and the right to use it cannot be transferred, even with the transfer of the business in which it may have been employed; the right to use it can be acquired only by becoming a member of one of the unions or employing those who are members, and lost only by ceasing to be a member or to employ members. Third. There is no exclusiveness in the use, or right to use, which is necessary to a legal trade-mark. *Brown v. Trade-marks*, §§ 143, 300, 324.

An interesting question as to the responsibility of a municipal corporation for damages caused by the firing of a cannon in a public park, was decided by the Supreme Court of Massachusetts in *Lincoln v. City of Boston*, 20 N. E. Rep. 329. There it was held that under the ordinance of the City of Boston providing that no cannon or artillery shall be fired by the militia or others upon the common or other public grounds, unless such firing is authorized by the city council, the mayor or the commander-in-chief of the militia of the commonwealth, a license to fire cannon on the common is not given by the city as an act of ownership, but as an act of municipal government, and the person doing the firing is not the city's agent, so as to make the city liable for damages caused by plaintiff's horse taking fright at the firing, and running away, on a neighboring street. The court says:

These considerations make plain what is very plain without them, that the ordinance set out in the declaration is not the exercise of an owner's authority over his property, but is a police regulation of the use of a public place by the public, made by the city under its power to make needful and salutary by-laws, without regard to the accidental ownership of the fee, *Stat.* 1854, ch. 448, § 35; *Com. v. Davis*, 140 Mass. 485, 4 N. E. Rep. 577. See *Com. v. Worcester*, 3 Pick. 462; *Pedrick v. Bailey*, 12 Gray, 161; *Com. v. Curtis*, 9 Allen, 266; *Com. v. Patch*, 97 Mass. 221; *Com. v. Brooks*, 109 Mass. 355. Like the ordinance discussed in *Com. v. Davis*, its purpose is prohibitory, and the license which it implicitly authorizes, *Rev. Ord.* 1885, ch. 1, § 7 is merely a removal of the prohibition and of the liability to a penalty which otherwise would be incurred, *Rev. Ord.* 1885, ch. 1, § 5. It makes no difference whether the license is given by the mayor or by the commander in chief of the militia, see *Stat.* 1887, ch. 411, §§ 90, 108, 109. In either case the license is not a permission granted by the agents of the owner, but an adjudication of an exception to a quasi statutory rule, made by a person who for that purpose is not the owner's agent. *A fortiori*, the person who fires the

cannon is not the city's agent or servant, and the firing is not the city's act. The case, then, is simply that the city has failed to prohibit the firing of cannon in a public park, by legislation, or has given its legislative sanction on certain conditions. It has no private interest in the matter, and there is no statute giving an action for such a cause, *Clark v. Waltham*, 128 Mass. 567, 570, and cases *supra*. See *Hutchinson v. Concord*, 41 Vt. 271, 274; *Tindley v. Salem*, 187 Mass. 171. Annoying, and even dangerous, as such firing may be, an adjoining householder could not maintain an action against the city, and the plaintiff stands no better than an adjoining owner would. We do not understand that he seeks to charge the city for a breach of its statutory duty with regard to highways. With regard to that, however, it may be, as to the duty of land owners, it would be enough to say that the act of the person who fired the cannon was the proximate, or at least a concurring cause; and that he was not a servant of the city, *Kidder v. Dunstable*, 7 Gray, 104; or, more shortly still, that noises outside the limits of the highway, amounting to a public nuisance, are not a statutory defect in the way, *Hixon v. Lowell*, 18 Gray, 59, 63; *Keith v. Easton*, 2 Allen, 552, 555; *Bemis v. Arlington*, 114 Mass. 507; *Cook v. Montague*, 115 Mass. 571.

Concerning the power of a stockholder in a corporation to enforce an inspection of the stock transfer book of the company, the Supreme Court of Rhode Island, in *Lyon v. American Screw Co.*, 17 Atl. Rep. 61, says:

One of the privileges incident to ownership of stock in a corporation, is that of an inspection of the books and condition of the company. This privilege in general becomes a right when the inspection is sought at proper times and for proper purposes and in particular when it is specially given either by the law of the State or by the charter and by-laws of the company. * * * But the petitioners argue that the transfer of stock is a part of the business of the company, and that consequently the stock ledger is included within the operation of the by-law. We do not so understand it. An "account of all the business of the company" has reference to its manufacturing and commercial transactions. A list of stockholders would neither naturally nor properly be included in an account of the business. Hence a book containing the names of the stockholders is not, in our opinion, within the provisions of the by-law. There is nothing in the charter nor in the statutes relating to this matter. If, then, the petitioners have not an express and absolute right to examine this book, but only what may be termed a privilege so to do, incident to ownership of stock, the question comes, under what circumstances may this privilege be enforced as a right? The answer has already been given—at proper times, and for proper purposes. One reason for this limitation is that a stockholder should not be entitled to call upon the court to enforce that which is not given him by law, or the rule of the company, unless the circumstances show that he needs such aid for some reasonable and proper purpose. While all the privileges of a stockholder should be fully accorded to him when occasion requires, the affairs of the company should not be interfered with without such requisite occasion. *People v. R. R. Co.*, 11 Hun, 1; *In re Sage*, 70 N. Y. 220; *Com. v. Insurance Co.*, 103 Pa. St. 111. We think it is well settled that in cases like the one before us it is dis-

cretionary with the court whether to issue a writ of *mandamus* or not; and that this discretion depends upon the necessity or propriety of granting it, under the circumstances shown. In the following cases it was denied because the facts did not show that it was necessary for the particular occasion. *The King v. Merchant Tailors' Co.*, 2 Barn. & Adol. 115; *Reg. v. Mariquita Mining Co.*, 1 El. & El. 239; *People v. Railroad Co.*, 50 N. Y. Super. Ct. 456; *Rosenfeld v. Einstein*, 46 N. J. Law, 479; *People v. Railroad Co.*, *supra*; *Hatch v. Bank*, 1 Rob. (La.) 470. In the following cases it was granted expressly upon the showing of a proper cause or of a right given: *In re Burton & Sadlers Co.*, 31 Law J. Q. B. 62; *People v. Steam Ship Co.*, 50 Barb. 280; *Cockburn v. Bank*, 13 La. Ann. 289. * * * We have therefore to consider whether the case now made is such as to call for the issuing of the writ. The petition is urged upon the ground that the stock has of late paid little or no dividends, and has depreciated very much in market value. But it is not alleged that this is due to any mismanagement of the company, or that it has been able to pay dividends, or that the books would disclose a value for the stock above its market value, if this would be material. For all that appears, the lack of dividends and the decline of the stock may be due simply to the ordinary competition and vicissitudes of business. In any event, no question is made of the right of the petitioners to fully inform themselves from the books of the company as to its financial condition. Also, that the officers of the company do not print and distribute among its stockholders any reports as to its business or condition, and they desire to inform themselves upon these matters. Excepting printing, this allegation is not supported by the testimony; on the contrary, it appears that copies of the treasurer's reports to the annual meetings have always been furnished to any stockholder asking for them. Also, that they desire to confer with their fellow-stockholders, and for this purpose to inspect the list. The by-laws provide both for annual and special meetings, which were, doubtless, deemed to afford ample opportunity for conference about the affairs of the company, as well as the fit occasion for it. It does not appear that the petitioners have been deprived of such conference at any annual meeting, or that they have tried to call a special meeting. Certainly outside talk among stockholders could amount to nothing unless it were to be followed by action at a corporate meeting. Neither do they allege that there is any considerable dissatisfaction among the stockholders, such as to render such a conference advisable or important. Indeed, the fact that one of the petitioners has advertised, from time to time, for nearly a year, for stockholders to send him their names and addresses for this purpose, without success, tends to show that there is no such dissatisfaction, and that the desire for a conference is not reciprocal. We fail to see, therefore, how the petitioners would be benefited by a writ of *mandamus*, or injured by its refusal.

THE RECENT LAW OF GIFTS

Gift in General.—A gift, as the ordinary view of the transaction is embodied in statutory phraseology, is a transfer of personal property, made voluntarily and without consideration.¹ A gift in view of death, commonly called a *donatio causa mortis*, has received statutory definition as one which is made in contemplation, fear or peril of death, and with intent that it shall take effect only in case of the death of the giver.² Where an absolute gift is made, a reservation of the right to use, in the nature of a condition subsequent, will not invalidate the gift.³

Consummation of Transfer.—To constitute a valid gift the transfer must be consummated, and not remain inchoate, or rest in mere intention; and this is so, whether the gift is by delivery only, or by the creation of a trust in a third person, or in the donor; for enough must be done to pass the title.⁴ Accordingly it has been held, in a ruling of comparatively recent date, that a vote by the trustees of a charity, created by will, that the note of a possible beneficiary given them as security for money loaned him out of the

fund, should "be surrendered to him, he having paid the interest punctually, and the trustees being satisfied that he will make good use of the money in the future," does not constitute an immediate gift of the note.⁵ So on the principle that a gift is not consummated without delivery, and that the subject of it must therefore be *in esse*, it has rather lately been ruled that a trustee cannot make a gift to his wife of what may become payable to the family in the future for board, as he could not give that which he had not yet acquired.⁶ A *donatio causa mortis* must be completed executed, precisely as required in the case of a gift *inter vivos*, subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation of the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets to pay the debts of the deceased donor.⁷

Delivery.—Absolute delivery is uniformly insisted upon,⁸ and it is said that "there must be delivery of possession; and that the thing must be put into the hands of the donee, or

¹ Cal. Civ. Code, § 1147. It has also been defined to be the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person who accepts it without any consideration: 1 Bouv. L. Dict. tit. Gift. It is said by our chief legal commentator that gifts or grants, which are alike methods of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent: 2 Bl. Com. 440. On distinction between sale and gift, see Newmark on Sales, § 10; Parkinson v. State, 14 Md. 184; 74 Am. Dec. 522, 531.

² Cal. Civ. Code, § 1149. See also 1 Pars. Cont. 236. "Cases of donations *causa mortis* are exceptions not to be extended by way of analogy: Healy v. Kirby, 18 Pa. St. 326; cited in 1 Am. L. Reg. 25, and quoted in Gano v. Fisk, 43 Ohio St. 462, 3 N. E. Rep. 532, 536, where it is further said (at p. 534), "Gifts *causa mortis* are not favored, and such gifts must be clearly proved. The civil law sought to prevent fraud in such gifts, and required their execution in the presence of five witnesses to render them valid. Great strictness and clear proof to establish such gifts have been required by the English courts, and litigation as to them has been extensive and hostile. Such a gift can be upheld only where the intention of the donor is definite and certain, and such intent is expressed as to a proper matter of such gift, and such gift is executed."

³ Bennett v. Cook, reported in full, 27 Cent. L. J. 90.

⁴ Martin v. Funk, 75 N. Y. 134; as quoted in Gano v. Fisk, 43 Ohio St. 462, 3 N. E. Rep. 532, 535, 536. The delivery must be as perfect and complete as the nature of the thing given will admit of: Gano v. Fisk, just cited, relying on Pars. Cont. *326, and cases cited, and on 3 Wait Act. & Def. 505.

⁵ Hayden v. Hayden, 8 N. E. Rep. Mass. 437, 440, holding that in order to give him an immediate right to the money, there must have been not only an intention to make a present gift to him, but enough must have been done in execution of such intention to make the gift complete; and citing Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157, 166; 2 N. E. Rep. 925; Sherman v. New Bedford Sav. Bank, 138 Mass. 581; Ide v. Pierce, 134 Mass. 262; Gerrish v. New Bedford Sav. Bank, 128 Mass. 159; Cummings v. Bramhall, 120 Mass. 552, 564; Shurtliff v. Francis, 118 Mass. 154; Clark v. Clark, 108 Mass. 522; Brabrook v. Five Cents Sav. Bank, 104 Mass. 228.

⁶ Read v. Rahn, 65 Cal. 343; 4 Pac. Rep. 111, 112.

⁷ Kaskett v. Hassel, 2 S. C. Rep. 415, as stated in note to Gano v. Fisk, 3 N. E. Rep. 536. If the gift does not take effect as an executed and complete transfer to the donee of possession and title either legal or equitable, it is a testamentary disposition, good only if made and proved as a will; *Ibid.* Gifts *causa mortis* are of a mixed nature resembling gifts *inter vivos* in the essential requisite of delivery, and resembling legacies in being subjects to the debts of the deceased, and in being ambulatory or revocable and contingent on death: Bloomer v. Bloomer, 2 Bradb. Surr. 340; quoted in Gano v. Fisk, 43 Ohio St. 462; 3 N. E. Rep. 532, 533, where the subject is further elaborated and reference is also made to Rhodes v. Childs, 64 Pa. St. 18; Roper Legacies 2; 3 Redf. Wills, § 2, and cases cited.

⁸ Note to Gano v. Fisk, 3 N. E. Rep. 537, referring to Chase v. Redding, 13 Gray, 418; Lessions v. Mosely, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Parish v. Stone, 14 Pick. 203; Grover v. Grover, 24 Pick. 261; Brown v. Brown, 18 Conn. 410; Camp's Appeal, 36 Conn. 88.

placed within his power to deliver the means of obtaining it;"⁹ while it is pointed out that without delivery the transaction is not valid as an executed gift; and without consideration, it is not valid as a contract to be executed.¹⁰ Thus, to establish a gift *causa mortis*, the common law requires clear and unmistakable proof, not only of an intention to give, but of an actual gift perfected by as complete a delivery as the nature of the property will admit of.¹¹ It has further been quite lately laid down, as made clear by a review of the decisions concerning the nature and effect of a delivery of a chose in action, that the instrument or document must be the evidence of a subsisting obligation, and be delivered to the donee so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession, by enforcing the obligation according to its terms, will not suffice.¹² But though to constitute a legal parol gift of chattels there must be actual or constructive delivery, so as to confer the right of enjoyment *in presenti*, yet the fact that the chattels were in the donee's possession at the time of the death of the donor, with whom the donee was living, may be considered, according to an important decision of recent rendition, as showing that there was no occasion to make a visible transfer of possession.¹³

⁹ Harris v. Clark, 3 N. Y. 93. The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and upon the death of the maker, leaving the promise unfulfilled, the gift fails: Starr v. Starr, 9 Ohio St. 74.

¹⁰ Harris v. Clark, 3 N. Y. 93, as quoted in note to Gano v. Fisk, 3 N. E. Rep. 537.

¹¹ Hatch v. Atkinson, 56 Me. 324, as quoted in Gano v. Fisk, 43 Ohio St. 462; 3 N. E. Rep. 532, 546.

¹² Basket v. Hassell, 2 S. C. Rep. 415. A delivery, in terms, which confers upon the donee power to control the fund after the death of the donor, when, by the instrument itself, it is presently payable, is testamentary in character, and not good as a gift: Note to Gano v. Fisk, 3 N. E. Rep. 537, referring to Powell v. Hellicar, 26 Beav. 261; Reddell v. Dubree, 10 Sim. 244; Farquharson v. Carver, 2 Colly. 356; Hatch v. Atkinson, 56 Me. 324; Bimm v. Markham, 7 Taunt. 224; Coleman v. Parker, 114 Mass. 380; Wing v. Merchant, 57 Me. 383; McWillie v. Van Vacter, 35 Miss. 428; Egerton v. Egerton, 17 N. J. Eq. 420; Michener v. Dale, 23 Pa. St. 59.

Savings Bank Deposits.—It has somewhat recently been held that to constitute a gift of money deposited in a savings bank in the name of the party claiming it as a gift, it must have been put in the name of the alleged donee with the intention, on the part of the donor, of making a gift of it, and it must have been accepted by the donee.¹⁴ Yet a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donor the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits, on the general ground that a delivery of a chose in action which would be sufficient to vest an equitable title in a purchaser is a sufficient delivery to constitute a valid gift of such chose in action.¹⁵ The delivery of a bank book by the donor in her last illness, saying that if she died the money should go to her sister in Ireland, has very recently been held not a complete *donatio causa mortis*.¹⁶

Checks and Certificates of Deposit.—It is said that the gift of an unaccepted check, not being in itself an equitable assignment of the fund, is not a sufficient gift¹⁷ even when accompanied by the pass book of the donor;¹⁸ but if the banker accept the check, prior to the death of the donor, the gift is complete and valid.¹⁹ The delivery of a certificate of deposit may constitute a valid gift *donatio*

¹³ Bennett v. Cook (S. C.), reported in full, 27 Cent. L. J. 90, with note, 92.

¹⁴ Scott v. Ford (Mass.), 2 N. E. Rep. 925. See Newmark on Bank Deposits, § 152.

¹⁵ Camp's Appeal, 36 Conn. 88; 4 Am. Rep. 39. See Hewitt v. Kaye, L. R. 6 Eq. 198; Amis v. Witt, 33 Beav. 619. The court held that the book itself is a document of title, the delivery of which, with that intent, is an equitable assignment of the fund. See Pierce v. Boston Savings Bank, 129 Mass. 425; Hill v. Stevenson, 63 Me. 364; Tillinghast v. Wheaton, 8 R. I. 536. A contrary doctrine has been held in Ashbrook v. Ryan, 2 Bush, 228, and in McConnell v. Murray, 8 Ir. Eq. 460. These statements of the purport of the cases are made in the note to Gano v. Fisk, 3 N. E. Rep. 537. See also Newmark on Bank Deposits, § 149.

¹⁶ Appeal of Walsh (Pa), 15 Atl. Rep. 470, as noted, 27 Cent. L. J. 511.

¹⁷ Second Nat. Bank of Detroit v. Williams, 13 Mich. 282; Bank of Republic v. Millard, 10 Wall. 152.

¹⁸ In re Beak's Estate, L. R. 13 Eq. 489.

¹⁹ Bromley v. Bruntton, L. R. 6 Eq. 275; note to Gano v. Fisk, 3 N. E. Rep. 537; Newmark on Bank Deposits, § 207. Where the drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn, it was held that until the check was either paid or accepted, the gift was incomplete, and that in the absence of such payment or acceptance, the death of the drawer oper-

causa mortis,²⁰ but the delivery must be such as to confer upon the donee the right to reduce the fund to possession; and where the donor annexes a condition precedent, which must happen before it becomes a gift, and the contingency contemplates is the donor's death, this gift cannot be executed in the donor's life-time, and consequently can never take effect.²¹

Evidence of Gift.—Where one party deposited a sum in bank to the credit of another, who testified that before the death of the depositor he had said that that money was hers, it was held within a recent period, that her evidence, if believed, was sufficient to establish a gift.²²

Declarations of Donor.—Where there has been plenary proof of a gift it is not error, according to a late ruling of the courts in an action by the administrator of the donor against the donee, to exclude declarations of the donor tending to controvert the gift.²³

Testamentary Gift.—A testamentary gift by a husband to his wife is superior to all legacies not specially preferred to it by the will.²⁴

Gift by way of Payment of Incumbrances.—When a decedent by parol agreed with his niece and her husband, that he would pay off certain incumbrances on their farm, they giving him a deed to it, and that after all the payments were made he would convey the land back to her, it was very lately held that the evidence showed that he held the land upon a constructive trust, that the payments he had made were a gift to the niece and that she was entitled to claim a deed to the land.²⁵

ated, as against the payee as a revocation of the check: *Simmons v. Sav. Soc.*, 31 Ohio St. 457.

²⁰ *Westerlo v. DeWitt*, 36 N. Y. 340; *Amis v. Witt*, 33 Beav. 619; *Moore v. Moore*, L. R. 18 Eq. 474; *Hewitt v. Kaye*, L. R. 6 Eq. 198.

²¹ *Basket v. Hassell*, 2 S. C. Rep. 415; note to *Gano v. Fish*, 3 N. E. Rep. 537.

²² *Alger v. North, etc. Co.* (Mass.), 15 N. E. Rep. 916, as noted, 26 Cent. L. J. 585.

²³ *Bennett v. Cook* (S. C.), reported in full in 27 Cent. L. J. 90. But in an action on a note by the payee against the maker, it has very lately been held that when declarations of the payee of an intention to present the maker with the note have been admitted, other declarations of the maker just prior thereto, that he intended to collect the note by legal means are admissible. *Sherman v. Sherman* (Iowa), 39 N. W. Rep. 232, as noted, 27 Cent. L. J. 438.

²⁴ *Moore v. Alden* (Me.), 14 Atl. Rep. 199, as noted in 27 Cent. L. J. 156.

Adverse Possession.—Where the donee understood the gift to him to be absolute, and accordingly took possession and held adversely to the donor for twenty-one years, his title is valid, according to a very recent ruling, although the donor may have understood the matter differently.²⁶

Undue Influence.—Where a father, eighty years old and feeble, shortly before death acknowledges deeds to a son, with whom he has been living, and on a bill by the other heirs to set them aside, there is evidence that the father was mentally incompetent, the son has the burden to show fairness and absence of undue influence.²⁷

²⁶ *White v. Cannon* (Ill.), 17 N. E. Rep. 453, as noted in 27 Cent. L. J. 275.

²⁷ *Moreland v. Moreland* (Pa.), 15 Atl. Rep. 655, as noted in 27 Cent. L. J. 590. Of similar scope is another ruling of almost as recent date, that when a party has been in possession of land under a parol gift from the owner for more than twenty years, and is sued by the owner or his representative, it is error for the court to direct a verdict for the demandant: *Wheeler v. Laird* (Mass.), 18 N. E. Rep. 212, as noted, 27 Cent. L. J. 533.

²⁷ *Collins v. Collins* (N. J.), 15 Atl. Rep. 349, as noted in 28 Cent. L. J. 97.

CORPORATIONS—STOCK—CERTIFICATES—NEGOTIABILITY.

EAST BIRMINGHAM LAND CO. V. DENNIS.

Supreme Court of Alabama, January 15, 1889.

A certificate of stock in a private corporation is not a negotiable instrument, and the owner of such a certificate, which was lost by him, or stolen from him, without fault on his part, can assert his title thereto against one, who subsequently became an innocent purchaser thereof for value.

The bill in this case was filed by J. F. Dennis against J. P. Mudd, and the East Birmingham Land Company, a private corporation, and sought to compel the transfer, on the books of the corporation, of a certificate for ten shares of stock, of which the complainant claimed to be the owner, and to compel the delivery of the certificate to him by said Mudd, who had the possession of said certificate, and claimed the ownership of it. The certificate was issued in the name of A. R. Dearborn, and was indorsed by him in blank. The complainant claimed that he had bought the certificate, with the blank indorsement thereon, from a holder who had acquired it by purchase from said Dearborn; and that it was lost by him, or stolen from him, without fault on his part. Mudd purchased the certificate for value from Wilson, Sage & Clark, stock-brokers in Birmingham; and,

while denying complainant's ownership, claimed that he acquired a good title by the custom and usage of brokers and merchants in Birmingham. A decree *pro confesso* was taken against the corporation. On final hearing on pleadings and proof, the court rendered a decree for the complainant, and this decree is now assigned as error by each of the defendants separately.

SOMERVILLE, J., delivered the opinion of the court:

We concur in the conclusion reached by the judge of the city court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it some time in March, 1888. The only question is whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant. The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It cannot be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking house, whence it was abstracted by some unknown person, apparently without any fault on his part. Nor does any question arise involving the rights of a subsequent *bona fide* purchaser of stock from one shown to be the owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors or purchasers without notice." Code 1886, § 1671, *Fisher v. Jones*, 82 Ala. 117, 3 South. Rep. 13. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant, Dennis, himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title.

Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper. The

rule is well settled that a *bona fide* purchaser of a negotiable bill, bond, or note, although he buys from a thief, acquires a good title, if he pays value for it, without notice of the infirmity of his vendor's title.

The authorities are clear in support of the view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper; and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority to make the sale.

This question arose and was decided by the New York Court of Appeals in *Bank v. Railroad Co.* (1856), 13 N. Y. 599. It was there held that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer or order of the party to whom they are given." They were said to be in some respects like a bill of lading or warehouse receipt, being "the representation of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is that all such instruments possess a sort of *quasi* negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In *Shaw v. Spencer*, 100 Mass. 382, it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks * * * so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of *Sewall v. Water-Power Co.*, 4 Allen, 282; decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. Rep. 349, where it was expressly held that *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in

regard to the matter of negligence, as follows: "But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading in *Gurney v. Behrend*, 3 El. & Bl. 622, decided by the English queen's bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent, without authority, fraudulently transferred the bill for value, and it was held by Lord Campbell that, for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of *Barstow v. Mining Co.*, *supra*, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. *Woolley v. Sergeant*, 14 Am. Dec. note, p. 427, and cases there cited; *Cook, Stocks*, §§ 7, 10, 192, 368, 437, 2 Daniel, Neg. Inst. (3d ed.) § 1708g. It harmonizes entirely with the declaration of our statute that shares of stock in private corporations are "personal property, transferable on the books of the corporation" in accordance with the rules and regulations of the corporation. Code 1886, § 1669; *Campbell v. Iron Co.*, 83 Ala. 451, 3 South. Rep. 369.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases it has often been held that the true owner, having conferred on the holder by contract all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." 2 Daniel, Neg. Inst. (3d ed.) § 1708g; *McNeil v. Bank*, 46 N. Y. 325; *Turnpike Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 N. J. Eq. 479; *Bank v. Livingston*, 74 N. Y. 223. These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver than a stranger who has been negligent in trusting no one. *Allen v. Maury*, 66 Ala. 10.

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. *Dickinson v. Gay*, 83 Am. Dec. 656, note 664; *Railroad Co. v. Johnston*, 75 Ala. 596; *Lehman v. Marshall*, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed.

NOTE.—There has been a constant effort on the part of stock-brokers to have certificates of shares in private corporations declared negotiable instruments, but the courts have uniformly decided that they are not negotiable,¹ though they are often spoken of as *quasi* negotiable. Therefore, the general rule, that a party cannot be deprived of his property without his consent or by due process of law, applies to such certificates. The officers of the corporation are the custodians of its stock-books, and it is their duty to see that all the transfers of stock are made by the stockholders themselves or by persons having authority from them. If they are in doubt, they may require proper proof before making a transfer, but in any case they must act on their own responsibility. The great principle is that the owner cannot be deprived of his property without his consent or by due process of law.² The corporation must exercise reasonable care. If it learns from the form of the certificate or otherwise, that the present holder thereof is not the absolute owner, and it fails to make inquiries, and issues a new certificate, and the rightful owner is injured thereby, the corporation is liable to him, without proof of fraud or collusion.³ When the company issues a new certificate, the power of attorney on the old certificate having been forged, the company is liable to the true owner.⁴ Though the cases are not numerous, yet the decision of the principal case is sustained by the authorities.⁵

Exceptions to Rule.—This rule applies when the owner was not negligent and did not put it in the power of another to mislead a third party, and the purchaser himself had no reason to doubt the title of his vendor. When the owner delivers the certificate to another with an executed power of attorney thereon to transfer the same, an innocent purchaser for value will be protected against the owner's claim thereto, though such vendor had no authority to sell, or otherwise disobeyed the owner's instructions.⁶ If, however, the purchaser knew that the holder was merely acting as attorney for another, the owner is not bound beyond the power given to his attorney.⁷ So, when the purchaser knew that the holder held the certificate in a fiduciary character, he was not protected when he took it to secure a debt growing out of another transaction.⁸ Where the vendor was a boy of only sixteen years of age, it was held that the vendee was not a *bona fide* purchaser.⁹ Where the owner, who had executed a blank power of attorney to transfer his stock on his certificate, lost the same, it was held that he was not guilty of such culpable carelessness as to lose his title as against a *bona fide* purchaser for value.¹⁰ In Illinois it was held, that one who lost a

¹ *Cook on Stock & Stockholders*, § 412.

² *Telegraph Co. v. Davenport*, 97 U. S. 369.

³ *Loring v. Salisbury Mills*, 125 Mass. 188.

⁴ *Pratt v. Boston, etc. R. Co.*, 126 Mass. 448; *Telegraph Co. v. Davenport, supra*.

⁵ *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Bereich v. Marye*, 9 Nev. 812; *Burton's Appeal*, 93 Pa. St. 214; *Dos Passos on Stockbrokers*, 611; *Barstow v. Min. Co.*, 64 Cal. 388.

⁶ *Mount Holly, etc. Co. v. Ferree*, 17 N. J. Eq. 117; *Weaver v. Barden*, 49 N. Y. 286; *Walker v. Detroit, etc. R. Co.* 47 Mich. 538; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325.

⁷ *Prall v. Tilt*, 28 N. J. Eq. 479.

⁸ *Anderson v. Nicholas*, 28 N. Y. 600.

⁹ *Biddle v. Bayard*, 18 Pa. St. 150; *Sherwood v. Meadow V. M. Co.*, 50 Cal. 412.

bond, which by statute was a negotiable instrument, was guilty of such negligence that he could not assert his title thereto against a *bona fide* purchaser for value, though for lack of his indorsement thereon such purchaser had obtained only the equitable title thereto.¹¹

Remedies.—After the certificate has been surrendered and a new certificate obtained, which has passed into the hands of a *bona fide* purchaser for value, the title of the latter is good against every person;¹² however the corporation is still liable to the true owner, and must pay him damages or go into the market and purchase other shares for him.¹³

S. S. MERRILL.

¹¹ *Gavin v. Wiswell*, 83 Ill. 215.

¹² *Machinists' N. B. v. Field*, 126 Mass. 845; *Mandlebaum v. North A. M. Co.*, 4 Mich. 465; *Pratt v. Taunton C. M. Co.*, *supra*.

¹³ *Cook on Stock & Stockholders*, § 865.

JETSAM AND FLOTSAM.

JUDGE THAYER, of the United States District Court, at St. Louis, has handed down an interesting decision in the case of the United States against Charles Gross, charged with stealing newspapers from the top of a letter box. Judge Thayer decides that the taking of a package of papers from the top of a letter box is no offense against the mail laws. The top of a mail box is not a receptacle for the mail, and a package placed there is no more in the custody of the mail than a package placed upon the steps of the post office.

THE Minnesota statute, requiring the upper berth in sleeping cars to be closed unless actually occupied, has been adjudged invalid in a decision at *nisi prius* in the case of the appeal of the Minneapolis & St. Louis R. Co. from the order of the Commission putting in force the law. The court holds that a person may purchase a berth or a whole section in a car and occupy it, but if he purchases one berth only he is not entitled to the whole section, and it is evident that lowering the upper berth, even if not occupied, will not cause the occupant of the lower berth any more discomfort than if it were occupied. The Commission have carried the case to the Supreme Court.

EX-MINISTER PHELPS, in an address recently delivered before the Glasgow Juridical Society, is reported to have made the following remarks on lawyers as speech-makers:

"Time was when the lawyers were esteemed to be pre-eminent the speech-makers. But they have been, in latter days, so far surpassed in that accomplishment by other classes in society, that they are no longer entitled to this questionable distinction. Lawyers are not much addicted to gratuitous oratory. They are seldom heard from until they are retained; nor then, unless there is an issue formed which it is necessary to discuss. Their argument must be confined to the matter in hand, and must cease when the discussion is exhausted or the question determined. They do not enjoy the latitude allowed to the lawyer described by the Roman satirist, whose client was heard complaining 'that his lawsuit concerned three little kids, while his advocate, in large disdain of these was thundering in forum over the perjuries of Hannibal and the slaughter of Cannæ.' The limits of forensic discourse are grave impediments to the cultivation of eloquence, which, in its modern state, needs to be unembarrassed by

facts, unrestrained by occasion, and unlimited by time. So the Bar has fallen into what might be called, in comparison with discussions elsewhere, a measurable silence."

SECTION 8 of an ordinance of the City of Concordia, Kansas, intended to protect people from injury by the use of bicycles, tricycles, dog and goat carts, etc., reads as follows: "Any person who shall wilfully frighten any team, single horse or mule, and damage results to single horse, mule, or any person therefrom, with a baby carriage, shall be liable as in the next section provided." A subscriber in that city writes us inquiring:

"Can you tell us, from inclosed ordinance, whether if a mule with a baby carriage should become scared, with the result of causing damage to said baby carriage, the person scaring said mule would be liable? If not, who would be liable?"

We are inclined to think that the framer of the ordinance and the mule are equally liable, though the former might be allowed to plead ignorance of law (and language, too), which the mule could not do.

RECENT PUBLICATIONS.

THE LAW OF EXECUTORS AND ADMINISTRATORS. By James Schouler. Second Edition. Boston: Charles C. Soule. 1889.

This is the second edition of a book which appeared but a few years ago, and from this circumstance and the well established reputation of the author, who has written nothing but what is meritorious, we feel that an extended notice of this work is not necessary. It has the advantage of being the only prominent work on a subject wherein there is, to the practitioner, much vexation and a great deal of conflicting authority, attributable, doubtless, to the fact that much of it is statutory. The book treats of the appointment and qualification of executors and administrators, probate of the will, bonds of executors and administrators, the revocation of letters and new appointment, foreign and ancillary appointments, of the assets and the inventory; of the powers, duties and liabilities of executors and administrators as to personal assets and their collection, care, custody and management; power to sell, transfer and purchase; of payments and distribution; of allowance, legacies, etc., and of the powers, duties and liabilities of executors and administrators as to real estate. It contains over seven hundred pages and is well indexed. The notes are copious and extensive and bear evidence of much research. The book is beautifully printed and is in every respect first-class.

THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS, by George C. Holt, of the New York Bar. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau Street. 1888.

As the author says, the subject of this book is novel. There are books on the jurisdiction of the Federal Courts and on that of the State Courts, but none on their concurrent jurisdiction, although the subject is treated incidentally in various places. It often becomes a nice question with an attorney as to what forum he will select for the bringing of his suit, where he has a choice in the matter, and it is often difficult to determine whether he has such a choice. To assist him in such determination is the object of this work. It treats of the concurrent jurisdiction of the United States Supreme Court, of the concurrent jurisdiction of the

United States Circuit and District Courts with each other and with the State courts; of the grounds of preference between United States Circuit and District Courts and State courts; of the grounds of preference between United States Circuit Courts and State courts, growing out of diversity of procedure, and of the grounds of preference between United States Circuit Courts and State courts, growing out of diversity of decisions. From this statement it will readily be seen that the book has a scope beyond that which the title page discloses. It contains 287 pages, well printed and thoroughly indexed, and will, no doubt, be found a valuable addition to the many works on Federal and State jurisdiction.

A DICTIONARY OF LAW, consisting of Judicial Definitions and Explanations of Words, Phrases, and Maxims, and an Exposition of the Principles of Law: Comprising a Dictionary and Compendium of American and English Jurisprudence. By Wm. C. Anderson, of Pennsylvania Bar. Chicago: T. H. Flood & Company, Law Publishers. 1889.

We confess ourselves at a loss to know what to say about this book. It contains 1182 large pages of fine print, and like all books of its kind, does not offer much inducement for steady, connected reading. We have, therefore, denied ourselves the pleasure of studying it entire and have simply glanced through the book with a view of determining its character and scope. Bouvier's Law Dictionary has so long been in use and is so universally and favorably known, that it will, perhaps, be somewhat difficult to supplant it. But there are obvious reasons why a more modern work, thoroughly prepared and having in view questions of law incident to the growth and development of the country and its people, will be found valuable. In this regard we are inclined to think that the author has done his work conscientiously and well. For instance, the definition and discussion of the subjects of "Trusts," "Oleomargarine," "Inter-State Commerce" and "Telephones," all of recent interest are full and complete. The author claims for his work many advantages over similar productions heretofore issued, the most important of which is quotations from judicial decisions, illustrating the decisions. The endeavor seems to have been to find definitions framed by the courts instead of the text writers. The printing and binding of the work is first-class, and we have no doubt the profession will find it useful and valuable.

HUMORS OF THE LAW.

CONSIDERABLE noise prevailed in the court-house in Tralee, and the Chief Baron observed that the sheriff, instead of preserving order, was intently reading a book. At last, when the uproar was intolerable, the Chief Baron exclaimed: "Mr. Sheriff, if you allow this noise to go on, you'll never be able to finish your novel in quiet."

THE larceny of a pair of trousers by a boy being fully proved, despite the character for honesty which was produced, the Chief Baron's charge was brief: "Gentlemen of the jury, you have heard the prisoner is an honest boy, but he stole the breeches."

A VERY clear case of highway robbery being proved, and a verdict of "not guilty" returned, the angry Chief Baron asked: "Is there any other charge against this honest man?" On being told that there was not, the Chief Baron said: "Mr. Gaoler, as I'm leaving Tralee on my way to Cork to-day, don't discharge this man until I have half an hour's start of him on the road."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATOR—Revival. — Where an administrator obtains a judgment, and after the estate has been fully settled and the debts paid, dies pending *scire facias* sued out by him on the judgment, the proceedings therein may be revived in the names of the distributees. — *Crane v. Crane*, Ark., 11 S. W. Rep. 1.

2. APPEAL—Transcript — Filing *Nunc Pro Tunc*. — Where P perfected an appeal to the supreme court from a circuit court, but failed to file his transcript as provided by the Code: *Held*, that the court had no jurisdiction to grant an order allowing the transcript to be filed *nunc pro tunc*, whatever the reasons may have been occasioning the neglect. — *Kelley v. Pike*, Oreg., 20 Pac. Rep. 685.

3. APPEAL — New Trial. — The rule that an order granting a new trial for insufficiency of the evidence, will not be reversed, unless the evidence is manifestly and palpably in favor of the verdict, applies, although the trial was by the court without a jury. — *Knapton v. Swenson*, Minn., 41 N. W. Rep. 948.

4. APPEAL—Practice — Assignment of Error. — A paper purporting to be an assignment of error, filed after time for filing has expired, no permission to file being asked, will not be considered. — *Meyers v. Territory*, Wash. Ter., 20 Pac. Rep. 685.

5. APPEAL—Suit Pending. — When it appears on the trial of a partition suit that there is a former suit pending on appeal in the supreme court, between the same parties, involving the same land, and adverse claims thereto, the trial court should suspend proceedings until the determination of the controversy in the former suit. — *Sharkey v. Kiernan*, Mo., 10 S. W. Rep. 886.

6. ASSAULT AND BATTERY — Sentence. — Pen. Code Cal. § 245, that so much of the judgment as provided for imprisonment in the State-prison as a means of

enforcing the payment of the fine was beyond the jurisdiction of the court, and void. — *Ex parte Arras*, Cal., 20 Pac. Rep. 688.

7. ATTORNEY AND CLIENT—Disbarment. — In a proceeding before the Supreme Court of California to disbar respondent as an attorney, under Code Civil Proc. § 287 *et seq.*, the court rendered judgment of disbarment for two years, and until a judgment obtained by a third person for money collected by said attorney should be paid: *Held*, that the punishment inflicted was within the jurisdiction of the court. — *In re Tyler*, Cal., 20 Pac. Rep. 674.

8. ATTORNEY AND CLIENT — Corporations. — In an action by an attorney against a railroad company of which he was a director, to recover for professional services, the defense that by reason of plaintiff's position, and his representations to an investment company, which is the real owner of the road, he is estopped to assert his claim because it would injuriously affect the investment company, cannot be set up. — *Ten Eyck v. Pontiac, etc. Co.*, Mich., 41 N. W. Rep. 906.

9. BANKS AND BANKING—United States Bonds — Taxation. — However true it be that United States bonds are not taxable as independent assets, it is a matter beyond discussion that, when the capital of a bank is in part or in whole invested in them, the shares of such banks, whether national or State, are liable to State taxation. — *First Nat. Bank v. Board of Reviewers*, La., 5 South. Rep. 408.

10. BOND—Sureties. — A county superintendent of education, without authority, borrowed money, and transferred to the latter a portion of the school fund to reimburse him: *Held*, that the fund so obtained by the lender was held in trust for the county, and that the fact that he afterwards returned it to the county did not give him any right against the sureties of the superintendent, although the money returned by him was used in making up a deficit in the school funds for which such sureties were liable. — *Collier v. Henderson*, Ala., 5 South. Rep. 486.

11. CARRIERS OF GOODS—Limitations in Receipt. — A condition in a receipt given to plaintiff by the express company, for property delivered to it for shipment, to the effect that the company would not be liable for any loss or damage unless claim therefor was presented within a certain time from the date of the receipt, was not binding on the plaintiff, the latter not having signed the receipt. — *Hartwell v. Northern Pac. Exp. Co.*, Dak., 41 N. W. Rep. 732.

12. CARRIERS OF PASSENGERS—Care Required. — As regards approaches of cars, such as platforms, stair ways, and the like, the carrier is only bound to exercise ordinary care in view of the dangers to be apprehended. — *Kelley v. Manhattan Ry. Co.*, N. Y. 20 N. E. Rep. 383.

13. CARRIERS—Passengers—Exemplary Damages. — Where a passenger on a railroad train is abused and insulted by the conductor, who has been informed that he had sold his ticket, which was not transferrable, and, without being given reasonable time to produce his ticket, is required to leave the train, he may recover exemplary damages. — *Louisville & N. R. Co. v. Maybin*, Miss., 5 South. Rep. 401.

14. CARRIERS OF PASSENGERS—Baggage. — A steamboat owner is not liable for loss by accidental fire of a passenger's baggage while stored in a warehouse, after the termination of the carriage, subject to delivery on call and presentation of baggage check. — *Lafrey v. Grummond*, Mich., 41 N. W. Rep. 894.

15. CHATTEL MORTGAGES — Preference. — Where chattel mortgages are given to secure a just indebtedness to certain creditors in the forenoon, and a general assignment of all the property of the debtor which remains after satisfying such mortgages is made in the afternoon of the same day, they do not necessarily constitute a single transaction, to be regarded as a general assignment. — *De Ford v. Nye*, Kan., 20 Pac. Rep. 481.

16. CONSTITUTIONAL LAW—Statute. — A law is not necessarily of a general nature, by reason simply of its being upon a general subject. — *State v. Shearer*, Ohio, 20 N. E. Rep. 335.

17. CONSTITUTIONAL LAW—Local Option. — The fifth amendment to the federal constitution does not prohibit congress from increasing police power, in those places where it has exclusive jurisdiction by local option laws. — *Territory v. O'Connor*, Dak., 41 N. W. Rep. 746.

18. CONTRACT—Construction. — A contract, for the purpose of developing a mining claim, binding one to cause a shaft to be sunk to the depth of 500 feet on the vein of ore does not oblige him to continue to sink the shaft after the vein has given out entirely. — *Woodworth v. McLean*, Mo., 11 S. W. Rep. 43.

19. CONTRACTS—Construction. — Defendant agreed with plaintiff to accept at any time within thirty days, certain shares of stock, the defendant to be entitled to all dividends or extra dividends declared during the time: *Held*, that defendant was not entitled to a dividend which had been previously declared, but which was payable during the thirty days. — *Hopper v. Sage*, N. Y., 20 N. E. Rep. 350.

20. CONTRACT—Money Paid by Mistake. — Evidence sufficient to justify verdict against express company for money paid them by mistake by plaintiff as agent, for a shortage of funds which occurred while plaintiff was injured and other employees took his place. — *Martin v. Wells Fargo & Co.*, Ariz., 20 Pac. Rep. 678.

21. CONTRACTS—Evidence. — In an action for breach of a contract to manufacture machines, where defendant was informed, pending negotiations for the contract, that many of the machines were for sale and use in another State, evidence of their market value in that State is admissible. — *Alabama Iron-works v. Hurley*, Ala., 5 South. Rep. 418.

22. CONTRACTS—Damages. — In an action to recover damages for a failure of defendants to comply with their contract to furnish lumber for plaintiff's use in the construction of a building, plaintiff may show that he could not procure lumber such as defendants had contracted to furnish in the market where it was to be delivered, and may recover the enhanced cost of procuring lumber elsewhere. — *Vickery v. McCormack*, Ind., 20 N. E. Rep. 495.

23. CORPORATIONS—Stock. — Equity will enjoin the carrying out of an agreement the evident purpose and effect of which was to violate by indirection Const. Ga., rendering the purchase of the stock of one corporation by another and any contract tending towards a monopoly illegal and void. — *Langdon v. Branch*, Ga., 27 Fed. Rep. 449.

24. CORPORATIONS—Directors. — A director of a corporation is disqualified to vote, at a meeting of the board of directors, upon a resolution authorizing the renewal of notes in his own favor. — *Smith v. Los Angeles I. & L. Co-op. Assn.*, Cal., 20 Pac. Rep. 677.

25. CORPORATIONS—Officers—Judgment. — Laws N. Y. 1875, ch. 611, § 21, provide that if any certificate, notice, etc., given by the officers of certain corporations are false in any material representation, all the officers who have signed them shall be jointly and severally liable for all the debts of the corporation contracted while they are officers: *Held*, that the statute imposes a penalty which cannot be enforced in another State, even though judgment has first been obtained in New York. — *Atrill v. Huntington*, Md., 16 Atl. Rep. 651.

26. COUNTERCLAIM. — In an action upon contract the defendant cannot, under ch. 66, § 97, Gen. St. 1878, set up as a counterclaim an independent cause of action arising in tort. — *Warner v. Foote*, Minn., 41 N. W. Rep. 985.

27. COURTS — Jurisdiction. — To a petition for an injunction, defendants answered, alleging that the ordinance under which plaintiff claimed was void as an

attempt to regulate commerce between the States and also in violation of the constitution of the State of Missouri: *Held*, that the record presented a question involving the construction of the constitution of the United States and of the State, within Const. Mo. art. 6, § 12, conferring jurisdiction in such cases upon the supreme court, and that the St. Louis court of appeals had no jurisdiction to hear and determine an appeal from an order dismissing the petition.—*State v. St. Louis Court of Appeals*, Mo., 10 S. W. Rep. 874.

28. COVENANTS—Against Incumbrances. — Where, after an exchange of lands by deeds containing covenants of warranty and against incumbrances, it appears that one of the tracts is subject to a vendor's lien, equity will compel the grantor to pay off or remove the incumbrance, or give the grantee suitable indemnity.—*Thomas v. St. Paul M. E. Church*, Ala., 5 South. Rep. 508.

29. CRIMINAL LAW—Confessions. — On a trial for burglary, evidence of a confession made by defendant when he was arrested, there having been no threats or inducements made, except that in response to his request for advice he was told that, if he was guilty, he had better "tell about it," but if not guilty he "ought not to own it," is admissible. — *Dodson v. State*, Ala., 5 South. Rep. 486.

30. CRIMINAL LAW—Homicide—Variance. — On a trial for murder, where the indictment charges an intent to kill deceased, and the proof shows an intent to kill another person, not deceased, a verdict of murder in the second degree need not be set aside for the variance.—*Territory v. Rowand*, Mont., 20 Pac. Rep. 687.

31. CRIMINAL LAW—Lotteries. — Evidence sufficient to convict defendant of setting up a lottery under How. St. Mich. § 9831.—*People v. Elliott*, Mich., 41 N. W. Rep. 916.

32. CRIMINAL LAW—Larceny. — Where defendant obtained goods under false representations, and it was agreed that title should remain in the seller and the goods should remain in a certain house, but she by a trick removed them: *Held*, that she was guilty of larceny.—*March v. State*, Ind., 20 N. E. 444.

33. CRIMINAL LAW—Former Acquittal. — Where all that appears from the record in a trial for a misdemeanor is that the judge, after the trial was commenced decided to try the defendant again upon another complaint, and discharged him, this is an acquittal which may be pleaded in bar of another trial for the same offense. — *Commonwealth v. Hart*, Mass., 20 N. E. Rep. 310.

34. CRIMINAL LAW—Evidence on Former Trial. — In a criminal prosecution, testimony given on a former prosecution for substantially the same offense, by a witness who has since gone to another State for an indefinite period, is admissible, especially as under Code Ala. 1886, § 4465, defendant could have the witness' deposition taken.—*Love v. State*, Ala., 5 South. Rep. 435.

35. CRIMINAL LAW—Homicide—Evidence. — On a trial for murder, where the defense is that defendant supposed he was shooting another, who had struck him, and gone into a neighboring shop, and, so believing, was acting in self defense, evidence that such assailant, while in the shop, tried to obtain a weapon, and threatened defendant's life, is inadmissible.—*Cleveland v. State*, Ala., 5 South. Rep. 436.

36. CRIMINAL LAW—Perjury—Indictment. — An indictment for perjury, which avers that the alleged false oath was taken in a proceeding before one P who had been duly appointed commissioner by the register in chancery, one W with authority to take the written testimony of defendant in an action for divorce, naming the parties to such action, and the court in which it was pending, sufficiently alleges the substance of the proceedings, under Code Ala. 1886, § 3908.—*Hicks v. State*, Ala., 5 South. Rep. 424.

37. CRIMINAL LAW—Homicide—Argument of Counsel. — *Held*, improper for the district attorney to comment before the jury on the absence of certain wit-

nesses who were present at the killing. — *People v. LeChuck*, Cal., 20 Pac. Rep. 719.

38. DAMAGES—Remote. — Damages for delay in delivery of article which are remote and not the natural result of the breach cannot be recovered. — *Swift v. Eastern Warehouse Co.*, Ala., 5 South. Rep. 505.

39. DEPOSITIONS. — Where depositions are taken and the parties attend and take part in the examination of the witnesses, and there is no suggestion that the depositions are not full and complete and returned in the same condition in which they were taken, the omission of the witnesses to sign or mark each separate sheet containing the evidence may be treated as an irregularity merely.—*Smith v. Gronoweg*, Minn., 41 N. W. Rep. 937.

40. DESCENT AND DISTRIBUTION. — Though a complaint by the administrator and distributees of an intestate for a distribution of assets does not aver that the latter was domiciled, or was an inhabitant of, the State, or that administration was granted in the State, judgment for plaintiffs will not be arrested for that reason, as the circuit court has general jurisdiction of the subject matter, and facts depriving it of that jurisdiction not appearing will be presumed not to exist. — *Chapell v. Schuee*, Ind., 20 N. E. Rep. 417.

41. DESCENT AND DISTRIBUTION—Adopted Child. — Under Pub. St. Mass. ch. 148, §§ 6, 7, a grandson adopted by his grandfather can only inherit from the latter as his adopted son, and not by representation of his deceased father also. — *Delang v. Bruerton*, Mass., 20 Pac. Rep. 806.

42. DOMICILE—Lunatic—Probate. — An alleged lunatic, for the appointment of a guardian for whom a petition is pending, can, if mentally capable, change his domicile to another State, though the guardianship resulting from such proceedings continues until his death, and the courts of the new domicile have original probate jurisdiction of his estate.—*Talbot v. Chamberlain*, Mass., 20 N. E. Rep. 305.

43. EJECTMENT—Title. — A decree in chancery that defendant's possession of the *locus in quo* is not adverse to plaintiff's title estops him to deny such title. — *Branson v. Morgan*, Ala., 5 South. Rep. 495.

44. EQUITY—Cancellation of Deed. — As a deed by husband and wife of her separate estate, absolute in form, reciting a valuable consideration, and purporting on its face to conform to statutory requirements, divests the wife of the legal title, she has no adequate remedy at law, and it is error to dismiss for want of equity a bill by her to have the deed canceled as a cloud upon the title to her separate estate.—*Armstrong v. Conner*, Ala., 5 South. Rep. 451.

45. EQUITY—Bill to Set Aside Deed. — A bill in equity to set aside a deed to land, where there has been acquiescence in an adverse possession for ten years before suit, is barred, under Code Ala. 1886, § 3419, unless there are excusable circumstances taking the case out of the operation of the statute.—*Scruggs v. Decatur Mineral & Land Co.*, Ala., 5 South. Rep. 440.

46. EQUITY—Reformation of Deed. — When a mistake is made in the description of land in a deed and mortgage, equity will reform the conveyances so as to make them express the real agreements. — *Houston v. Paul*, Ala., 5 South. Rep. 433.

47. EQUITY—Accounting. — Money was advanced to a person to be used by him in raising sunken treasure, upon his promise to return a large sum, if successful. It appearing that the further prosecution of the work by the person had become impossible: *Held*, that he must account for the moneys received, and, after certain allowances, pay back the unexpended balance. — *Thomas v. Hortshorn*, N. J., 16 Atl. Rep. 916.

48. EVIDENCE. — In an action for work done in the construction of a brick-kiln, where the main issue concerns the number of bricks laid, it is not necessary that plaintiff should prove the number laid with mathematical certainty. — *Birmingham Fire Brick Works v. Allen*, Ala., 5 South. Rep. 454.

49. **EVIDENCE**—Parol to Vary Writing. — Where parties have made a written farm lease, complete on its face with minute provisions as to the rights and obligations of both parties, parol evidence is inadmissible to prove that at the date of its execution, the lessors orally agreed to drain the land. — *Diven v. Johnson, Ind.*, 20 N. E. Rep. 423.

50. **EVIDENCE**—Examination of Accounts. — Where evidence is the result of voluminous facts, or of the inspection of many books and papers, the inspection of which cannot conveniently take place in court, or where a witness has inspected the accounts of parties, though not allowed to give evidence of their particular contents he will be allowed to speak of the general balance or result of such examination. — *Masonic Mut. Ben. Soc. v. Lackland, Mo.*, 10 S. W. Rep. 835.

51. **EXCEPTIONS**—Bill of — Absence of Judge. — A bill of exceptions not presented to the trial judge, nor deposited with the clerk of the trial court, within the time fixed by statute or order, though such judge is absent from the State, and the bill is tendered to an associate judge, who marks the date of tender thereon, but declines to sign and seal it, cannot afterwards be properly authenticated by the presiding judge. — *Fechheimer v. Trounsteins, Colo.*, 20 Pac. Rep. 704.

52. **EXECUTION**—Return. — Under Rev. St. Mo. 1879, § 2325, an execution may issue returnable, at plaintiff's option, either to the first or second term after its issuance; and, in the absence of a showing to the contrary, it will be presumed that the sheriff who sold under the execution complied with the law. — *Blodgett v. Perry, Mo.*, 10 S. W. Rep. 891.

53. **EXECUTORS AND ADMINISTRATORS** — Non-resident. — Code N. Y. § 2662, relative to the grant of letters of administration, does not effect a repeal of the priority of right of letters as provided for by statute, and such right is not lost by residence in another State, where the person so entitled is a citizen of the United States. — *Lilley v. Mason, N. Y.*, 20 N. E. Rep. 355.

54. **EXEMPTION**—Waiver. — In Pennsylvania, a waiver of a debtor's statutory exemption in favor of a lien creditor whose claim is less than the amount of such exemption, does not inure to the benefit of junior creditors, so as to prevent the debtor from claiming the balance of the exemption after the satisfaction of the senior lien. — *Hallman v. Hallman, Penn.*, 16 Atl. Rep. 871.

55. **FACTORS AND BROKERS**—Evidence. — Plaintiff alleged a contract by which he was employed to obtain for defendant the titles of the latter's co owner of a mining claim for not more than a certain sum, plaintiff's commission to be the difference between that sum and the price paid; Held, that evidence of what a witness said to plaintiff about his understanding with defendant before plaintiff went to see defendant was irrelevant. — *Huntton v. Lloyd, Mont.*, 20 Pac. Rep. 693.

56. **FACTORS AND BROKERS**—Commission. — A real-estate broker induced one P to purchase certain land of defendant. Afterwards P discovered that there was a large amount of purchase money due on the land; Held, that the fact that P refused to complete the contract, on account of a defect in the title, although the purchase money stipulated to be paid by him would have enabled defendant to clear off the incumbrance, could not defeat the right of the broker to recover his commission from defendant. — *Birmingham Land & Loan Co. v. Thompson, Ala.*, 5 South. Rep. 473.

57. **FORCEFUL ENTRY**. — To constitute the offense of forcible entry, under Code N. O. § 1023, the premises must be in the actual, not merely constructive, possession of the person whose possession is charged to have been interfered with. — *State v. Bryant, N. Car.*, 9 S. E. Rep. 1.

58. **FRAUD**—Burden of Proof. — A charge that "fraud is never presumed, but the burden rests upon one claiming fraud to make it out by clear and convincing proof," is not misleading, as conveying the impression

that fraud must be proved beyond a reasonable doubt. — *Wallace v. Mattice, Ind.*, 20 N. E. Rep. 497.

59. **GAMING**—Securities. — Where one transfers certain bonds in his possession, but of which he is not the owner, to A to obtain money for the purpose of buying "cotton future," there being no intention that any cotton shall be delivered, but simply that the difference in price shall be settled according to the market fluctuations, and A advances the money with knowledge of the purpose for which it is to be used, he cannot hold the bonds as against the real owner. — *Lee v. Boyd, Ala.*, 5 South. Rep. 439.

60. **HIGHWAYS**—Sidewalks—Duty of Abutter. — A land-owner is under no legal obligation to build or keep up a walk along the highway adjoining his land, and is not liable for personal injuries sustained by a party on account of the narrowness of such walk or its defective condition. — *Fletcher v. Scotten, Mich.*, 41 N. W. Rep. 301.

61. **HOMESTEAD**—Conveyance to Wife—Sufficiency. — Under Civil Code Cal. § 1265, a declaration of a homestead by a husband on his separate property vests a joint title thereto in himself and wife, and a subsequent conveyance of the property by him to his wife is valid, and passes the complete title to the wife, subject to the homestead. — *Burkett v. Burkett, Cal.*, 20 Pac. Rep. 715.

62. **HOMESTEAD**—Conveyance. — In a conveyance of homestead executed prior to act Ala. April 23, 1873, requiring the signature and separate examinations of the wife in conveyances of the homestead, it is sufficient that the wife voluntarily signed the deed, and it was attested and probated in the form prescribed by statute for ordinary conveyances, without any separate examination of the wife. — *Jones v. Roper, Ala.*, 5 South. Rep. 459.

63. **HOMESTEAD**—Extent. — Where part of a tract of land described in a declaration of homestead is actually appropriated for family use by the declarant, but the remaining portion is used principally for the business of general blacksmithing and wagon building, carried on in a building thereon, such latter portion forms no part of the homestead claim. — *In re Allen, Cal.*, 20 Pac. Rep. 679.

64. **HUSBAND AND WIFE**—Wife's Separate Estate. — Under Code Ala. 1876, § 2706, by which the husband, as trustee of the statutory separate estate of the wife, had the right to control it without liability to account to the wife for the rents, etc., land purchased in the name of the wife with such rents could not be subjected to the husband's debts. — *Long v. Eford, Ala.*, 5 South. Rep. 432.

65. **HUSBAND AND WIFE**—Wife's Separate Estate. — Where a married woman has received personal property, as a gift from her father, and, with her husband's consent, has always managed it as her own, and with it purchased other property in her own name, the property and the proceeds of its sale remain her property, and not her husband's. — *Botts v. Gooch, Mo.*, 11 S. W. Rep. 42.

66. **HUSBAND AND WIFE**—Conveyance. — Under the Alabama statutes, a deed by a husband and wife of her separate estate, without fraud in its execution, the consideration of which was in part a debt for articles of support furnished the family, and in part a debt due by the husband, vests a legal title in the grantee, and is a complete defense to ejectment by the wife. — *Conner v. Armstrong, Ala.*, 5 South. Rep. 449.

67. **HUSBAND AND WIFE**—Wife's Separate Estate. — A married woman cannot bind her statutory separate estate so as to charge it with a contract in the form of a will agreeing to convey a portion of it to certain parties on her death. — *Bolman v. Overall, Ala.*, 5 South. Rep. 455.

68. **HUSBAND AND WIFE**—Wife's Separate Property — Liability for Husband's Debt. — Under Code Miss. 1890, § 1177, a wife is not liable for debts incurred by a husband in carrying on a mercantile business in his own name with money belonging to her. — *Leinhouf v. Barnes, Miss.*, 5 South. Rep. 402.

69. **INJUNCTION—Bond—Estoppel.** — In a suit on a bond given for an injunction against the further prosecution of a suit therein recited, the obligors are estopped from denying that there was such a suit pending. — *Person v. Thornton*, Ala., 5 South. Rep. 470.

70. **INJUNCTION.** — Equity will, at the suit of persons holding the complete equitable title to land, restrain as to their estate the levy of an execution issued on a judgment against the person holding the legal title. — *Parks v. People's Bank*, Mo., 11 S. W. Rep. 41.

71. **INSURANCE—Policy.** — Where a policy provides that it shall be void if the assured was not the sole and unconditional owner of the property and when it was insured plaintiff described it as his, it is a good defense to show that he had but a leasehold and executory contract to purchase. — *Brown v. Commercial Fire Ins. Co.*, Ala., 5 South. Rep. 500.

72. **INSURANCE—Accident Policy.** — Held, that the terms "external and visible signs upon the body of the insured" only applied to bodily injuries not resulting in death. — *Paul v. Travelers' Ins. Co.*, N. Y., 20 N. E. Rep. 847.

73. **INSURANCE—Life Insurance—Creditor.** — A creditor who takes out insurance certificates amounting to \$6,500, on the life of his debtor, who owes him \$1,000, the insurance being taken out in the mutual aid associations, where the amount to be realized depends on the number and solvency of the members, and the creditor paying the mortuary dues and assessments, and actually realizing only \$2,124.52 on the certificates, on the debtor's death is entitled to retain the balance remaining, after deducting the debt, interest and expenses. — *Rittler v. Smith*, Md., 16 Atl. Rep. 890.

74. **INTOXICATING LIQUORS—Local Option—Constitutional Law.** — The local option law of Washington Territory, giving to "precincts of Washington Territory" power to repeal the existing law, and prohibit the sale of liquor, is invalid as a delegation of legislative authority. — *Turner v. Saxon*, Wash. Ter., 20 Pac. Rep. 685.

75. **INTOXICATING LIQUORS—Constitutional Law.** — Act Ala. Nov. 27, 1886, entitled "An act to amend an act approved December 12, 1882, to amend § 1544 of the Code of Alabama, so far as applies to Butler county, Ala., so as to authorize the probate judge of said county to order an election to determine whether spirituous, vinous, or malt liquors," etc., "shall be sold, given away, or otherwise disposed of, in precinct 12 of said county," is, as the latter part of the title indicates, a complete law, original in form, providing for a "local option" election in that precinct, and amends no previous law, except by implication: Held, that the reference in the title to the amended act may be regarded as surplusage; and, so regarded, the act is not violative of Const. Ala. 1875, art. 4. — *Gandy v. State*, Ala., 5 South. Rep. 420.

76. **INTOXICATING LIQUORS—Jury—Qualification.** — The fact that one, as constable, is specially charged with enforcing the law for the suppression of intemperance, does not disqualify him from acting as a juror on a trial for keeping a liquor nuisance in another precinct. — *State v. Cosgrove*, R. I., 16 Atl. Rep. 900.

77. **INTOXICATING LIQUORS—License Tax—Club.** — A club which distributes liquors among its members, receiving pay for them as they are distributed by the glass, the proceeds going into the treasury of the club, to be used in purchasing other liquors, or in paying expenses, is taxable as a retail dealer. — *People v. Soule*, Mich., 41 N. W. Rep. 906.

78. **IRRIGATION—Pollution of Stream.** — A complaint alleging that the relators are owners of land which is irrigated by the waters of a certain creek; that defendants are operating stamp mills and polluting the stream with mineral refuse therefrom, thus rendering the water unfit for irrigation purposes, and praying that defendants be perpetually enjoined from so polluting the water, does not present a case *publici juris*, so as to give the supreme court original jurisdiction under

Const. Colo. art. 6, § 2. — *People v. Rogers*, Colo., 20 Pac. Rep. 702.

79. **IRRIGATION—Ditches.** — Under Act Colo. 1881 § 1, a ditch constructed by one on his land for irrigating it cannot be enlarged, against his consent, for the purpose of conveying water to the land of others, where there are other practicable routes, and especially where such ditch is not of a uniform grade, and its enlargement would greatly diminish its usefulness. — *Downing v. Moore*, Colo., 20 Pac. Rep. 766.

80. **JUDGMENT—Amendment.** — An amendment *subsequent* to the filing of an insufficient statement by confession will not be allowed to the prejudice of subsequent judgment creditors whose executions have been levied. — *Auerbach v. Behuke*, Minn., 41 N. W. Rep. 946.

81. **JURY—Drawing.** — Manner of drawing jury held a substantial compliance with the statutes. — *Long v. State*, Ala., 5 South. Rep. 443.

82. **JUSTICES OF THE PEACE—Forcible Detainer.** — Neither the title nor right of possession can be made an issue in an action under the Montana forcible detainer act, and hence a justice of the peace properly refused to certify such action to the district court without trial. — *Sheehy v. Flaherty*, Mont., 20 Pac. Rep. 687.

83. **LIBEL AND SLANDER—Privileged Communication.** — Director of a company against which stockholders file suit alleging fraud on part of officers to control company stock cannot maintain action for defamatory matter in petitions though it was false and malicious. — *Runge v. Franklin*, Texas, 10 S. W. Rep. 721.

84. **LIBEL AND SLANDER.** — Words charging a wife with deserting her husband in his sickness are actionable *per se*. — *Smith v. Smith*, Mich., 41 N. W. Rep. 499.

85. **LIBEL AND SLANDER.** — In an action for libel, a charge that plaintiff had been "tried for conspiracy and libel, and convicted," is justified, if literally true, though plaintiff, after the conviction and before the publication, had succeeded in having one case against him dismissed, and had taken an appeal in the other. — *Boogher v. Knapp*, Mo., 11 S. W. Rep. 45.

86. **LOGS AND LOGGING—Obstruction of Stream.** — Where defendants, having a right to construct a boom for logging purposes, in a stream that had been made a public highway for the purposes of logging, continue it a reasonable time, they are not liable for damages caused by an obstruction made by a log jam, if they exercise due care to prevent it, or to break it when formed. — *Harold v. Jones*, Ala., 5 South. Rep. 438.

87. **MALICIOUS PROSECUTION—Custom and Usage.** — Plaintiff, an architect, when prosecuted at the instance of defendant, for larceny from the latter of plans for a building, could show, in an action for malicious prosecution, that the property of the drawings was in him by a universal custom, and that the builder was entitled to them only during the time of construction; and that defendant had erected buildings by such plans. — *Lunsford v. Deitrich*, Ala., 5 South. Rep. 461.

88. **MANDAMUS.** — *Mandamus* will only lie when there is a clear legal right and not in behalf of one who seeks to have certain shares transferred to him on books of corporation where the assignor claims the right to redeem. — *Brunsville Turnpike Co v. State*, Ind., 20 N. E. Rep. 421.

89. **MANDAMUS.** — Determining whether relator is or not entitled to a peremptory *mandamus* compelling the respondent judge to grant him a writ of injunction depends upon whether the law entitles him to it as of right. If the law gives the respondent the discretion to grant or refuse it, the *mandamus* will not go. — *State v. Rightor*, La., 5 South. Rep. 416.

90. **MASTER AND SERVANT—Fellow-servant.** — Where the regulations of a railroad company provide that, in case a train becomes divided, the front brakeman shall go to the rear of the front portion, and signal the engineer which way to move, etc., and also that in case the conductor is cut off from the train, the right to command shall devolve on the engineer, the engineer

and breakman are only fellow-servants, in case of the breaking of a train, when the engineer does not assume the command, and both are acting in the line of their separate duties. — *Louderville & N. R. v. Martin*, Tenn., 10 S. W. Rep. 772.

91. MASTER AND SERVANT—Contract of Hiring.—An employee cannot recover on a contract of hiring, by the terms of which he is to work a certain number of hours per day, for parts of days less than the prescribed number of hours, where his failure to work is not due to any interference or neglect on the part of the employer; though such contract provides that the employee is to be paid a certain amount per hour. — *Wilson v. Lyle*, Penn., 16 Atl. Rep. 861.

92. MASTER AND SERVANT — Liability of Lessor Railroad Company. — One employed as conductor by a railroad company operating as lessee, without authority of statute, a railroad belonging to another corporation, cannot recover of the latter corporation for injuries sustained on account of a defect in an engine owned and controlled by the lessee. — *East Line & Red River R. Co. v. Culbertson*, Tex., 10 S. W. Rep. 708.

93. MECHANICS' LIENS—Subcontractors. — Mechanics' lien exists in favor of subcontractors and others, notwithstanding prior payment of the full contract price, in good faith, by the owner to his contractor; also that such liens are not limited to the amount agreed to be paid by the owner to his contractor. — *Henry & Coatsworth Co. v. Evans*, Mo., 10 S. W. Rep. 868.

94. MECHANIC'S LIEN—Notice.—Under the Colorado lien act of 1881, § 4, unless a statement is served as required, the claimant is not entitled to a decree establishing his lien. — *Greeley, S. L. & P. R. Co. v. Harris*, Colo., 20 Pac. Rep. 764.

95. MINES AND MINING. — A relocation of a mining claim is an implied admission of the validity of the original location, and an assertion that the relocater claims a forfeiture by reason of a failure on the part of the original locator to make his annual expenditure. — *Wills v. Blain*, N. Mex., 20 Pac. Rep. 798.

96. MINES AND MINING—Parol Evidence. — Under Rev. St. U. S. § 2324, as to a location of a mining claim parol evidence is admissible to show that a natural object or monument referred to in the location, but not designated therein as a permanent monument, is in fact permanent. — *Seidler v. Lafare*, N. Mex., 20 Pac. Rep. 789.

97. MORTGAGES—Assignment.—In Alabama, an assignment of a mortgage, to be effectual to convey the mortgagee's legal title and enable the assignee to maintain ejectment, must be by such a conveyance in form and words as is required to convey the legal title to land in ordinary cases. — *Sanders v. Cassidy*, Ala., 5 South. Rep. 508.

98. MORTGAGE—Foreclosure — Statute of Frauds. — Sales of land under foreclosure are not within the statute of frauds. — *Andrews v. O'Mahoney*, N. Y., 20 N. E. Rep. 374.

99. MORTGAGES—Foreclosure—Limitation.—A purchaser at sheriff's sale, under a judgment pending foreclosure of a senior mortgage, is not a necessary party to the foreclosure, and, when joined by an amended complaint, cannot set up a limitation which had not run when the original complaint was filed. — *Wise v. Griffith*, Cal., 20 Pac. Rep. 678.

100. NEGLIGENCE—Drunkenness. — Question under the evidence as to negligence of railroad company in killing intoxicated man. — *Columbus & W. Ry. Co. v. Wood*, Ala., 5 South. Rep. 463.

101. NEGLIGENCE—Jurisdiction.—When the statute in a State where a death is caused by wrongful act gives a right of action to the personal representative, that right may be enforced in another State having a similar statute, in a court having jurisdiction of defendant. — *Cincinnati, H. & D. R. Co. v. McMullen*, Ind., 20 N. E. Rep. 287.

102. NEGOTIABLE INSTRUMENTS—Note. — One who

has given a note in part payment of certain timber cannot, after he has received all that he is entitled to under the contract, defend against the note on the ground that such timber at the time of the sale was on land belonging to the wife of the vendor, and that he had no right to sell it. — *McKenzie v. Wimberly*, Ala., 5 South. Rep. 468.

103. NEGOTIABLE INSTRUMENTS. — The payee of a note transferred it to a creditor in consideration of the discharge of a debt owing to the creditor, but, as the amount of such debt was not fixed, the creditor agreed that, if the debt fell short of the amount of the note, he would pay the difference to such payee: Held, that the creditor became the absolute owner of the note. — *Wilson v. Law*, N. Y., 20 N. E. Rep. 399.

104. NEGOTIABLE INSTRUMENTS—Lost Note. — Evidence sufficient to account for non production of note so as to put defendant on his defense. — *Chitt v. Moses*, N. Y., 20 N. E. Rep. 392.

105. NEGOTIABLE INSTRUMENTS — County Warrants. — A county warrant has not the qualities of a negotiable paper, and the plaintiff stands in the shoes of his assignor, the original holder. — *Bank of Santa Cruz County v. Bartlett*, Cal., 20 Pac. Rep. 682.

106. PARTITION—Equity. — As incidental to a partition between heirs, a court of equity may adjust and equalize advancements, though jurisdiction of controversies as to advancements is conferred on the probate court. — *Marshall v. Marshall*, Ala., 5 South. Rep. 476.

107. PARTIES — Real Party in Interest. — A suit brought by one in his individual name, but in reality for the benefit of non residents, as owners of the claim sued on, must be viewed as instituted by the constituents themselves, who must be considered as the real plaintiffs in court. — *Smith v. Atlas Cordage Co.*, La., 5 South. Rep. 418.

108. PARTNERSHIP—Rights of Partners—Equity—Jurisdiction.—Defendants were partners, doing banking business, with capital stock divided into shares, and, at a time when the partnership was in fact hopelessly insolvent, fraudulently represented that it was in a prosperous condition, declared large dividends, increased the nominal capital stock, and sold complainants shares of such new stock: Held, that a bill in equity is the proper remedy to recover their stock payments, money they had on deposit at the time of the bank's failure, and the money they had been compelled to contribute as partners to pay its debts. — *Appeal of Andriessen*, Penn., 16 Atl. Rep. 840.

109. PARTNERSHIP—Attachment.—A, being indebted to plaintiff, formed a partnership, and transferred his stock of goods to the firm, and the latter then bought new stocks, with which the old was intermingled. Plaintiff afterwards attached part of the goods in the hands of A, but there was no evidence that the latter had become the owner thereof, as his individual property, or that the partnership had been dissolved. No notice of such dissolution was given, and goods purchased by the firm continued to be received and mingled with the partnership stock: Held, that the goods attached by plaintiff were partnership property, and that plaintiff's claim should be postponed to the claims of subsequently attaching creditors of the firm, the latter having become insolvent. — *First Nat. Bank of Clinton v. Brenneisen*, Mo., 10 S. W. Rep. 584.

110. PLEADING—Demurrer. — Under Rev. St. Ind. § 857, providing that a cause for a demurrer to a reply shall be "that the facts therein stated are not sufficient to avoid the answer," a demurrer which assigns as a cause that the reply does not state facts sufficient to constitute a good reply to the defendant's answer, to which it is directed, is not sufficient. — *Feden v. Mail*, Ind., 20 N. E. Rep. 493.

111. PROBATE PRACTICE—Constitutional Law. — The statute requiring, as a condition precedent to probate proceedings for the settlement of estates, the payment to the county treasurer of specified sums arbitrarily prescribed with reference to the value of the estate in

question: *Held*, unconstitutional. — *State v. Gorman*, Minn., 41 N. W. Rep. 948.

112. PUBLIC LANDS—Homestead—Trespassers. — A mere trespasser on public lands with an enclosure erected and maintained contrary to express provisions of act Cong. Feb. 25, 1885, cannot by such occupancy prevent a homestead entry of the land by a citizen who goes peaceably upon a portion of the tract. — *Whitaker v. Pendala*, Cal., 20 Pac. Rep. 680.

113. RAILROAD COMPANY. — Under act N. Y. May 6, 1884, several applications may be made by a company to determine whether the railroad ought to be constructed and operated along certain streets, provided such streets are named in the company's articles of association as being streets through which it is proposed to construct the railroad. — *In re People's R. Co.*, N. Y., 20 N. E. Rep. 367.

114. RECEIVERS—Waiver. — Leave to sue a receiver is jurisdictional, and cannot be waived by him, and under Code Wash. Ter. § 81, the question may be raised at any stage of the case in the district or supreme court. — *Brown v. Rauck*, Wash. Ter., 20 Pac. Rep. 785.

115. REPLEVIN—Pleading. — In an action to recover the possession of specific personal property the defendant may, under the general denial, prove ownership or the right of possession of the property in controversy in a third person. — *Chamberlin v. Winn*, Wash. Ter., 20 Pac. Rep. 780.

116. REPLEVIN—Sequestration—Affidavit. — In sequestration of movable property, based on the vendor's privilege, an affidavit to the debt, to the privilege, and to the fear that "the defendant will conceal, part with, or dispose of the movable in his possession during the pendency of the suit," fills all the requirements of the law. — *Lowden v. Robertson*, La., 5 South. Rep. 405.

117. REPLEVIN—Verdict. — In replevin a verdict that the defendant is entitled to the possession of the property sued for is not contrary to law because it gives the value of the property. The latter will be treated as surplage. — *Van Meter v. Barnett*, Ind., 20 N. E. Rep. 426.

118. SEDUCTION—Chastity. — "Unchaste," as used in statute, providing that no conviction for seduction can be had if it is proved that the one seduced was unchaste, means actual lewd conduct and not merely bad reputation. — *Hussey v. State*, Ala., 5 South. Rep. 484.

119. SHERIFFS—Attachment. — A sheriff who, under an attachment regular on its face, seizes goods in the possession of one not a party to the writ, to whom the attachment defendant, the real owner, has transferred the goods to defraud creditors, need not, to justify such seizure, prove the regularity of the proceedings prior to the attachment. — *Buddee v. Spangler*, Colo., 20 Pac. Rep. 760.

120. SPECIFIC PERFORMANCE—Mistake. — On bill for specific performance of contract to convey land where boundary line was misunderstood: *Held*, that as the defendant had been mistaken as to a material fact by the omission of plaintiff to point out the lines, specific performance would be denied, whether the omission was intentional or unintentional. — *Campbell v. Durham*, Ala., 5 South. Rep. 507.

121. TAXATION—Railroad Lands. — Lands of a railway company, which are exempt from taxation "until sold and conveyed," if conveyed before May 1st, are subject to taxation for the then current year. If not conveyed until after that date, they are not. — *Martin County v. Drake*, Minn., 41 N. W. Rep. 942.

122. TAXATION—Form of Tax Deed. — Although the form prescribed for tax deeds by 2 Wag. St. Mo. p. 1205, is prepared for a single tract, it is no objection to the admission of a tax deed in evidence that it contains ten different tracts, in ten different sections, in tabulated and abbreviated form, when no recital or statement prescribed by the form is omitted, and the abbreviations used are expressly authorized by statute. — *Allen v. White*, Mo., 10 S. W. Rep. 881.

123. TELEGRAPH COMPANY—Damages. — In action to recover damages for failure to deliver telegram on Sunday no recovery can be had unless it also appears there was a reasonable necessity for transmitting the message that day. — *West. Union Tel. Co. v. Yopst*, Ind., 20 N. E. Rep. 222.

124. TELEGRAPH COMPANY—Damage. — In action for damages for delay in delivering telegram, where plaintiffs claim the difference between the price of lot of ground offered to him and its actual value, the damages claimed are not too remote or speculative. — *Alex. v. West. Union Tel. Co.*, Miss., 5 South. Rep. 397.

125. TENANCY IN COMMON—Improvements. — Defendant, being a tenant in common with plaintiffs, and holding much the largest interest in the property, had a right to make improvements in good faith and for the betterment of the property, whether she had notice of plaintiff's title when she made the improvements or not. — *Alleman v. Hawley*, Ind., 20 N. E. Rep. 441.

126. TRESPASS—Criminal Prosecution—Warning. — Under Code Ala. 1886, § 8874, declaring that any person who, without legal cause, enters the premises of another, after warning, etc., that there must be a warning first, and an entry afterwards. One already in possession, even though a trespasser, or there by implied permission, cannot, by a warning then given, be converted into a violator of the statute. — *Goldsmith v. State*, Ala., 5 South. Rep. 480.

127. TRESPASS—Parties. — A complaint alleging that plaintiff was lawfully in possession of certain premises as tenant, and that defendant wrongfully entered thereon, and committed diverse trespasses and injuries to the land, is not demurrable for the non joinder of the land-lord as party plaintiff. — *Strohlburg v. Jones*, Cal., 20 Pac. Rep. 705.

128. TRUSTS—Accounting. — In an action to require an alleged trustee to account for the proceeds of certain property of his *cestui que trust*, a paragraph of the answer may admit the receipt of a portion of the fund and allege in avoidance that the defendant had accounted therefor with his *cestui que trust*, and deny the other material allegations of the complaint. — *Colglazier v. Colglazier*, Ind., 20 N. E. Rep. 490.

129. USURY—Interest. — A promissory note, bearing interest, payable semi-annually, is not usurious, although it stipulates that the semi-annual installments of interest shall bear interest at the same rate if not paid when due. — *Taylor v. Hestand*, Ohio, 20 N. E. Rep. 345.

130. VENDOR AND VENDEE. — Where a land contract set forth in the complaint in an action for specific performance contains a complete and certain description, on its face, it is a matter of defense that the description is false. — *Williams v. Langertin*, Minn., 41 N. W. Rep. 966.

131. WILLS—Construction. — A clause in a will directing the accumulation of a fund for the benefit of testator's son, then in being, to be paid in installments as the legatee shall reach the ages of 21, 25, and 30 years, respectively, is valid. — *Cloftin v. Cloftin*, Mass., 20 N. E. Rep. 454.

132. WILLS—Deed—Requisites. — An instrument conveying property, but showing on its face that the use thereof is reserved during the maker's life-time, may be either a deed or will, the class to which it belongs being determinable upon all the circumstances surrounding the parties and attending its execution. — *Sharp v. Hall*, Ala., 5 South. Rep. 497.

133. WITNESS—Competency. — The vendor of land, who transferred to complainant the purchase money notes in suit, having died, the testimony of the vendee, as to transactions and statements between himself and the deceased vendor, in regard to the sale, is incompetent. — *Hodges v. Denny*, Ala., 5 South. Rep. 492.

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CURRENT EVENTS.

THE vacancy in the United States Supreme Court still remains unfilled. It is not likely that the President finds the task of selecting a fitting successor to the late Stanley Matthews an easy one, though the responsibility involved in a choice is so great that hurried action is neither desirable nor expected. The impression seems to prevail that an Ohio man, or at least a resident of the Sixth Judicial Circuit, will be appointed. That State is now left without a representation in the supreme court for the first time in sixty years. John McLean, who was appointed by Jackson in 1821, served until 1861, and was succeeded by Noah H. Swayne, who was given Salmon P. Chase as a colleague in 1864, and Morrison R. Waite upon Chase's death, in 1873. Swayne retired in 1881, and was succeeded by Matthews.

Chief Justice Horton, of Kansas, has written, suggesting the eminent qualifications of United States Circuit Judge David J. Brewer, and zealous friends East and West are mentioning the name of Henry Hitchcock, Esq., of St. Louis. Outside of the local pride which people of this locality would naturally feel in the selection of the latter gentleman, all who know him will testify to his profound legal ability, eminent scholarly attainments, incorruptible integrity and fearless honesty.

THE judges of the Supreme Court of Indiana evidently feel that they sufficiently earn their salaries by hearing, considering and deciding the cases that come before them, without attending to the work of preparing the *silabi* of opinions rendered by them. At least they refuse so to do, on the petition of the reporter for that court, who calls their attention to a recent act of the legislature, requiring such work of them. The court holds that this is an unconstitutional requirement, and say they will not obey it. They find

ample reason for their refusal. First, that the legislature cannot impose ministerial duties upon the court. Second, that the legislature cannot add duties to those devolved upon the judges by the constitution. Third, the legislature cannot, in violation of the constitutional inhibition, authorize the judges to discharge the essential duties of the reporter. Judges cannot be required to perform any other than judicial duties. The preparation of the *silabi* is an essential part of the reporter's work. Head-notes may be copyrighted, but the opinions of the court cannot be. The work is essentially and intrinsically ministerial, and therefore cannot be performed by the judges of the court.

The immense advantage which the court has, in a controversy of this sort, with the legislature, is at once apparent and is equal to that possessed by the Mikado's prime minister, Poo Bah, who held all the offices of State, and as Chancellor of the Exchequer, found it his duty, as it suited his convenience, to overrule a law which, as Lord High Admiral, it was his duty to execute. The only way for the Indiana legislature to enact and enforce the objectional statute is for them to adopt a suggestion made to Poo Bah, as Lord High Admiral, to enable him to circumvent himself as Chancellor of the Exchequer, "come over here where the Chancellor can't hear us." The Indiana legislature might go somewhere where the supreme court can't hear them.

A VICTORY for what is known as the police power of a State has recently been recorded in the decision by Judge Wallace, of the United States Circuit Court, in the suit brought by the Western Union Telegraph Company against the New York Board of Electric Control. The latter ordered the company to remove its poles and wires on certain streets, and to place the same underground. The company refused to obey this order, and the poles were directed to be cut down. The company applied for an injunction to prevent the cutting down of the poles, on the ground that it was engaged in interstate commerce, and that the order amounted to such a regulation of commerce as congress alone was competent to make, and interfered with the privilege granted to the company by

the act of congress, to construct and operate lines of telegraph over and along post roads in the United States.

The grounds upon which Judge Wallace based his decision refusing the injunction are interesting. There is, of course, no doubt, under the recent decisions of the Federal courts of last resort that telegraph companies are like railway companies—instruments of commerce; that, being instruments of commerce, they are subject to the regulating power of congress in respect to their interstate business, and that it is the duty of congress and the courts to see to it that intercourse and the transmission of intelligence between the States by means of the telegraph are not obstructed or unnecessarily encumbered by State or municipal legislation. This doctrine is clearly recognized by Judge Wallace in his decision. He decided further that the streets of New York City are post roads within the meaning of the act of congress giving telegraph companies the right to construct and operate telegraph lines "over and along" such roads. The fact that persons and corporations are engaged in interstate commerce and enjoy grants from the United States, does not, however, place them beyond the operation of the laws and police regulations of the State in which they reside or carry on their business, and it is only when local regulations incapacitate or unreasonably impede them in the exercise of their federal privileges or duties that such regulations invade the national jurisdiction.

Judge Wallace holds that the privileges to maintain telegraph lines "over and along" post roads, does not exclude reasonable regulations by the State respecting location and mode of construction, and is not invaded by the requirement that the wires be placed in conduits underground. In short the regulation complained of by the company falls within the class of police regulations which local authorities are competent to impose. It may, indeed, be said with truth that the regulation falls more clearly within the limits of the police power than many which have hitherto been held by the federal courts to lie within that province. The subject matter involved concerns more immediately the public safety than, for example, that involved in the oleomargarine cases, and it not strange that, with the decisions of the Federal Supreme

Court in those cases in mind, Judge Wallace should have held the regulation to be reasonable and one within the power of the State to impose.

NOTES OF RECENT DECISIONS.

THE Supreme Court of the United States went exhaustively into the question of the power of a common carrier to exempt itself from liability for loss occasioned by negligence, in *Liverpool & G. W. Steam. Co. v. Phenix Ins. Co.*, 9 S. C. Rep. 469. The court reaffirm and apply to carriers by water the rule in *Railroad Co. v. Lockwood*, 17 Wall. 357, that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to the public policy, and consequently void. *Express Co. v. Caldwell*, 21 Wall. 264; *Railroad Co. v. Pratt*, 22 Wall. 123; *Bank v. Express Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 U. S. 655; *Hart v. Railroad Co.*, 112 U. S. 331; *Insurance Co. v. Transportation Co.*, 117 U. S. 312; *Inman v. Railroad Co.*, 129 U. S. 128. It was argued also, that law of New York, the *lex loci contractus*, was settled by recent decisions of the court of that State allowing a carrier to stipulate for exemption from all liability for negligence, citing therefor *Mynard v. R. R. Co.*, 71 N. Y. 180; *Spinetti v. Steamship Co.*, 80 N. Y. 71. But to this, the court says the United States courts are not bound by the decisions of the State courts. It was argued by appellant that this contract, to be performed upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this the court found two answers: 1st. That there is not shown to be any such general maritime law. 2d. The general maritime law is in force in this country so far only as it has been adopted by general usage, and no rule of the maritime law concerning the validity of such a stipulation has ever been adopted in the United States.

But it was also argued that as the contract was to be chiefly performed on board of a British vessel, and to be finally completed in

Great Britain, the case should be determined by the British law, and that by that law the clause of exemption from liability was valid. The court discuss this contention at considerable length, and cite many authorities to show: 1st. The law of Great Britain being the law of a foreign country must be pleaded and proved. *Church v. Hubbard*, 2 Cranch, 187; *Ennis v. Smith*, 14 How, 400; *Dainese v. Hale*, 91 U. S. 13; *Pierce v. Indseth*, 106 U. S. 546; *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Hanley v. Donoghue*, 116 U. S. 1; *Renaud v. Abbott*, *Ibid.* 277; *Lamar v. Micon*, 112 U. S. 452, and 114 U. S. distinguished. 2d. That, though the stipulation in question would be valid according to the law of Great Britain, (see *Taubman v. Pac. Co.* 26 Law T. (N. S.), 704; *Steel v. Steamship Co. L. R. 3 App. Cas. 73*; *Railway Co. v. Brown*, L. R. 8 App. Cas. 703), yet that the general rule established *ex comitate et jure gentium* is that the place where the contract is made is to be considered in expounding and enforcing the contract. *Nav. Co. v. Shands*, 3 Moore P. C. (N. S.), 272; *Lloyd v. Guibert*, 6 Best & S. 100; *Bank v. Nav. Co.*, L. R. 9 Q. B. Div. 118; *Watts v. Camors*, 115 U. S. 353; *Morgan v. Railroad Co.*, 2 Woods, 244; *Hale v. Nav. Co.*, 15 Conn. 538; *Dyke v. Railway Co.* 45 N. Y. 113; *McDaniel v. Railway Co.*, 24 Iowa, 412; *Penn. Co. v. Fairchild*, 69 Ill. 260; *Brown v. Railroad Co.*, 83 Pa. St. 316; *Curtis v. Railroad Co.*, 74 N. Y. 116, all reviewed at length and discussed, and the conclusion reached that according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country, and that there does not appear to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of En-

gland, or to any other law than to the place where the contract was made.

An important question arising out of the consolidation of railroad companies came before the Supreme Court of Indiana, in *Louisville, N. A. & C. R'y Co.*, 20 N. E. Rep. 432. There a railroad company went entirely out of existence by being consolidated with another company, and a creditor having a statutory lien on the old company proceeded against its successor. The questions were: 1st. Whether its successor, the appellant, became liable, so that a judgment for the amount of plaintiff's claim was properly rendered against it? 2d. If it did become liable, can an order directing the sheriff to sell all of its property within the State of Indiana be maintained? To the first the court answer in the affirmative. To the second the answer is in the negative, though it is held that as long as the debt remains unpaid the lien obtained against the old company afforded a basis for the exercise by the equity court of its jurisdiction to coerce payment. The court says:

According to the established rule of the common law, which controls the current of modern authority, the franchises of a corporation—mere incorporeal hereditaments—were not subject to seizure and sale upon execution, in the absence of express statutory provisions authorizing the sale and prescribing the method of transfer. It follows as a natural sequence that lands, easements, or things essential to the existence of the corporation and the execution of its corporate duty, and without which its franchise would be of no practical use, cannot be levied upon and sold on execution at law, so as to detach them from the franchise, and thus destroy its use. *Railroad Co. v. State*, 106 Ind. 87, 4 N. E. Rep. 316; *Ammant v. President*, etc., 13 Serg. & R. 210; *Baxter v. Turnpike Co.*, 10 Lea, 438, 4 Am. & Eng. Corp. Cas. 134; *Herm. Ex'ns*, 561. Thus it has been said, in effect, that the franchises and corporate rights of a company, and the means which are necessary to enable it to maintain its existence and subserve the objects and purposes of its creation, are incapable of being granted away or transferred by any act of the company, without express authority, or by any adverse process against it. *Canal Co. v. Bonham*, 9 Watts & S. 27. *Gue v. Canal Co.*, 24 How. 257; *Draw Bridge Co. v. Shepherd*, 21 How. 112. In a recent case, in which it appeared that a contractor had recovered a judgment against a railroad company, under which the "right of way to the railroad, so far as the right of way has been obtained, and all appurtenances belonging to said railroad," were sold by the sheriff, and conveyed to the purchaser, the Supreme Court of the United States held the sale void, saying, in effect, that the company had no estate in its right of way capable of being sold on execution on a judgment at law, apart from its franchise to own and operate a railroad; that what the company acquired was merely an easement in the land to enable it to discharge its functions of making and maintaining a public high-

way, the fee of the soil remaining in the grantor. Moreover, the court said, in substance, that it would be clearly violative of the policy of the State under whose laws the railroad company had been organized to permit a private individual to seize and appropriate, by means of an execution sale, the right of way which had been acquired by the railroad company in pursuance of the purposes for which it was organized. *Railroad Co. v. Doe*, 114 U. S. 840; *Freem. Ex'ns* (2d ed.) § 179; *Black v. Railroad Co.*, 22 N. J. Eq. 130-399; *Thomas v. Railroad Co.*, 101 U. S. 871; *Stewart's Appeal*, 56 Pa. St. 413; *Richardson v. Sibley*, 11 Allen, 65; *Foster v. Fowler*, 60 Pa. St. 27. The plaintiff in the present case acquired a mere statutory lien upon so much of the road-bed as he had constructed. The statute provides that the lien may be foreclosed, but it makes no provision for the sale of the franchise, or of the road as an entirety, or of anything that would in effect destroy or impair the use of the franchise. The statutes regulating the construction and operation of railroads within the State plainly contemplate that the power to condemn lands and construct and operate railroads shall be confined to railroad corporations. There is no provision by which an individual citizen may condemn land for railroad purposes, nor is it contemplated that lands condemned and used for such purposes may afterwards be sold out on execution or by order of the court, and become the property of an individual, so long as the corporation is not dissolved, and continues in the use of its franchises and property. The statute, unlike that which authorizes railroad companies to execute mortgages on their property and franchises, gives the contractor a lien, and nothing more. As it appears in the present case that the debt remains unpaid, the lien affords the basis for the exercise by a court of chancery of its flexible jurisdiction, to coerce payment of the debt. The legislature doubtless deemed it the wiser course to leave the method of coercing payment in each case to the court, rather than to prescribe a method which might be suited to one case, and not to another. While the corporation is solvent, with property and officers and agents subject to the order and process of the court within the State, a court of chancery cannot be without expedients for coercing payment out of any money or property which the corporation itself might have applied to that purpose. In such a case, doubtless, a court of chancery would have the power to take possession of the corporate property by means of a receiver, and wind up the corporation, and sell its property. Upon that subject we decide nothing until a case arises. The conclusion of the whole matter in the present case is that the order of the circuit court directing the railroad to be sold as an entirety, together with all its franchises, privileges, and immunities incident thereto, was in excess of the power of the court. So far as cases relied on seem to support a contrary doctrine from that above enunciated they are not deemed applicable to the facts in the present case. *Railroad Co. v. Lewton*, 20 Ohio St. 401; *Railroad Co. v. James*, 6 Wall. 750.

THE misconduct of the jury in drinking intoxicating liquors while deliberating on their verdict in criminal trials was considered by the Supreme Courts of California and Louisiana, in *People v. Lee Chuck*, 20 Pac. Rep. 719, and *State v. Broussard*, 5 South. Rep. 647. The California court says:

In some cases it has been held that for a juror to take

a drink of liquor during the trial was sufficient ground for granting a new trial. The case before us presents quite a different question. Here the trial had closed. The life of the defendant was in the hands of the jury. They were deliberating upon a question of the gravest consequence to the defendant, to society, and to themselves. They had, up to the time of partaking of the liquors, failed to agree, and soon after agreed upon and returned a verdict that, if sustained, must send the defendant to the gallows. It seems to us that if the fact that the jury drank intoxicating liquors, without proof that it affected their minds, or the conclusion reached by them, could be held sufficient to set aside the verdict in any case, no stronger case than the one before us could be presented. We are of the opinion that where the proof of the drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict, in a capital case, a verdict of conviction should not be allowed to stand. This is our conviction, independent of authority, but the great weight of authority is to the same effect. *People v. Gray*, 61 Cal. 164, 183; *Leighton v. Sargent*, 31 N. H. 119; *Brant v. Fowler*, 7 Cow. 563; *People v. Douglass*, 4 Cow. 26; *Wilson v. Abrahams*, 1 Hill, 207; *Jones v. State*, 13 Tex. 168; *State v. Baldy*, 17 Iowa, 39; *Ryan v. Harrow*, 27 Iowa, 494; *Davis v. State*, 35 Ind. 496; *State v. Bullard*, 16 N. H. 139; *Pelham v. Page*, 6 Ark. 535; *Gregg v. McDaniel*, 4 Har. (Del.) 367. The respondent cites the following authorities not already referred to as opposed to the doctrine that the mere fact that the jury drank intoxicating liquors is sufficient to set aside the verdict, without a showing that it did or might have affected the result: *Pen. Code*, § 1181, subd. 3; *People v. Williams*, 24 Cal. 31; *People v. Brannigan*, 21 Cal. 339; *People v. Symonds*, 22 Cal. 349; *People v. Dennis*, 39 Cal. 625; *People v. Turner*, *Id.* 370; *People v. Anthony*, 56 Cal. 397; *People v. Lyle*, 4 Pac. Rep. 977; 1 Bish. Crim. Proc. § 999; *State v. Caulfield*, 23 La. Ann. 148; *Davis v. People*, 19 Ill. 74; *Thompson's Case*, 8 Grat. 657; *State v. Upton*, 20 Mo. 398; *Rowe v. State*, 11 Humph. 492; *Roman v. State*, 41 Wis. 312; *Westmoreland v. State*, 45 Ga. 225; *Kee v. State*, 28 Ark. 155; *Russell v. State*, 53 Miss. 382. We have given these authorities our careful attention, and find that, while they support the general rule that misconduct of the jury should not avoid a verdict unless it appears to have injured the complaining party, in our judgment they do not shake the well established and salutary rule above laid down, when applied to a capital case, where the misconduct occurred while the jury were actually deliberating upon their verdict. It is urged upon us that the section 1181 Penal Code referred to sets forth and limits the kind of misconduct for which a new trial may be granted, and that to authorize the setting aside of the verdict it must affirmatively appear that a fair and due consideration of the case is prevented. Such a construction of the statute would compel a defendant, in every case of this kind, to show affirmatively that he had been actually injured by the misconduct complained of. None of the cases cited go to that extent, and, if they did, we should not be inclined to follow them. That the jury in this case was guilty of misconduct we presume none will deny. The wrongful act committed was one the direct tendency and natural consequences of which was to affect their capacity to perform their duties. Such being the nature of the misconduct complained of, and the act being committed at the most critical time in the trial, when a cool head and unclouded brain was so essential to the preservation of the rights of the defendant, to allow

the verdict to stand could not, in our judgment, be justified by any rule of law, reason, or justice. Of the many cases cited by respondent there is but one where the punishment was death, and in none of them was the liquor drank while the jury were deliberating upon their verdict. In most, if not all, of them, it is conceded that the act was reprehensible, and should be punished; but they say that as the act was committed at a time during the progress of the trial, when it affirmatively appeared that no injury could have resulted, the verdict should not be disturbed. * * * It must be conceded that *Hare v. State*, 4 How. (Miss.) 187, supports the contention of the respondent, but the facts are so different that it should have little weight; and so far as it declares, in general terms, that to warrant the setting aside of a verdict, and granting a new trial, upon the ground of misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct, it is not in harmony with the cases on the question before us, nor does it coincide with our views on the subject, when applied to the circumstances of this case.

The Louisiana court says:

We are constrained to believe that the absorption of so much intoxicating liquor on empty stomachs, after a night of discomfort, by these two jurors, must have had an injurious effect on their minds, and that it was the immediate cause of the sickness which they then felt. Under the facts in the record, and in view of the amount of the intoxicating liquor imbibed by these two jurors, we have no hesitation in holding that they, at least, were not in a condition to exercise the cool and dispassionate judgment which the law expects of every juror in deliberating over a cause involving the life or the liberty of a fellow-being, and that, as a consequence, the accused has not had a trial by twelve men, "good and true," as the law contemplates. We feel very confident that in thus ruling we make no departure from the line of jurisprudence under which it is settled that the verdict of a jury in a criminal cause is not to be vitiated by the mere fact that during their deliberations in a protracted trial the jury were allowed a moderate use of spirituous liquors as refreshments or as a stimulant. *State v. Caulfield*, 23 La. Ann. 148; *State v. Dorsey*, 40 La. Ann. It would be difficult to formulate any affirmative rule, or to prescribe an inflexible limit to the practice, and courts can do no more than to guard against excesses in determining such questions. But the circumstances of this case disclose an outrageous abuse of the privilege which no court will sanction or tolerate, and which loudly calls for rebuke from any one who believes in a proper administration of justice, or in the solemnity of trials, in criminal causes. We have been at great pains to examine all the cases within our reach in which the point was raised, with varying results, depending upon the gravity of the charge, and we feel mortified to see that our reports will contain the worst case of its kind thus far to be found in the books. *Proff. Jury*, §§ 459-463.

FOREIGN ASSIGNMENTS.

1. General Rule as to the Transfer of Personal Property.
2. Comity of Foreign States in such Cases.
3. Comity Overruled by Positive Law or Public Policy.
4. Where Preferences are made Contrary to Foreign Statutes.
5. Statutory Regulations, when not Applicable to Foreign Assignments.
6. In Case of Involuntary Assignments.
7. Exempt Property.
8. Assignment of Real Estate.

§ 1. *General Rule as to Transfer of Personal Property.*—It is a familiar rule of the law, relating to the transfer of personal property, that the law of the domicile of the transferor, or of the place where the transfer is made, will govern as to the mode and sufficiency of it; and, usually, if it be valid there, it will be valid everywhere. The law of the place where a contract is made usually governs, not only as to its sufficiency and validity, but as to the legal rights and obligations of parties arising from it.¹ If, however, the contract is to be performed in another State or country, it is usually governed and construed according to its laws.² This doctrine is applicable, in general, to transfers of personal property by assignments in trust for the benefit of creditors. If the assignment is valid where made, it is usually valid everywhere; and if it embraces personal property situate in another State or country, it transfers and vests such property in the assignee, except where it would contravene some law of such State or country, or be mimical to public policy to give it that effect. And unless the assignment be void, or avoided, on such grounds, the assignee will take and hold such property, from the time such assignment takes effect in the State or country where it is made, as against the attaching creditors of the assignor in any for-

¹ Story's Conf. L. §§ 203-215, 340, 379-384, 410, 411; *May v. Beud*, 7 Cush. 15; *Blake v. Williams*, 6 Pick. 286, 17 Am. Dec. 372; *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 184; *Mendell v. Gale*, 18 Ind. 151; *Jordan v. Thornton*, 2 Eng. (Ark.) 224, 44 Am. Dec. 546; *Hale v. New Jersey Nav. Co.*, 15 Conn. 589, 39 Am. Dec. 398; *Guillander v. Howell*, 35 N. J. 657; *Downer v. Cheseborough*, 36 Conn. 39, 4 Am. Rep. 29.

² *Larabee v. Talbott*, 5 Gill (Md.), 426, 46 Am. Dec. 637; *Wilcox v. Hunt*, 13 Pet. (U. S.) 378; *Lee v. Selleck*, 33 N. Y. 615; *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Tillotson v. Tillotson*, 34 Conn. 335; *Pope v. Nickerson*, 3 Story, 484; *Hibernia Nat. Bk. v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518.

eign State or country.³ The *situs* of personal property is said to follow the owner.⁴ A distinction has sometimes been made in respect to the *situs*, between debts, choses in action or intangible property, and movable or tangible property.⁵ A creditor assenting to an assignment is estopped from repudiating it.⁶

§ 2. *Comity of Foreign States in such Cases.*—The laws of a State have no extraterritorial force—*proprio jure*, but, through the comity of foreign States or nations, such laws are sometimes respected, and the rights of parties resting upon them, enforced. This is the case, where they are not opposed by the laws of the foreign State or country, or at variance with its public policy, declared or otherwise, or prejudicial, in a legal sense, to the State or country or its citizens.⁷

³ Story's Conf. L. § 332, 333, 379-390, 404-416; Shaffee v. Bank, 71 Me. 514, 36 Am. Rep. 345; Hanford v. Paine, 32 Vt. 442, 78 Am. Dec. 586; Moore v. Willett, 35 Barb. 663; Kelly v. Ceapo, 45 N. Y. 86; Andrews v. Herriot, 4 Cow. 508; Gullander v. Howell, 35 N. Y. 657; Ockerman v. Cross, 54 N. Y. 29, 40 Barb. 465; Warner v. Jaffery, 96 N. Y. 248; Speed v. May, 17 Pa. St. 91, 55 Am. Dec. 540; Law v. Mills, 18 Pa. St. 185; May v. Breed, 7 Cush. 15, 54 Am. Dec. 700; Theoeret v. Jenkins, 7 Mart. (La.) 315; Richardson v. Leavitt, 1 La. An. 43, 45 Am. Dec. 90; Chewing v. Johnson, 5 La. An. 678, 52 Am. Dec. 610; Askew v. La Cygne Exc. Bk., 88 Mo. 366, 53 Am. Rep. 590; Gatewood v. Whitlock, 9 Fla. 88, 76 Am. Dec. 607; Mills v. Kerneghan, 56 Ga. 155; Johnson v. Sharp, 31 Ohio St. 611, 27 Am. Rep. 529; Shortwell v. Jewett, 9 Ohio 180; Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Gregg v. Sloan, 76 Va. 497; Whipple v. Thayer, 16 Pick. 25, 26 Am. Dec. 626; May v. Wanemacher, 111 Mass. 202; Atherton v. Ives, 20 Fed. Rep. 890; Bank v. Earle, 13 Pet. 519; Caskie v. Webster, 2 Wall. Jr. 131; Green v. Van Buskerk, 7 Wall. 139; Black v. Zacharie, 3 How. (U. S.) 183; Rosenthal v. Mastin Bank, 17 Blatch. 323; Lane v. Lavillian, 4 Ark. 70, 37 Am. Dec. 769; Koster v. Meritt, 32 Conn. 249; Clayton v. Clayborn, 42 Conn. 351; Smith v. Blatchford, 2 Ind. 184, 52 Am. Dec. 504.

⁴ Story's Conf. L. §§ 379, 383, 384; Andrews v. Herriot, *supra*; Speed v. May, *supra*; Succession of Alice Packard, 9 Rob. (La.) 438, 41 Am. Dec. 341.

⁵ People v. Commissioners, 28 N. Y. 224; Speed v. May, *supra*; Caskie v. Webster, 2 Wall. Jr. 131.

⁶ Shaffee v. Bank, 71 Me. 514, 36 Am. Rep. 345; Clay v. Smith, 3 Pet. (U. S.) 411; Bodley v. Goodrich, 7 How. (U. S.) 276; Horsey v. Chew, 3 Cent. Rep. (Md. 1886) 879.

⁷ See *Ante*, § 1; Burrill on Assignments, 202-309; Story's Conf. L. §§ 7-38, 240, 390, 464, 512; Saunders v. Williams, 5 N. H. 213; Dunlap v. Rogers, 47 N. H. 281; Hanford v. Paine, 32 Vt. 442, 78 Am. Dec. 586; Ward v. Morrison, 25 Ot. 595; Greenwood v. Curtis, 6 Mass. 378; May v. Breed, 7 Cush. 15, 54 Am. Dec. 700; Whipple v. Thayer, 16 Pick. 25, 26 Am. Dec. 626; Fall River Iron Works v. Ceoad, 15 Pick. 11; *Ante*, § 1; Means v. Hapgood, 19 Pick. 105; Ingraham v. Geyer, 13 Mass. 146; Dehm v. Foster, 4 Allen, 553; Edgerly v. Bush, 81 N. Y. 199; Hoyt v. Thompson, 19

§ 3. *Comity Overruled by Positive Law or Public Policy.*—The courtesy or comity of a State or nation, which regards the laws of a foreign one, and gives them an extraterritorial force, may be overruled by positive law, or by public policy. This public policy may or may not be declared by the statutes of the State or country. What is injurious to the State or its citizens, and therefore against public policy, in such cases, should, perhaps, be the subject of positive legislation, and not left to the discretion of the courts.⁸ It is a general rule of law that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile.⁹ And this rule proceeds on the fiction of law that the domicile draws to it the personal estate of the owner wherever it may happen to be. But it has been held that this fiction is not of universal application; and it yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined, and always yields when the law and policy of the State where the property is situated have prescribed a different rule of transmission from that of the State where the owner lives.¹⁰ In this case the facts were as follows: On March 1, 1881, W, a resident of New York, made a general assignment for the benefit of creditors to the plaintiff, at which time W owned personal property situate in two counties in Pennsylvania. The assignment

N. Y. 207; Slater v. Carroll, 2 Sandf. Ch. 573; Willets v. Walte, 25 N. Y. 577; Alwood v. Protective Ins. Co., 14 Conn. 555; Upton v. Hubbard, 28 Conn. 275; Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Fox v. Adams, 5 Greenl. 245; Frazier v. Fredericks, 24 N. J. 162; Walters v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607; Milne v. Morton, 6 Binn. (Pa.) 353; Lane v. Mills, 18 Pa. St. 85; Witson Carson, 12 Md. 54; Johnson v. Sharp, 31 Ohio St. 611, 27 Am. Rep. 529; Wieder v. Maddox, 66 Tex. 372, 59 Am. Rep. 617; Huth v. Bank, 4 B. Mon. 423; Thevert v. Jenkins, *supra*; Brashear v. West, 7 Pet. 608; Harrison v. Sterry, 5 Cranch, 289; post, § 3; Smith v. Chic. & N. W. R. Co., 23 Wis. 267; Forbes v. Scannell, 13 Cal. 241; Bohlen v. Cleveland, 5 Mason, 174.

⁸ Story's Conf. L. § 390; Whart. Conf. L. § 353. See also Zepsey v. Thompson, 1 Gray, 243; Ingraham v. Geyer, 13 Mass. 145; Fox v. Adams, *supra*; Varnum v. Camp, *supra*; Rice v. Courts, 32 Vt. 40, 78 Am. Dec. 597; Bishop v. Holcomb, 10 Conn. 444; Gullander v. Howell, 35 N. Y. 657; Oliver v. Townes, 14 Mart. (La.) 97; Bryan v. Breslin, 26 Mo. 423, 72 Am. Dec. 216; Leroy v. Crowningshield, 2 Mason, 157; Green v. Van Buskirk, 7 Wall. 139; Pierce v. O'Brien, 129 Mass. 314, 37 Am. Rep. 360.

⁹ *Ante*, § 1.

¹⁰ Earle, J., in Warner v. Jaffray, 96 N. Y. 248.

was recorded in one of those counties on the 18th, and in the other on the 19th day of March 1881. On the day of the execution of the assignment, but after its delivery to the assignee, the defendants who were creditors of W, and residents of New York, without actual notice of the assignment, commenced actions against the assignor in Pennsylvania, and by virtue of attachments issued therein, the property situate in that State was levied upon. At the time the assignment was made a statute of Pennsylvania, regulating such assignments, provided, among other things, that an assignment of property situate in that State, made by a person not a resident therein, may be recorded in any county where the property is situated, and shall take effect from and after its date, "provided that no *bona fide* purchaser, mortgagor, or creditor having a lien thereon before the recording in the same county, and not having previous actual notice thereof, shall be affected or prejudiced." The action was brought to restrain the defendants from further proceeding under the attachment. The court held that as the defendants acquired valid liens on the property in Pennsylvania, prior to the recording of the assignment in that State, those liens were saved from the operation of the assignment; that the laws of New York, did not follow the defendants into Pennsylvania, and that they had the same right to enforce payment of their claims out of their debtor's property found there, as a resident debtor had, and that the action was not maintainable. The statute of Pennsylvania, prescribed the mode of making foreign assignments effective in that State, and the positive law of that State could not be controlled by the law of a foreign State. In such a case the law of the actual *situs* governs.¹¹ Where an assignment was made in Maryland, of all the estate and effects of the assignor, in trust for the benefit of his creditors, and valid there, it was held that it did not operate to transfer property of the assignor situate in Pennsylvania, so as to prevent an attachment of it by a non-resi-

dent creditor of the assignor, the assignment not having been recorded in that State, as required by law, previous to such attachment.¹² A voluntary assignment in Massachusetts, at common law, without consideration, is, it seems, void, except so far as it may be assented to by the creditors; and such an assignment would not protect the assigned property against an attaching creditor.¹³ And the assent of creditors will not be presumed.¹⁴ And a voluntary assignment for the benefit of creditors made in a State, which if made in Massachusetts, would be void for want of consideration, would be ineffectual to transfer property in that State so as to protect it against an attaching non-assenting creditor of the assignor residing in that State, although the assignment be valid in the State where made.¹⁵ Such an assignment would appear to be valid there as against attaching creditors residing in other States.¹⁶ In Massachusetts, it has also been held that, a general assignment executed in Pennsylvania, in trust for such creditors as should within four months release all their claims against the assignor, was invalid as to a creditor, resident of Massachusetts, as such a provision would avoid an assignment made there.¹⁷ And it may be observed that if an assignment is repugnant to the positive law of a foreign State, where the assigned property is at the time, it will be invalid as to creditors there.¹⁸

§ 4. *Where Preferences are made Contrary to Foreign Statutes.*—When a general assignment for the benefit of creditors, is made

¹² *Phelon v. Barnes*, 50 Pa. St. 230. See also *Blake v. Williams*, 6 Pick. 286, 17 Am. Dec. 372; *Abraham v. Plestro*, 3 Wend. 538, 20 Am. Dec. 738; *Johnson v. Hunt*, 23 Wend. 86; *Hoyt v. Thompson*, 5 N. Y. 320; *Steel v. Goodwin*, 4 Cent. Rep. (Pa. 1886) 659; *Pierce v. O'Brien*, 129 Mass. 314, 37 Am. Rep. 360; *Smith's Appeal*, 104 Pa. St. 381.

¹³ See *Edwards v. Mitchel*, 1 Gray, 239; *May v. Wanemacher*, 111 Mass. 205. See also in Maine: *Chaffee v. Bank*, 71 Me. 514, 36 Am. Rep. 345.

¹⁴ *Russell v. Woodward*, 10 Pick. 408.

¹⁵ *Pierce v. O'Brien*, 129 Mass. 314, 37 Am. Rep. 360. See also *Zipsey v. Thompson*, *supra*; *Swan v. Crafts*, 124 Mass. 453; *Osborn v. Adams*, 18 Pick. 245; *Bradford v. Lappan*, 11 Pick. 76; *Fall Riv. Iron Works v. Crody*, 15 Pick. 11.

¹⁶ *Whipple v. Thayer*, 16 Pick. 25, 26 Am. Dec. 626; *Wales v. Alden*, 22 Pick. 245; *May v. Wanemacher*, 111 Mass. 209; *Richardson v. Forepaugh*, 7 Gray, 548.

¹⁷ *Ingraham v. Geyer*, 13 Mass. 146.

¹⁸ *Ante*, § 1, 2; See also *Chaffee v. Blatchford*, 13 Cent. Rep. (Dist. Columbia, 1888) 183; *Varnum v. Camp*, 13 N. J. L. 326.

¹¹ *Green v. Van Buskirk*, 7 Wall. 139, 34 Barb. 457; *Hervey v. Locomotive Works*, 93 U. S. 664; *People v. Commissioners*, 23 N. Y. 224; *People v. Smith*, 88 N. Y. 576; *Ockerman v. Cross*, 54 N. Y. 29, 40 Barb. 465; *Edgerly v. Bush*, 81 N. Y. 199; *Hibernian Nat. Bk. v. Lacomb*, 84 N. Y. 367, 38 Am. Rep. 518; *Story's Conf. L.* § 388.

with preferences authorized by the law of the State where it is made, but prohibited by the law of the State where the assigned property, or a portion of it, is situate at the time, the authorities are quite uniform in holding that such an assignment will not vest such property in the assignee as against an attaching creditor of the assignor residing in such foreign State. Thus where a general assignment for the benefit of creditors was made in New York, giving preferences to creditors, which was authorized in that State, and a portion of the assigned property was at the time situated in New Jersey, where assignments with preferences were prohibited, and subsequently and before the assignee had come into the actual possession of such property in the latter State, it was there taken under a foreign attachment at the suit of a creditor of the assignor and sold; in a suit by the assignee in New York, for a conversion of such property it was held, that no title to the same passed to the assignee by virtue of such assignment, and that the property was subject to the attachment.¹⁹ In the case of *Bryan v. Brisbane*,²⁰ *supra*, it was held in Missouri, that an assignment of property for the benefit of creditors made in Minnesota, containing preferences in favor of certain creditors designated therein, and valid there, was not valid as against an attaching creditor, as to the assigned property situate in Missouri, who had taken the property there by virtue of the attachment, subsequent to the assignment, but before notice thereof.²¹ But see, where the rule seems to be somewhat qualified, especially, where the assignee has come into the actual possession of assigned property in the foreign State before an attachment of the same.²² If an assignment for

the benefit of creditors is valid in the State where made, and embraces choses in action, an action may be brought and maintained thereon by the assignee in a foreign State or country, although the assignment would have been void if executed there. This would be in accordance with general principles of comity.²³

§ 5. *Statutory Regulations, when not Applicable to Foreign Assignments.*—In New York, and various other States, it has been held that statutes regulating assignments of personal property for the benefit of creditors and prescribing the mode of execution thereof, apply to and regulate such assignments as are made and executed within the State by citizens thereof, and not to those made in a foreign State or country in accordance with its laws. Thus, it has been held in New York, that a voluntary assignment by a debtor residing in Canada, valid there, and embracing personal property in New York, where the assignee subsequently took actual possession of the same, vested such property in the assignee as against an attachment at the suit of a creditor of the assignor, residing in New York, subsequently issued, and by virtue of which such property was taken, although the directions of the statute of New York relating to assignments for the benefit of creditors, were not observed in making the assignments. Such regulations were held to apply to assignments made in New York, and not to those made in other States or countries.²⁴ But see, in Pennsylv-

¹⁹ *Guillander v. Howell*, 35 N. J. 657. See also *Bryan v. Brisbane*, 26 Mo. 423, 72 Am. Dec. 219; *Varnam v. Camp*, 1 Green (N. J.) 326, 25 Am. Dec. 476; *More v. Bonnell*, 2 Vroom, 90.

²⁰ *Supra*.

²¹ See also *Story's Conf. L.* § 888; *Brown v. Knox*, 6 Mo. 306; *Thurston v. Rosenfield*, 42 Mo. 474; *Bentley v. Whittemore*, 4 E. C. Green, 462; *Zepsey v. Thompson*, 1 Gray, 243; *Boyd v. Rockford Mills*, 7 Gray, 406; *Van Winkle v. Armstrong*, 4 Cent. Rep. (N. J. 1886) 53.

²² *Richardson v. Leavitt*, 1 La. An. 430, 45 Am. Dec. 90; *United States v. Bank*, 8 Robinson, 262; *Oliver v. Townes*, 14 Martin (La.), 93; *Dundas v. Bowler*, 3 McLean, 397; *Bank v. Wood*, 14 La. An. 554; *Maberry v. Shisler*, 2 Harr. (Del.) 349; *Kitchen v. Reinskey* 42 Mo. 427.

²³ *Fuller v. Steiglitz*, 27 Ohio St. 355, 23 Am. Rep. 312; *Shortwell v. Jewett*, 9 Ohio, 180. See also *Hunt v. Lathrop*, 7 R. I. 58; *Hall v. Boardman*, 14 N. H. 38; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Bullock v. Taylor*, 16 Pick. 335; *Martin v. Potter*, 11 Gray, 37; *Abraham v. Plestoro*, 8 Wend. 538, 20 Am. Dec. 738; *Moore v. Bonnell*, 2 Vroom, 90; *Thurston v. Rosenfield*, 42 Mo. 494.

²⁴ *Ockerman v. Cross*, 54 N. Y. 29. See also *Wieder v. Maddox*, 66 Tex. 372, 59 Am. Rep. 617; *Hanford v. Paine*, 32 Vt. 443, 78 Am. Dec. 586; *Chaffee v. National Bank*, 71 Me. 524, 36 Am. Rep. 345; *Butler v. Wendell*, 57 Mich. 62, 58 Am. Rep. 329; *Train v. Kendall*, 137 Mass. 366; *Rice v. Courtis*, 82 Vt. 460, 78 Am. Dec. 597; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Wilson v. Carson*, 12 Md. 54. See *People v. Smith*, 88 N. Y. 576. But see, in Pennsylvania, where a foreign attachment was required to be recorded in the county where the property was situated, in order be effectual against the liens of creditors without actual notice. *Ante*, § 3; *Phelon v. Barnes*, 60 Pa. St. 230; *Warner v. Jaffrey*, 96 N. Y. 248. See also *Hervey v. Locomotive Works*, 93 U. S. 664; *Hibernian Nat. Bk. v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Smith's Appeal*, 104 Pa. St. 381.

vania, where a foreign attachment was required to be recorded in the county where the property was situated, in order to be effectual against the liens of creditors without actual notice.

§ 6. *In Case of Involuntary Assignments.*—The general rules relating to assignments, and the comity of States, before noticed, are not applicable to involuntary or compulsory assignments, made under, and by operation of, bankrupt or assignment laws. Such assignments, by operation of law or compulsory, do not operate in a foreign State, and the laws providing therefor have no extraterritorial effect, nor will comity require a foreign State to give such laws force and effect within its territorial limits.²⁵ In the case last cited the court say: "In America such assignments are held inoperative upon property, real or personal, not situated within the territory over which the laws that make, or compel the debtor to make them, have dominion, as are discharges of the debtor, attempted to be made under them, inoperative as to persons not resident in the State under whose laws they are made."²⁶ In such a case the law operates *in rem* if at all.²⁷ Such assignments in one State have no force or effect in other States or countries, even in respect to citizens of the former.²⁸

§ 7. *Exempt Property.*—General assignments for the benefit of creditors must at least embrace all the property of the assignor not exempt from execution, without any reservation to the assignor, except the surplus remaining after the satisfaction of his debts.²⁹

²⁵ Story's Confli. L. 410-416; Burrell on Assignments, 303; Zipsey v. Thompson, 1 Gray, 243; Hoyt v. Thompson, 5 N. Y. 320; Holmes v. Rumsen, 20 Johns. 229; Abraham v. Plestro, 3 Wend. 538, 20 Am. Dec. 738; Kelly v. Crapo, 45 N. Y. 86, 41 Barb. 603; Willets v. Waite, 25 N. Y. 577; Clark v. Booth, 17 How. (U. S.) 322; Odgen v. Saunders, 12 Wheat. (U. S.) 213; Harrison v. Sterry, 5 Cranch (U. S.), 289; Wieder v. Maddox, 66 Tex. 372, 59 Am. Rep. 617.

²⁶ See also Saunders v. Williams, 5 N. H. 214; Dalton v. Currier, 40 N. H. 247; Blake v. Williams, 6 Pick. 285, 17 Am. Dec. 372; Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442; Walters v. Whitlock, 9 Fla. 95, 76 Am. Dec. 607; Hutchinson v. Peshine, 16 N. J. Eq. 218; Cook v. Moffat, 5 How. (U. S.) 295.

²⁷ Willets v. Waite, 25 N. Y. 577; Hibernian Nat. Bk. v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518.

²⁸ *Id.*; Rawn v. Pierce, 110 Ill. 350, 51 Am. Rep. 691; Kidden v. Tafts, 48 N. H. 121; Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442; Johnson v. Hunt, 23 Wend. 87. See Pierce v. O'Brien, 129 Mass. 314, 37 Am. Rep. 360.

²⁹ Heafer v. Knell, 31 Md. 554; Groover v. Wake-

Exempt property need not be embraced in the assignment, nor need there be a reservation of the surplus to the assignor contained therein, as the law would protect the assignor's rights in these respects. But exempt property may be reserve by the assignment.³⁰ Exemption laws have application to persons resident in the State in which they exist, and when an assignment conveys property in that and another State, it would seem that the exemption should be measured and governed by the law of the domicile of the assignor.³¹ In various States a general assignment for the benefit of creditors carries all property of the debtor, not exempt from execution, and is presumed to pass such property to the assignee for the purposes of the trust.

§ 8. *Assignment of Real Estate.*—It is a familiar principle of the law that the transfer of real estate is governed by the law of the place where it is situated. A deed, mortgage or other conveyance or incumbrance of real estate, made by the owner, must be executed in conformity with the laws of the place where it is located; and this rule applies to the acknowledgement, and recording such instruments as well as to their formal execution.³² This rule of law is equally applicable to assignments of real estate in trust for the benefit of creditors of the assignor. The instrument of assignment must be in writing and made in conformity with the requirements of the law of the State or country where the property is situated, in respect to execution, acknowledgment, and recording. And such assignments, in the various States of this country, are generally required to be

man, 11 Wend. 187; Goodrich v. Downs, 6 Hill, 438; Whallon v. Scott, 10 Watts, 239; Mitchell v. Stiles, 13 Pa. St. 366.

³⁰ Muhr v. Pinover, 9 Cent. Rep. (Md. 1887) 67; Burrell on Assignments, 224; Bishop on Insolvent Debtors, § 179; Dolson v. Kerr, 5 Hun, 643; Dow v. Platner, 16 N. Y. 562; Smith v. Mitchell, 12 Mich. 180; Garnor v. Frederick, 18 Ind. 501.

³¹ Wilder v. Maddox, 66 Tex. 372, 59 Am. Rep. 372. See also Bryant v. Young, 21 Ala. 264; Newall v. Hayden, 8 Iowa, 143; Helfestien v. Cave, 3 Iowa, 289. On the subject of exemptions see also, Dolson v. Kerr, 5 Hun, 643; Hickman v. Meisinger, 49 Pa. St. 465; Baldwin v. Peet, 22 Tex. 708; Farguharson v. McDonald, 2 Helsk. (Tenn.) 404.

³² Story's Confli. L. § 428; McCormick v. Sullivan, 10 Wheat. 192; Goddard v. Sawyer, 9 Allen, 78; Cutter v. Davenport, 1 Pick. 81; Osburn v. Adams, 18 Pick. 245; Donaldson v. Phillips, 18 Pa. St. 170, 58 Am. Dec. 614; Young v. Dowling, 15 Ill. 497; Meighen v. Strong, 7 Minn. 177.

in writing, and signed, acknowledged and recorded, like common deeds of conveyance of real estate.³³ G. W. FIELD.

³³ Story's Conf. L. §§ 423, 474; D'Ivernois v. Leavitt, 4 Sandf. Ch. 252, 23 Barb. 63; Siator v. Carroll, 2 Sandf. Ch. 578; McGoon v. Scales, 9 Wall. 23; Rogers v. Allen, 8 Ohio, 488; Lucas v. Tucker, 17 Ind. 41; Osborn v. Adams, 18 Pick. 245; Loving v. Pairo, 10 Iowa, 282, 77 Am. Dec. 108; Gardner v. Com. Nat. Bk., 95 Ill. 298; Hutchinson v. Peshine, *supra*.

CONTRACT—PRINCIPAL AND AGENT—PAROL EVIDENCE.

HEFFRON V. POLLARD.

Supreme Court of Texas, February 26, 1889.

A written contract, signed by an agent for his principal cannot be varied by parol evidence to the effect that the agent signed it in the name of the principal for his (the agent's) own benefit and with the intention to bind himself, in an action upon such contract against the agent; nor is parol evidence competent to show that the agent by so signing meant to use it as his own business name, where the name of the principal is that of a real person.

GAINES, J., delivered the opinion of the court:

The appellee brought the suit in the court below. He alleged that the defendant, who is appellant here, agreed in writing to pay W. H. Pollard & Co. and one F. W. Hendricks a certain price for certain pipe, the dimensions of which he described in his petition, and that he was the owner of the claim by assignment from Hendricks, and his partner, who with himself constituted the firm of W. H. Pollard & Co.* The substance of the allegations in the petition with reference to the execution of the agreement is that W. H. Pollard & Co. and F. W. Hendricks "entered into a contract in writing with defendant, the said defendant so contracting in the name of John W. Fry, by which the said Pollard & Co. and the said Hendricks bargained and sold to the said defendant a large amount of property," etc. There is an alternative allegation in the petition which the execution of the contract is set out in substantially the same language, but which alleges a different effect as to time of delivery and payment. The defendant pleaded *non est factum*. Upon the trial the plaintiff offered in evidence a contract in writing, of which the following is a copy: "*The County of Galveston, State of Texas*. This agreement, made and entered into by and between John W. Fry on the one part, and F. W. Hendricks and W. H. Pollard & Co. on the other part. It is hereby understood that the said Jno. W. Fry shall take all of the 24-inch pipe (concrete), not exceeding 430 lineal feet, and all of the 18-inch pipe (concrete), not exceeding 700 lineal feet, at the following prices, viz.: The 24-inch pipe at \$1.50 per foot, and the 18-inch pipe at \$1.25 per foot—the said pipe to be paid for at the above rate,

as used by the said Jno. W. Fry; and that the said Jno. W. Fry shall not manufacture or use any other pipe of the above quoted sizes until all the above noted pipe is consumed in the city of Galveston. [Signed] JOHN W. FRY, per HEFFRON. W. H. POLLARD & CO. F. W. HENDRICKS. Witness: N. A. OLCOTT. W. J. JUNKER." In order to prove the execution of the contract so offered, plaintiff was sworn as a witness, and testified that "the written contract was signed 'J. W. FRY, per HEFFRON,' and that it was so signed by Heffron for himself and in his presence;" meaning in the presence of the plaintiff. He also testified that he had made diligent search for the subscribing witnesses, but could not find them. The defendant was then placed on the stand by plaintiff, and testified that he signed the contract, "as it purported, 'J. W. FRY, per HEFFRON,' but that he signed it as the agent of Fry, and not for himself, and that he had no personal interest in it." The court thereupon admitted the contract over the objection of the defendant, and the defendant excepted.

We may treat the case, for the purposes of this opinion, as if there was sufficient evidence introduced to show that in executing the contract Heffron used the name of Fry in order to make the contract for his own benefit. We think the evidence subsequently introduced, though conflicting, warranted the jury in finding that the plaintiff's theory of the case was the true one, and it may be doubted whether this would not have cured the error of introducing it for want of sufficient evidence upon that point, if error it were. But the question presents itself whether in a contract like this, which is made in the name of a principal, and which is signed in his name by another as his agent, it is competent to show by parol evidence, in order to recover on the written contract itself, that in signing the agreement the one who purports to sign as agent signed the name of the principal for his own benefit, and with the intention to bind himself. We have been unable to find any case in which this exact point has been determined. There are few branches of law that have given rise to more adjudications than that of principal and agent, and the cases are especially numerous in which the liability of the principal or agent as to third parties is discussed. There are certain principles, however, which are well settled. If the principal be disclosed, and it appear upon the face of the contract that the agent does not intend to bind himself, the agent is not liable. If the principal be not disclosed, it is universally conceded, as to non-negotiable contracts not under seal, that parol evidence is admissible to show the principal, and to hold him liable upon a contract made in the name of the agent for his benefit. This may seem to be an exception to the rule that parol evidence is not admissible to vary the terms of a written contract, but it is not so held. It is said not to vary the terms of the contract, but to bring in a new party, whom the law holds bound by reason of his rela-

tion to the party in whose name it is executed for his benefit. In such a case the principal may either sue or be sued. But a plaintiff cannot sue both; he must make his election. If, however, the principal be disclosed, and the face of the writing shows that the agent is bound, it is presumed that the other party has elected in the contract itself to look to the agent, and the principal is not liable upon it. *Chandler v. Cox*, 54 N. H. 561, was a case in which the principals were sued upon a contract which was signed by their agent, but which did not upon its face disclose an agency. It was, however, a question of fact whether or not the principals were known to be such at the time the contract was executed. The court in an able and elaborate opinion, which reviews all the authorities, hold that if the principals were not known when the agreement was signed, parol evidence was admissible to show the agency of the signor, and to charge the principal; but that if, in point of fact, agency was then disclosed, such evidence tended to vary the writing, and could not be admitted. The ground of the ruling upon the latter point was that if the plaintiff knew, when the contract was entered into, that it was made for the benefit of third parties, the writing showed that they had elected to look to the agent (principal?) for its performance, and parol evidence was not admissible to vary the writing by showing that they did not so elect. The contract now before us presents a different case, but we think a stronger one for the defendant. As to the legal effect of this contract upon its face there can be no doubt. It discloses the names and relation of all the parties connected with it. It binds Fry, the principal, and does not bind Heffron, the agent. If it had said, in express terms, that Fry was bound by the contract, and Heffron not, the meaning, in the light of the law, would not have been more unmistakable. Can Heffron be held liable upon this written agreement? Is it permissible, in order to bind him, to show by parol testimony an intention exactly contrary to that expressed on the face of the writing, namely, that Heffron was bound by it, and that Fry was not bound? In our opinion, this cannot be done without violating a cardinal rule of evidence. It is very different from the case of an undisclosed principal. The law makes him responsible for the act of his agent. The act of the agent, made for his benefit, and within the scope of the authority conferred by him, is his act. In such a case parol evidence may be inserted to show that, by reason of a fact, existing at the time the contract is made, not known to one of the parties, there is a third party for whose benefit it is made who is bound by it. The relation of principal and agent being unknown to one of the contracting parties, he could not make an election at that time, and it is not to be presumed that he intended to look alone to the agent, should it subsequently appear that the contract was made for the benefit of another, who has given authority for its execution. The undisclosed principal may

sue on a contract made for him in the name of his agent, and for a similar reason he is liable to be sued. But we apprehend that if a contract in writing should expressly declare that if it should subsequently be disclosed that a party signing had a principal, such principal should not be bound, no evidence would be admitted to show a liability contrary to such express terms.

But there is another point of view from which this case must be considered. The effort in the court below was to show that the defendant assumed the name of Fry in order to make the contract for his own benefit. We understand the law to be that when a party for the purpose of transacting business adopts an assumed name, whether it be fictitious or the name of another, he is bound by a contract made in that name. In *Trueman v. Loder*, 11 Adol. & E. 589, Lord Denman says: "Parol evidence is always necessary to show that the party sued is the person making the contract, and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, or whether the contract be signed by his own hand, or that of agent, are inquiries not different in their nature from the question, who is the person who has just ordered goods in a shop?" In that case the principal had been engaged in doing business in the name of his agent, and the contract was signed by the agent in his own name. See, also, *Melledge v. Iron Co.*, 5 Cush. 158; *Brown v. Parker*, 7 Allen, 337. In the present case, also, the name is not a fictitious one. It is the name of a real person. But the contract purports to bind him alone, and upon its face is inconsistent with the idea that the defendant in signing it may have intended to use it for his own business name. His signature as agent clearly negatives the conclusion that any such construction was intended to be put upon it. The intention of the parties to a written contract must be derived from the writing itself, where its meaning is clear. Can it be said that the admission of parol evidence to show that the contract before us was made for the benefit of defendant, and was intended to bind him, does not violate the rule? We think not. The contract clearly shows the relation of all the parties to it—who was to be bound, and who was not to be bound; and its legal effect cannot be varied by such evidence.

The rule is further illustrated by the well recognized rule that although, in case of an undisclosed principal, the plaintiff may show there was a principal in order to bind him, yet the agent is not permitted to prove the same fact in order to free himself from responsibility. Such a contract shows clearly upon its face that he is bound, and the law will not permit him to show the contrary. To this there is an apparent, but not a real, exception. The agent may show, in order to relieve himself from liability upon an apparent written agreement, which if real would bind himself upon its face, that it was agreed, when it was signed, that it should not take effect as a contract, but that the real contract was an unwritten one, which

bound only his principal. In other words, he may show that the writing was a mere colorable transaction, and was understood by the parties to be not a contract at all, and that the real contract was not in writing, and bound only his principal. *Rogers v. Hadley*, 2 Hurl. & C. 227. So in this case we think that, if it were true that the writing offered in evidence was understood and agreed to be a mere colorable transaction intended to obscure defendant's real connection with the contract, and if he really purchased the pipe, the plaintiff could have recovered upon the real agreement, notwithstanding the apparent contract entered into in writing. If the plaintiff had alleged and proved a want of authority on part of the defendant to make the contract for Fry, then, also, he could have maintained his action against defendant. But even in that case, according to what appears to us the better reason and the weight of authority, his action would have been not upon the contract itself, but upon the implied warranty or for the deceit. *Bartlet v. Tucker*, 104 Mass. 336; *Lander v. Castro*, 43 Cal. 497; *Hall v. Crandall*, 29 Cal. 567. The defendant testified, in effect, that he had authority from Fry to make the agreement for him. The testimony of plaintiff is not necessarily inconsistent with the idea that he did have such authority, although insinuating the agreement he may have acted for himself. If the contract had been signed in the name of Fry only, it would have been proper to have permitted it to be read to the jury, upon proof that defendant signed it, that the contract was made for his benefit, and that he assumed the name of Fry as his business name in the transaction. But the writing was inconsistent with the theory that Fry's name was used as the name of the defendant, and therefore did not establish the plaintiff's case, and should have been excluded. For the error in admitting it the judgment must be reversed. In order for defendant to have availed himself of the illegality of the contract as a defense, he should have pleaded it. 1 Chit. Pl. (16th Am. ed.) 506. If the plaintiff could have maintained his action upon the written contract, four years not having elapsed when the suit was brought, the statute of limitations was no defense. The other questions we deem unnecessary to consider. The judgment is reversed, and the cause remanded.

NOTE.—The doctrine is sound in principle and fully established by the authorities that, where parties to an agreement have professed to set down their agreement in writing, they cannot add to or subtract from it, or vary it in any way by parol evidence; otherwise they would defeat that which was their primary intention in committing it to writing.¹ But a document purporting to be a contract, signed by the parties, is not necessarily so, and it is competent for either of the parties to show by parol evidence that it was not their intention, in signing, that it should operate as a

contract, and that the real contract between them was not in writing.² But the question in the principal case does not come under this seeming exception. Here the written instrument is the only contract of the parties. It shows on its face to have been made by an agent for the benefit of a disclosed principal, whom it legally binds. And the question presented is, whether or not parol evidence is competent, to show that by so signing, the agent intended to bind himself and not the principal. Clearly, its introduction for this purpose would violate the above well established rule of law, for to permit it to be shown that the agent intended to bind himself, would be to entirely vary the terms of the written contract. An apparent exception to the rule as to the admissibility of parol evidence is where the principal is not disclosed, as pointed out in the principal case. It is held that parol evidence to show who is meant by the signature does not vary the written contract, but only serves to identify him. This doctrine is clearly defined. Thus, in *Trueman v. Loder*,³ the agent signed the contract in his own name, that being the custom of the principal, to do business in the name of the agent. The doctrine was stated that parol evidence is always necessary to show that the defendant is the party making the contract, and bound by it. For the court said that whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. "If he is sued for the price, and his identity is made out, the contract is not varied by appearing to have been made by him in a name not his own."⁴ To the same effect is *Melledge v. Boston Iron Co.*,⁵ where plaintiff, having a legal demand against a corporation, took the personal note of the general agents thereof, and it was held that, notwithstanding, recovery against the corporation could be had, upon proving either that the note was in fact the note of the corporation, and that the corporation had adopted the signature of their agents as their form of signature, or that he took the note under a misapprehension, caused by acts of the corporation and their agents, as to the identity of the corporation with the concern designated by the agents' signature. So, if upon the face of the instrument there are indications suggestive of agency, such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper, parol evidence is competent to show who the parties intended should be bound or benefited.⁶ And even where the contract bears no such suggestion on its face, the rule, as now generally received, is that parol evidence is competent either in favor of or against the corporation (a specialty is perhaps an exception);⁷ but there

² *Pym v. Campbell*, 6 E. & B. 370; *Rogers v. Hadley*, Hurl. & C. 227; 1 Greenl. on Ev. § 303.

³ 11 Adol. & Ellis, 589.

⁴ Illustrations of this doctrine will be found in *Wilson v. Hart*, 7 Taunt. 296; *Whitehead v. Tuckett*, 15 East, 400, and *South Carolina Bank v. Case*, 8 B. & C. 427.

⁵ 5 Cush. (Mass.) 158, 173, et seq.

⁶ *Vater v. Lewis*, 36 Ind. 288; *Babcock v. Beman*, 1 E. D. Smith, 593; *Bank v. White*, 1 Denio (N. Y.), 593; *Wright v. Boyd*, 3 Barb. 523; *Barlow v. Congregational Society*, 8 Allen, 460; *Barney v. Newcomb*, 9 Cush. 46; *Baldwin v. Bank*, 1 Wall. 234.

⁷ *Higgins v. Senior*, 8 M. & W. 634; *Trueman v. Loder*, 11 Ad. & E. 594; *Dykens v. Townsend*, 24 N. Y. 61; *Coleman v. Bank*, 53 N. Y. 394; *Ford v. Williams*, 21 How. (N. Y.) 281; *Huntington v. Knox*, 7 Cush. 371; *Railroad v.*

¹ *Bast v. Bank*, 101 U. S. 93; *Muhlig v. Fiske*, 131 Mass. 110; 1 Greenl. Ev. § 275; *Abbott's Tr. Ev. p. 409*, par. 36; *Forrythe v. Kimball*, 91 U. S. 291.

is a well recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent.⁵

Yet, notwithstanding, parol evidence is not admissible for the purpose of exonerating the signer (where he does not sign as agent) from personal liability if the other party to the instrument chooses to so hold him,⁹ unless there is evidence that the signer was duly authorized to contract for the corporation, and that credit was actually given to the corporation alone.¹⁰

As above indicated commercial paper, as notes, bills, etc., constitutes an exception to this principle. The rule is well settled that any person taking a negotiable promissory note, contracts with those only whose names are signed to it as parties, and cannot therefore maintain an action upon the note against any other person.¹¹ However, this rule does not preclude charging a party who, instead of the name by which he is usually known, signs with intent to bind himself thereby, his initials, or a mark, or any name under which he is proved to have held himself out to the world and carried on business.¹²

"But if a person signs the name of another, as maker of a promissory note, who has not authorized him to do so, and who therefore is not bound by the signature, the signer is not personally liable in an action of contract upon the note itself, even if he signs his own name also as that of the agent affixing the other signature, and the party whose name he assumes to put to the note is incapable of making such a contract; but only in an action of tort for falsely representing himself to be authorized to sign the name of the other person."¹³

And in *Abbey v. Chase*,¹⁴ Mr. Justice Metcalf said: "When one, who has no authority to act as another's agent, assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed or the promise in the simple contract, unless it contains apt words to bind him personally."

So, in *Draper v. Massachusetts Steam Heating Co.*,¹⁵ Mr. Justice Hoar said: "In this commonwealth it is well settled that if the instrument purports to express the contract of the principal, the agent is not personally liable on it; but that the remedy in such *Benedict*, 5 Gray, 566; *Hubbart v. Borden*, 6 Wheat. 91; *Story on Agency*, §§ 148, 160; *Wharton on Agency*, §§ 296, 409, 458, 492, 729.

⁵ *Barker v. Insurance Co.*, 3 Wend. 94; *Pentz v. Stanton*, 10 Wend. 271; *DeWitt v. Walton*, 9 N. Y. 571; *Stackpole v. Arnold*, 11 Mass. 27; *Railroad v. Benedict*, 5 Gray, 566; *Beckham v. Drake*, 9 M. & W. 79; *Briggs v. Patridge*, 64 N. Y. 357, 363.

⁹ 2 Tayl. on Ev. § 1064; *Abbott's Trial Ev.* p. 37, par. 35.

¹⁰ *Ang. & Ames on Corp.* 299, § 294; *Abbott's Trial Ev.* p. 37, par. 35.

¹¹ *Bank of British N. A. v. Hooper*, 5 Gray (Mass.) 567; *Williams v. Robbins*, 16 Gray, 77; *Brown v. Parker*, 7 Allen (Mass.) 837; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101, 104; *Lander v. Castro*, 43 Cal. 497, 501; *Hall v. Crandall*, 29 Cal. 567.

¹² *Merchants' Bank v. Spicer*, 6 Wend. (N. Y.) 443; *George v. Lurrey, Mood. & Malk.* 516; *Williamson v. Johnson*, 2 D. & R. 281; *Fuller v. Hooper*, 3 Gray (Mass.) 334.

¹³ *Bartlett v. Tucker*, 104 Mass. 339, 340; *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 Mass. 461; *Jeft v. York*, 4 Cush. (Mass.) 871.

¹⁴ 6 Cush. (Mass.) 54.

¹⁵ 5 Allen (Mass.) 328.

case is by an action on the case for falsely representing himself to be authorized to bind his principal."¹⁶

¹⁶ See *Grafton Bank v. Flanders*, 4 N. H. 239; *Underhill v. Gibson*, 2 N. H. 352, 356; *Woodes v. Dennett*, 9 N. H. 55; *Pettingill v. McGregor*, 12 N. H. 179, 191; *Moor v. Wilson*, 6 Foster, 332, 336; *Weare v. Gove*, 44 N. H. 196; *Palmer v. Stephens*, 1 Denio (N. Y.) 471; *Walker v. Bank*, 5 Selden (N. Y.) 562; *White v. Madison*, 26 N. Y. 117; *Brown v. Bank*, 6 Hill (N. Y.) 443.

JETSAM AND FLOTSAM.

AN important act for the protection of minority stockholders and the securing of publicity in corporate affairs has been passed this month by the legislature of Massachusetts. Hereafter the officials of every company chartered in that State will be required to file at the State house, on the request of any stockholder, between thirty and sixty days before its annual meeting, complete lists of the shareholders, with their residences and the number of shares belonging to each. These statements are to be made in a form approved by the commissioner of corporations, and are to be sworn to. The penalty for neglect to file the required lists is a fine of \$1,000 against the corporation and the same sum on the delinquent official.

As to the admissibility in evidence of telephone communications the Supreme Court of Missouri said in the recent case of *Wolfe v. Mo. Pac. Ry. Co.* "A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiff's private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge, of which the court will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of he other testimony in support or in contradiction of it."

TRUSTS AND SYNDICATES IN ENGLAND.—In the course of argument a question was put to Sir H. James as to the legality of the trusts and syndicates being formed in this country. He said: "I have looked at some of them—the salt trust, for instance—but I do not know enough of them. All I can say is, if these syndicates carried on their business in America they would have very sharp justice shown to them there." The master of the rolls: "It does not strike me as clear if there is a combination to buy all the salt in the king-

dom for the purpose of raising the price 70 per cent beyond what it would be, I do not feel at all clear that that is not an illegal combination." Sir H. James: "According to the common law of America and our common law it is illegal."—*The Law Times*.

QUERIES ANSWERED.

QUERY NO. 15.

[To be found in Vol. 28, Cent. L. J., p. 267.]

The corporation is liable. "The keeping of gunpowder in a place where it will be liable, in case of explosion, to injure houses in close proximity, constitutes a private nuisance, and the person so keeping it is liable for injuries resulting from such explosions without regard to the question whether he was chargeable with negligence." *Heeg v. Sicht*, 80 N. Y. 579; *Dilworth's Appeal*, 91 Pa. St. 247; *Cooley on Torts* (2d ed.), 723.

QUERY NO. 16.

[To be found in Vol. 28, Cent. L. J., p. 287.]

The agent is entitled to his commission if he can prove that the property offered in trade is as represented, when the vendor is satisfied with the terms made through the broker to the purchaser and no solid objection can be stated to the contract, the commission of the agent is due. *Koch v. Emmerling*, 22 How. (U. S.) 69; *Hayden v. Grillo*, 26 Mo. App. 289; 16 Cent. L. J. 442; 22 Cent. L. J. 526; *Birmingham Land Co. v. Thompson*, 28 Cent. L. J. 409, Digest No. 56.

HUMORS OF THE LAW.

JUDGE M., of Mississippi, is noted for his droll witticisms from the bench. On one occasion the sheriff of one of the counties of his district tendered to his Honor a man by the name of Jack Deal to be sworn as bailiff of the grand jury. Mr. Deal was one-armed bow-legged and otherwise deformed, having had his jawbone broken on one occasion. The sheriff led him up to the judge to be sworn. The latter sized him up critically and said: "Mr. Sheriff, I call for a new deal; you must have cut that Jack from the bottom."

FORCE OF HABIT.—The force of habit is illustrated in the case of an old solicitor in chancery who, being invited to pray, in a religious meeting, concluded his petition as follows: "And if mistaken in the special relief prayed, your orator prays for such other and further or different relief as the nature of the circumstances of each case may require, and as to-to-to-the good Lord may seem meet. And your orator will ever pray, etc."

ONE of the judges of the West Virginia Court of Appeals tells the following as having actually occurred when he was examining an applicant for license. The applicant was of mature years, having previously held the office of justice.

Judge: "What are the requisites of a valid will?"

Applicant: "Can't tell 'em all, judge, but I remember one is that it must be read at the burial over the grave of the testator."

Judge: "What is a fee-simple?"

Applicant: "I guess about two dollars and a half."

Judge: "What is the largest estate in land?"

Applicant: "A very large estate would, in this country, be about one thousand acres."

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. **ABATEMENT.** — Where defendant in ejectment died pending suit, and his widow and heirs were served with process before the statute had become a bar, it is immaterial what irregularities attended the amending of the petition, and the striking out the name of the deceased defendant, and inserting the names of the present defendants. — *Missouri Pac. Ry. Co. v. McCarty*, Mo., 11 S. W. Rep. 52.

2. **ABATEMENT — Damages.** — In Maryland, as at common law, an action by a husband to recover damages for the negligent killing of his wife abates on the death of the husband. — *State v. Baltimore & O. R. Co.*, Md., 17 Atl. Rep. 88.

3. **ADMINISTRATORS — Embezzlement.** — In a summary proceeding brought in the probate court under 1 Wag. St. Mo. p. 85, § 7, by an administrator, to recover assets of the estate embezzled, fraudulent misappropriation by the defendant is essential to a recovery, but the openness and notoriety of defendant's possession under a claim of title is not of itself a defense, unless such claim is of a valid title, and made in good faith. — *Gordon v. Eams*, Mo., 11 S. W. Rep. 64.

4. **APPEAL — Jurisdiction.** — In an action of *assumpsit* by a private corporation, authorized by its charter to levy tolls upon persons using a river which had been improved by it, against the defendant for tolls, there is a judgment for the plaintiff for less than \$100. Upon a writ of error by the defendant: *Held*, this court has no jurisdiction to review the judgment of the circuit court, although the record shows that the real defense to the action was that the condition of the river was such that the plaintiff had no right to levy the tolls for which the judgment was recovered. — *Miller v. Little Kanawha Nav. Co.*, W. Va., 9 S. E. Rep. 57.

5. **APPEAL — Judgment.** — Generally, if pending an appeal or writ of error, the matter of controversy in the suit be settled, this court will simply dismiss the appeal or writ of error without deciding the merits.

merely to determine as to costs, and will not pass on the question of costs.—*Ferguson v. Mullender*, W. Va., 9 S. E. Rep. 28.

6. APPEAL—Nonsuit. — Where the rulings of the trial court are such as to entirely preclude a recovery by plaintiff, the Supreme Court of Missouri will review proper exceptions to such rulings after nonsuit with leave, and an unsuccessful effort to have the alleged errors corrected below. Overruling *Gill v. Clark*, 54 Mo 415.—*Sachse v. Clingingsmith*, Mo., 11 S. W. Rep. 69.

7. APPEAL—Justice of the Peace.— *Held*, that though the appeal from a justice was not brought to trial at the following term, appellant had complied with Rev. St. Wis. § 8766, which requires the appeal to be brought to a hearing before the end of the second term. — *Newman v. Board*, Wis., 41 N. W. Rep. 961.

8. APPEAL—Objections not Raised. — Where error is assigned in overruling a demurrer, but no objection to the pleading demurred to is pointed out by counsel on appeal, the question of the sufficiency of the pleading will not be considered.— *Engleman v. Arnold*, Ind., 20 N. E. Rep. 505.

9. APPEAL—Presumptions.—The rule is that where it does not appear affirmatively that the proper process was not issued, but it does appear that jurisdiction was assumed, and a final judgment rendered by a court of general jurisdiction, jurisdiction will be presumed. — *Royce v. Turnbaugh*, Ind., 20 N. E. Rep. 485.

10. APPEAL—Bill of Exceptions.—An order striking out an amended complaint will not be reviewed where there is no bill of exceptions showing why or upon what showing it was stricken out. The fact that the papers are printed in the transcript, simply marked by the judge as having been read on the hearing, is not sufficient.—*Cleland v. Walbridge*, Cal. 20 Pac. Rep. 730.

11. APPEAL—Time of Taking. — Under Code Civil Proc. Cal. § 989, an appeal from a decree settling an administrator's account, taken within the statutory time after the entry of the decree, but not within sixty days after the decision and the filing of the findings, is not in time to present the question of the insufficiency of the evidence. — *In re Rose's Estate*, Cal., 20 Pac. Rep. 712.

12. ASSUMPSIT—Money Had and Received. — In an action to recover from defendant money which he had been convicted of receiving knowing the same to have been stolen from plaintiff, the latter is entitled to recover upon the preponderance of the testimony; it is not necessary that the jury should be convinced beyond a reasonable doubt. — *United States Exp. Co. v. Jenkins*, Wis., 41 N. W. Rep. 957.

13. ATTACHMENT—Embezzlement. — In an action for the recovery of money an attachment may issue, where, from the affidavit, it appears that the defendant has embezzled the money of plaintiff, to recover which the action is brought. The language of the statute allowing an attachment where "the plaintiff's debt was fraudulently contracted" is to be liberally construed, so as to include "debts or liabilities fraudulently created or incurred."—*Cole v. Aune*, Minn., 41 N. W. Rep. 934.

14. BILLS OF EXCEPTIONS.—In Wisconsin, the only proper and authorized practice requires that amendments allowed by the trial court to the proposed bill of exceptions shall be incorporated in the bill as finally settled and signed. — *Killips v. Stevens*, Wis., 41 N. W. Rep. 970.

15. BONDS—Interpretation. — Under Rev. St. Ind. 1881, § 4246, as to requirements of bonds for repairing county buildings where the bond executed contains no stipulation making the obligors responsible for indebtedness incurred by a subcontractor, the statute does not make them liable for such indebtedness.— *State v. Hinsdale Doyle Granite Co.*, Ind., 20 N. E. Rep. 437.

16. CARRIERS OF GOODS—Delivery—Trustees. — Where an agent to whom goods are consigned by his principal, and who has no pecuniary interest in them beyond his lien for commissions, contracts with a com-

men carrier for their delivery, he may sue the carrier in his own name for their wrongful delivery, under Rev. St. Mo. § 3463. — *Wolfe v. Mo. Pac. Ry. Co.*, Mo., 11 S. W. Rep. 49.

17. CARRIERS OF PASSENGERS—Ejection. — Where in suit for damages for being (properly) ejected from a car, where plaintiff admits that he received all his injuries after he had gone out of the car, and as a result of his holding on the railing in resisting the force of those removing him, and the evidence does not show that more force than was necessary to put him off was employed, he cannot recover for injuries, on the ground of the force employed.—*Wright v. Cal. Cent. Ry. Co.*, Cal., 20 Pac. Rep. 740.

18. CHATTEL MORTGAGES—Removal. — An indictment which alleges that a mortgagor of certain horses did "run" the mortgaged property out of the State, instead of using the statutory word "remove," is sufficient.—*Williams v. State*, Texas, 11 S. W. Rep. 114.

19. CHATTEL MORTGAGES—Record.—Under Rev. St. Me. 1857, ch. 91, § 2, a mortgage is recorded when received by the clerk, and date noted on the mortgage, as against subsequently attaching creditors of the mortgagor, though the record is not completed, and does not contain the date of the receipt of the mortgage.—*Monaghan v. Longfellow*, Me., 17 Atl. Rep. 74.

20. COLLATERAL INHERITANCE TAX.—Code Md. 1888, art. 81, § 102, imposing a tax on property "passing from any person who may die seized and possessed thereof, being in this State," to any person not one of certain enumerated relatives of the decedent, applies to property within the State, though the decedent who bequeathed it resided in another State.— *State v. Dalrymple*, Md., 17 Atl. Rep. 82.

21. CONSTITUTIONAL LAW—Attachment.—Our statute, which provides that an attachment may be sued out in equity for the recovery of damages for a wrong, is constitutional. A suit in equity may, under the provisions of said statute, be maintained to recover damages for the breach of a marriage contract. — *McKinsey v. Squires*, W. Va., 9 S. E. Rep. 55.

22. CONSTITUTIONAL LAW—Occupation Tax. — Acts Tex. March 11, 1881, and April 4, 1881, prohibiting the occupation of selling liquors in quantities less than one quart, etc., are not unconstitutional, because, as a condition precedent to engaging in such occupation, they require the tax thereon to be paid in advance for the term of a year, but permit the tax on other occupations to be paid quarterly, and require a license to pursue such occupation, but permit others to be pursued without a license.—*Fahy v. State*, Tex., 11 S. W. Rep. 108.

23. CONSTITUTIONAL LAW—Amendments. — Section 1, art. 15, of the constitution of Nebraska, does not prescribe the form in which propositions by the legislature to amend the constitution shall be made, whether by bill or joint resolutions.— *In re Senate File*, Neb. 41 N. W. Rep. 381.

24. CONSTITUTIONAL LAW—License. — Acts Va. 1883-84, ch. 450, § 65, imposing a tax on the business of selling coupons out from the bonds of the State is constitutional.—*Cuthbert v. Commonwealth*, Va., 9 S. E. Rep. 16.

25. CONTRACTS—Interpretation. — A county advertised for bids per head for taking care of and boarding "the blind and helpless paupers" of the county, and "all other paupers" at the poor-farm: *Held*, that the county was entitled to show by parol evidence that the words "other paupers" included only such as were supported at the poor-farm.—*Kirk v. Brazos County*, Tex., 11 S. W. Rep. 143.

26. CONTRACT—Performance.—A party cannot be excused from performing his contract simply because performance will be a hardship. — *St. Joseph County v. South Bend, etc. Ry. Co.*, Ind., 20 N. E. Rep. 499.

27. CONTRACTS—Orders Payable on Condition. — Where orders drawn on the owner of a building by a contractor engaged in its construction are made payable when the contractor has completed his contract up to a certain point, and before such point is reached

an agreement is made between the contractor and owner by which, on account of the inability of the former to go on with the work, he is permitted to discontinue, and all the liabilities between the parties to the agreement are canceled, the payee of such orders cannot sue the owner on them. — *Linnehan v. Matthews*, Mass., 20 N. E. Rep. 463.

28. **CONTRACT—Rescission.** — Construction of contract to build a bridge it being stipulated that for any reason deemed sufficient to the company it was to have the privilege by giving one month's notice to annul the contract, etc. — *Henderson Bridge Co. v. O'Connor*, Ky., 11 S. W. Rep. 18.

39. **COUNTER-CLAIM—Unliquidated Damages.** — In an action for the price of merchandise, damages arising from the non-performance by plaintiff of a building contract with defendant are not available, by way of counter claim, under Civil Code Ky. § 96, defining a "counter claim" as a cause of action in favor of a defendant against a plaintiff, which arises out of the contract or transaction stated in the petition as the foundation of plaintiff's claim, or which is connected with the subject of the action. — *Forbes v. Cooper*, Ky., 11 S. W. Rep. 24.

30. **COUNTIES—Officers.** — When a new county is created by the division of a larger one, the county commissioners elected at an election ordered by the governor in such new county for the election of officers, merely continue in office until the next general election for such officers, and until their successors are elected and qualified. — *State v. Fields*, Neb., 41 N. W. Rep. 968.

31. **CRIMINAL LAW—Rape.** — On a prosecution for rape, the issue being defendant's identity, the State improperly asked a witness on cross-examination if he had received a letter from defendant after the commission of the crime, asking if defendant was accused of it; as the loss of the letter should first be established. — *Johnson v. State*, Tex., 11 S. W. Rep. 106.

32. **CRIMINAL LAW—Verdict.** — Though Code Crim. Proc. Tex. art. 715, authorizes an informal verdict, with consent of the jury, to be reduced to proper form, the jury cannot be recalled, after they have been discharged, to substitute a valid for an invalid verdict. — *Ellis v. State*, Tex., 11 S. W. Rep. 111.

33. **CRIMINAL LAW—Sodomy.** — On a trial for sodomy, the testimony of the person on whom the offense was committed must be corroborated, if he consented, and the jury should be so instructed where the question of consent is in doubt. — *Medis v. State*, Tex., 11 S. W. Rep. 112.

34. **CRIMINAL LAW—Larceny.** — A conviction of larceny cannot be sustained where the only evidence tending to connect defendant with the commission of the crime is that of an accomplice, and the other evidence is merely that larceny was committed. — *Smith v. State*, Tex., 11 S. W. Rep. 113.

35. **CRIMINAL LAW.** — On an indictment under acts Md. 1868, ch. 179, § 2, for knowingly using, and causing to be used, certain means for causing abortion, letters from defendant to the girl, containing instructions to take ergot, a bottle of which was sent with one of the letters, and minute directions as to how it must be taken, and naming other means to be employed, are admissible in evidence. — *Jones v. State*, Md., 17 Atl. Rep. 69.

36. **CRIMINAL LAW—Disorderly House.** — Evidence admissible as tending to show that house was kept for the resort of lewd persons. — *Hersinger v. State*, Md., 17 Atl. Rep. 81.

37. **CRIMINAL LAW—Homicide—Negligence.** — Under Pen. Code Tex. art. 579, defining negligent homicide, the offense is sufficiently charged by an indictment alleging that defendants, while engaged in running an engine, did back the engine negligently, without giving warning, and without looking to see if any one was likely to be injured, and by said negligence one M was struck and killed, and that his dangerous position might have been known by defendants if they had

used that care and caution which one of ordinary prudence would use under like circumstances. — *Anderson v. State*, Tex., 11 S. W. Rep. 33.

38. **CRIMINAL LAW—Murder—Co conspirator.** — Where the evidence of one jointly indicted with defendant for murder which would acquit the latter, if believed, is excluded on the ground that witness was a co conspirator, a conviction will be reversed on appeal, when the record does not show with reasonable certainty that witness was a co-conspirator. — *Lewis v. Commonwealth*, Ky., 11 S. W. Rep. 27.

39. **CRIMINAL LAW—Rape.** — In a prosecution for assault with intent to commit rape, it is not error to allow the mother of the prosecutrix to testify that when she first met her daughter after the assault, which was on the next day, the daughter made complaint of the outrage. — *Lee v. State*, Wis., 41 N. W. Rep. 960.

40. **CRIMINAL LAW—Embezzlement.** — Under Rev. St. Wis. § 4667, providing that in a prosecution for embezzlement evidence may be given of "any such embezzlement committed within six months next after the time stated in the indictment," an information for embezzlement cannot be sustained by evidence of acts committed before the time stated therein. — *State v. Cornhauser*, Wis., 41 N. W. Rep. 969.

41. **CRIMINAL LAW—Homicide.** — To sustain a conviction of murder in the first degree it is necessary to show premeditation and deliberation on the part of the person convicted; therefore, where the proof shows that the person convicted killed another purposely, there being no proof of deliberation and premeditation, a verdict of murder in the first degree cannot be sustained. — *Anderson v. State*, Neb., 41 N. W. Rep. 951.

42. **DEDICATION—Acceptance.** — In order to constitute dedication of land to public use all that is required is the assent of the owner and the fact of its being used for public purposes. — *People v. Reed*, Cal., 20 Pac. Rep. 706.

43. **DEED—Consideration.** — It is the settled law of this State that recital in a deed of the payment of a valuable consideration for the property therein conveyed is not evidence of such payment as against a stranger or a creditor of the grantor assailing the deed as voluntary, and fraudulent as to him. — *Cohn v. Ward*, W. Va., 9 S. E. Rep. 41.

44. **DEED—Notice.** — A deed to a married woman and her husband, reciting that it is made in consideration that the heirs and legal representatives of B. (whose widow the *feme* grantee is) have withdrawn all claim in and to a certain head-right survey, on which B had located a head right certificate, is sufficient to put prudent persons on inquiry, and to charge them with notice of the fact that the *feme* grantee's interest in her separate right in the location of the B certificate constituted the consideration for which the deed was given. — *Montgomery v. Noyes*, Tex., 11 S. W. Rep. 138.

45. **DEEDS—Description.** — Where a deed contains two descriptions, — one general, and the other special, — and they do not agree, the grantee may rely on the description which is most beneficial to him. — *Winter v. White*, Md., 17 Atl. Rep. 84.

46. **DEED—Trusts.** — In a deed of trust, in which the grantor and the *cestui que trustent* were mentioned in their proper places, the name of the trustee was omitted. He was invested with a discretionary trust, which he accepted by signing the deed with the grantor, two days before the acknowledgment by the latter: Held, that the signatures supplied the blank, and pointed out the party signing as the person intended by the grantor to be trustee; and the omission, being clerical, should be disregarded in determining the effect of the deed. — *Boyce v. Stiles*, Mo., 11 S. W. Rep. 57.

47. **DEEDS—Acknowledgment.** — Where a conveyance of land in the republic of Texas was acknowledged in Ohio before a notary public who was not authorized by the laws of the republic to take acknowledgments in such cases, and was registered, the defective acknowledgment

edgment was cured, and the original registration made valid, by act Texas 1874.—*Baker v. Westcott*, Tex., 11 S. W. Rep. 157.

48. DESCENT AND DISTRIBUTION.—Where a creditor brings an action under a statute permitting actions to be brought for the debts of a decedent against his heirs, where there is only a single creditor, an allegation of the plaintiff that he is the sole creditor of the estate of defendant's decedent is put in issue by a general denial.—*Zuernerman v. Rosenberg*, Tex., 11 S. W. Rep. 150.

49. DRAINAGE—Claims.—Construction of Laws Cal. 1886, p. 78, providing for payment of claims for work done and material furnished under drainage act declared unconstitutional.—*Callahan v. Dunn*, Cal., 20 Pac. Rep. 787.

50. EJECTMENT—Community Property.—In ejectment by the heirs of a patentee of a head-right certificate and his wife, claiming the land to have been community property, against the grantees of the patentee alone, the defendants may, to show an outstanding superior title, introduce a deed from the patentee to a *bona fide* purchaser, executed before the patent was issued, without connecting themselves with such grantee.—*Daniel v. Bridges*, Tex., 11 S. W. Rep. 131.

51. EJECTMENT—Adverse Possession.—While it is true that a plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of defendant's, yet long possession and actual and continued occupancy under claim of title, based upon deeds of conveyance, are *prima facie* evidence of title, even in ejectment.—*Hacker v. Horlemus*, Wis., 41 N. W. Rep. 965.

52. ELECTIONS—Service.—Under Comp. Laws N. M. §§ 1288, 1898, an answer in election contests cannot be served by posting it on a house once occupied by the contestant, but vacated before the posting, and fifty miles distant from his actual place of residence, where he was publicly living.—*Vigil v. Pratt*, N. Mex., 20 Pac. Rep. 785.

53. ELECTIONS—Governor.—Where neither the speaker of the house of delegates, nor the joint assembly of both houses of the legislature convened for the purpose of opening and publishing the returns of the election for the office of governor, does in fact open and publish the returns in respect to said office, or declare any person elected to that office, this court cannot by *mandamus* adjudge the person who appears from the returns certified to the speaker of the house to have received the highest number of votes for that office to be the governor.—*Goff v. Wilson*, W. Va., 9 S. E. Rep. 26.

54. ELECTIONS—Constitutional Law.—Pub. Acts Mich. 1887, No. 293, providing for election contests by petition to the probate judge, and appointment of a board of examiners to recount the ballots, permits a candidate to proceed under it only after the decision of the board of canvassers; and the petition to the probate judge should state who had been declared by the board elected, in order that notice of the contest may be given to him.—*Andrews v. Carney*, Mich., 41 N. W. Rep. 923.

55. EMINENT DOMAIN—Damages Recoverable.—Defendant's railroad was properly and skillfully constructed along the bank of a stream which supplied plaintiff's mill pond and water-power below. The timber of defendant's adjacent land was cut down and removed for ties, and in consequence the sand of which the surface was composed washed down into the stream, and was deposited in the mill pond, clogging plaintiff's wheel, and diminishing the retaining capacity of the reservoir: *Held*, that plaintiff was not entitled to damages under Const. Tex. art. 1, § 17.—*Trinity & S. Ry. Co. Meadows*, Tex., 11 S. W. Rep. 145.

56. EMINENT DOMAIN.—Proceedings necessary under North Carolina statute as to eminent domain.—*Allen v. Wilmington & W. R. Co.*, N. Car., 9 S. E. Rep. 4.

57. ESTOPPEL—In Fals.—Defendant purchased land subject to a mortgage thereon previously made by the

grantor. The mortgagee brought suit to foreclose, and made defendants parties; but at their instance, and on their disclaiming any right or interest under their deed, the case was dismissed as to them: *Held*, that they could not, after foreclosure, justify a refusal to surrender the premises by setting up a title under the homestead laws, acquired after they had obtained possession of the premises under the deed from the mortgagor.—*Anderson v. Thompson*, Ariz., 20 Pac. Rep. 803.

58. EVIDENCE—Parol.—Parol evidence held admissible to show deed, note and title bond was intended as a conditional sale and not a mortgage.—*Wolfe v. McMillan*, Ind., 20 N. E. Rep. 509.

59. EVIDENCE—Parol to Vary Written Agreement.—Bond for a deed mentioning an incumbrance: *Held*, not sufficiently definite to exclude parol evidence showing what kind of incumbrance, when due and payable.—*Rhodes v. Wilson*, Colo., 20 Pac. Rep. 746.

60. EVIDENCE.—The fact that plaintiff, in an action on a written agreement, has erroneously been allowed to testify as to some previous negotiations, resulting in the writing, does not entitle defendant to introduce like incompetent evidence as to previous conversations on the subject.—*Gorsuch v. Rutledge*, Md., 17 Atl. Rep. 76.

61. EXECUTORS AND ADMINISTRATORS—Practice.—Under Rev. St. Mo. §§ 170, 223, upon the filing of the annual settlement at the proper time, the court may during the term order a sale of the realty without petition and order to show cause.—*Day v. Graham*, Mo., 11 S. W. Rep. 55.

62. EXECUTORS AND ADMINISTRATORS—Judgment.—A judgment rendered against an administratrix, to be collected out of the assets of the estate and not from defendant personally, in an action brought against the administratrix individually under How St. Mich. § 5929, rendering a personal representative liable personally for failure to pay a debt after a decree of the probate court directing a distribution of assets is void.—*Peckham v. Berrien County Circuit Judge*, Mich., 41 N. E. Rep. 926.

63. FACTORS AND BROKERS—Commission.—A broker is entitled to compensation when he procures a purchaser with whom his principal is satisfied and who actually contracts for the property but the trade falls through on account of defect in seller's title.—*Conklin v. Krakaner*, Tex., 11 S. W. Rep. 117.

64. FRAUD—Pleading.—In an action for damages for fraud and deceit, an allegation in the complaint that there was a conspiracy to commit the fraud does not affect the ground of action, as the *gravamen* is fraud and damage, and not the conspiracy.—*Brackett v. Grinbold*, N. Y., 20 N. E. Rep. 376.

65. FRAUDULENT CONVEYANCES.—In a suit by a judgment creditor to set aside a deed as fraudulent, it is error to set the deed aside *in toto*, as it is valid and binding between the parties to the fraud, and only void as to creditors.—*Love v. Tinsley*, W. Va., 9 S. E. Rep. 44.

66. FRAUDULENT CONVEYANCES—Attachment.—An attaching creditor, having a lien on the property of his debtor by force of the attachment act, is entitled, prior to the recovery of judgment, to the aid of a court of equity in setting aside a fraudulent conveyance or incumbrance.—*Cocks' Admr. v. Varney*, N. J., 17 Atl. Rep. 108.

67. GUARDIAN AND WARD—Jurisdiction.—The probate court of a county in this State in which real estate of a ward residing out of this State, under guardianship by virtue of an appointment of a guardian in another State, is the "probate court having jurisdiction," upon an application by the guardian for license to sell such real estate of the ward.—*Menge v. Jones*, Minn., 41 N. W. Rep. 972.

68. HOMESTEAD.—A homestead assigned under Code Tenn. (Mill. & V.) § 2940, upon the death of the debtor vests in his second wife and their minor child, though the assignment was made during his marriage with his first wife.—*National Bank of Pulaski v. Shelton*, Tenn., 11 S. W. Rep. 95.

69. INFANCY—Contracts—Ratification.—Passive

acquiescence by a married woman in a deed executed by her and her husband, while she was an infant and covert, will not, however long continued amount to a ratification while coverture still exists.—*Stull v. Harris Ark.*, 11 S. W. Rep. 104.

70. INJUNCTION—Bonds.—Where, after a hearing in equity for an injunction, the bill, on its merits, is dismissed, and the dismissal entered on the docket, an action may be sustained on the bond given to procure the preliminary injunction, without a formal decree being signed and filed.—*Thurston v. Haskell, Me.*, 17 Atl. Rep. 73.

71. INJUNCTION—Jurisdiction.—A court of equity has no jurisdiction to enjoin the secretary of State from delivering to the speaker of the house of delegates the sealed returns of an election for governor, properly transmitted to him, and such injunction, if granted, will be treated as a nullity.—*Fleming v. Guthrie, W. Va.*, 9 S. E. Rep. 23.

72. INJUNCTION — Prosecution of Suit in Sister State.—The Massachusetts courts will not enjoin a citizen of that State from prosecuting a suit in a State court of South Carolina to foreclose a mortgage of land situated there, by reason of the fact that the supreme court of that State, entertains views of the law which governs the rights of the parties differing from those held by the Supreme Court of the United States.—*Carson v. Dunham, Mass.*, 20 N. E. Rep. 312.

73. INSOLVENCY — Injunction.—In Maryland the jurisdiction of the circuit and common pleas courts over insolvency proceedings is of a limited nature, being prescribed by statute; and they have no power to grant injunctions in such proceedings, except in the single instance provided for by act 1880, ch. 172, where an inquiry is instituted to determine the insolvency of a debtor.—*Paul v. Locust Point Co., Md.*, 17 Atl. Rep. 77.

74. INSURANCE—Reformation.—Where it is sought to show that a policy of insurance on the property of, and in favor of, a corporation was so drawn by mistake, and was really intended to cover merely the interest of a stockholder in such corporation, it is incumbent on the insurance company to prove the mistake by evidence entirely plain and convincing, beyond reasonable controversy.—*Blake Opera-house Co. v. Home Ins. Co., Wis.*, 41 N. W. Rep. 968.

75. INSURANCE—Waiver.—By-laws of a mutual insurance company, providing that all agents shall be appointed by the secretary, and that no insurance shall be binding until the cash premium shall have been actually paid to some "duly authorized and commissioned" agent of the company, are for the benefit of the company, and may be waived.—*Susquehanna Mut. Fire Ins. Co. v. Elkins, Penn.*, 17 Atl. Rep. 24.

76. INTOXICATING LIQUORS.—A complaint charging the unlawful keeping of ale, wine, and rum, for sale, also of "strong and malt and intoxicating liquors," is not defective for failure to inform defendant as to whether he is accused of keeping unlawfully liquors in fact intoxicating, or those deemed by law to be intoxicating.—*State v. McKenna, R. I.*, 17 Atl. Rep. 51.

77. INTOXICATING LIQUORS — Constitutional Law.—Const. R. I. amend. 5, requiring the general assembly to enact laws to prevent the sale of intoxicating liquors "to be used as a beverage," does not take away from the general assembly the power which it previously had to restrict the sale, for other purposes, to certain persons or classes.—*State v. Kennedy, R. I.*, 17 Atl. Rep. 51.

78. JUDGMENT—Vacation.—In California the trial court has no power to review its own order setting aside a judgment for want of service of summons, where the order was regularly made after hearing and consideration.—*Hanson v. Hanson, Cal.*, 20 Pac. Rep. 736.

79. JUDGMENT—Dismissal.—An agreement by a plaintiff to transfer to another all his interest in the land which is the subject of litigation, upon being paid a certain sum, which has not been paid, does not constitute an executed transfer of such interest, so as to

justify a dismissal of the action.—*Maloney v. Finnegan, Minn.*, 41 N. W. Rep. 979.

80. JUDGMENT—Negligence.—In an action under Rev. St. Tex. art. 2899, by surviving children against a railroad company for the death of their mother caused by the alleged negligence of defendant, plaintiffs were not concluded by a judgment rendered in a suit brought by their father, for himself only, upon the same cause of action, to which they were not made parties.—*Galveston, H. & S. A. R. Co. v. Kutac, Tex.*, 11 S. W. Rep. 127.

81. JUDGMENT BY CONFESSION—Partnership.—A confession of judgment under seal, in the name of a partnership and of a member of the firm, is binding only upon such member.—*Perth Amboy Co. v. Wood, Penn.*, 17 Atl. Rep. 4.

82. LANDLORD AND TENANT—Lease.—Construction of lease providing that "should the premises be rendered partially untenable by fire or the elements:" Held, under the facts that the premises were not untenable within the meaning of the lease.—*Harris v. Cortiss, Minn.*, 41 N. W. Rep. 940.

83. LIBEL—Pleading.—In an action for libel, where plaintiff sets out the parts of the writing constituting the alleged libel, together with the averments as to its publication, by reducing the libelous matter to writing, and reading the same to various persons, it is improper to require him to either set out the whole writing, or file it with the petition.—*Wallis v. Walker, Tex.*, 11 S. W. Rep. 123.

84. LIMITATIONS — Under Rev. St. Tex. art. 1868, where a plaintiff took a voluntary nonsuit, and then had the judgment set aside, and the cause reinstated upon the payment of costs, that such nonsuit did not have the effect to set the statute of limitations in operation.—*Childs v. Mayo, Tex.*, 11 S. W. Rep. 154.

85. MARRIED WOMAN—Feme Sole Trader.—Where a married woman has been declared a *feme sole* trader, under act Pa. May 4, 1855, which expressly authorizes married women so declared to dispose of their property without any interference on the part of their husbands, and she afterwards executes a mortgage for the purpose of stripping herself of her property in fraud of her husband's rights, the mortgage is valid as between the parties, and a court of equity will not give her any relief from the consequences of it.—*Appeal of Hedden, Penn.*, 17 Atl. Rep. 29.

86. MASTER AND SERVANT — Fellow servants.—A brakeman on a freight train is a fellow-servant within the rule of the master's liability for negligence, with one having general charge of the company's freight business in the locality of the accident at issue, with authority to employ and discharge hands in connection with such business.—*Galveston, H. & S. A. Ry. Co. v. Farmer, Tex.*, 11 S. W. Rep. 156.

87. MASTER AND SERVANT — Contributory Negligence.—In an action for personal injuries caused by the alleged negligence of defendant, where plaintiff's own case necessarily puts in issue all the facts relied on by defendant to show his contributory negligence, the burden of proof is on plaintiff to acquit himself of fault, and in such case no plea of contributory negligence is necessary on the part of defendant.—*Murray v. Gulf, etc. Ry. Co., Tex.*, 11 S. W. Rep. 125.

88. MASTER AND SERVANT—Negligence.—The duty of the master to see to it that the machinery furnished for the use of his servants is reasonably safe does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of the use, and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine.—*Eicheler v. St. Paul Furniture Co., Minn.*, 41 N. W. Rep. 975.

89. MASTER AND SERVANT—Negligence.—Question of negligence on part of defendant where plaintiff was injured by an ox which came on defendant's track through insufficient fences.—*Magee v. North Pac. Coast R. Co., Cal.*, 20 Pac. Rep. 709.

90. MEASURE OF DAMAGES—Crops. — The measure of damages for injuries to crops caused by an overflow, is the value of the crops at the time and place of their destruction, as they stood upon the ground. — *Sabine & F. T. Ry. Co. v. Smith*, Tex., 11 S. W. Rep. 128.

91. MUNICIPAL CORPORATIONS—Streets—Damages. — A municipal corporation is not liable for depreciation in the value of private property caused by permitting a railroad company to place its tracks below grade across the street on which the property is situated, thus deflecting travel from that street to another, but not obstructing access to the property, though rendering it less convenient. — *Fairchild v. City of St. Louis*, Mo., 11 S. W. Rep. 60.

92. MUNICIPAL CORPORATIONS—Defective Streets. — Our statute imposes an absolute liability upon cities, villages and towns for injuries sustained by reason of the failure of municipal authorities to keep in repair the streets, sidewalks, etc., within the corporate limits, provided its authorities have opened or controlled such street or sidewalk where the injury was sustained as a public street or sidewalk. — *Biggs v. City of Huntington*, W. Va., 9 S. E. Rep. 51.

93. MUNICIPAL CORPORATIONS—Defective Streets. — Question of liability of city for defective street to policeman injured on sidewalk, the question being also as to the knowledge of defect by the policeman. — *City of Galveston v. Hemmes*, Tex., 11 S. W. Rep. 29.

94. NEGLIGENCE. — Question of negligence under the facts where plaintiff was injured passing through a private gangway, by a ladder falling on her which was in the hands of defendant's servant. — *Clarke v. Rhode Island Electric Co.*, R. I., 17 Atl. Rep. 59.

95. NEGOTIABLE INSTRUMENTS—Indorsement. — In Vermont, a third person who indorses his name in blank upon a note, under that of the payee, *prima facie* assumes the obligation of a maker. — *National Bank v. Dorset Marble Co.*, Vt., 17 Atl. Rep. 42.

96. NEGOTIABLE INSTRUMENTS—Collateral Security. — Where a note is indorsed and delivered as collateral security, the indorser and indorsee are to be regarded as sustaining towards each other the relation of pledgor and pledgee; and, if such collateral paper matures before the principal debt, the duty and obligation of the pledgee in the collection thereof is performed by the exercise of reasonable and ordinary care and diligence. — *Mount Vernon Bridge Co. v. Knox County Sav. Bank*, Ohio, 20 N. E. Rep. 339.

97. NEGOTIABLE INSTRUMENTS—Evidence. — In an action on a promissory note, the defense was that it was given by defendants to plaintiff for the sole purpose of procuring the release of one W, who was in jail upon a criminal charge at the complaint of plaintiff. One of the questions asked defendants was: "What was your understanding when you signed the note?" Held, that this was properly excluded. — *Fosdick v. Farnardale*, Mich., 41 N. W. Rep. 361.

98. NEW TRIAL—Surprise. — A motion for a new trial on the ground that the applicant was surprised by the introduction of certain testimony at the trial, and that such testimony could have been successfully met by a witness who was absent, is properly refused where it appears that the applicant did not make known his surprise when such testimony was offered, and that no continuance was asked for. — *Romero v. Demerats*, N. Mex., 20 Pac. Rep. 787.

99. NUISANCE—Damages. — An individual cannot enjoin a public nuisance, such as the obstruction of a road, unless it works special and peculiar injury to him, and that injury must not be trivial, or such as may be compensated in damages, but must be serious, affecting the substance and value of the plaintiff's estate. — *Talbot v. King*, W. Va., 9 S. E. Rep. 48.

100. OFFICE AND OFFICER. — The constitution provides that "when a vacancy happens during the recess of the legislature in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy, and the

commission shall expire at the end of the next session of the legislature, unless a successor shall be sooner appointed." Held, that the governor may in the recess make an appointment to fill the office temporarily, where the vacancy first began during the session of the legislature. — *State v. Kuhl*, N. J., 17 Atl. Rep. 102.

101. PARTITION OF DECEDANT'S ESTATE. — An order of sale in partition will not be refused because the time has not yet expired within which the estate of the testator, under whose will complainants derive title, may be subjected to the payment of debts, when it does not appear that there are any debts, but does appear that the administrator has a large amount of personal property in his hands. — *Hendry v. Hollingdrake*, R. I., 17 Atl. Rep. 50.

102. PENSION—Fees for Obtaining. — The statutes of the United States prescribing the compensation of pension attorneys, and making it unlawful to demand or receive a greater sum than that prescribed, are not limited to persons who are recognized or known to the commissioner of pensions as attorneys or agents of applicants. — *Caverly v. Robbins*, Mass., 20 N. E. Rep. 450.

103. PRINCIPAL AND SURETY—Contribution. — Where the complainant, in a bill for contribution between sureties, has paid only a part of the joint indebtedness, and one or more of the defendants have also made payments thereon, the amounts paid by all the parties must be added together, and the sum divided by the number of solvent sureties, which will give the basis for contribution. — *Gross v. Davis*, Tenn., 11 S. W. Rep. 92.

104. RAILROAD COMPANY—Municipal Aid. — The new constitution abrogated the act of February 8, 1870, so far as it authorized the issuing of bonds in aid of a certain railroad upon an election held after the new constitution went into effect; and no new act having been passed to confer the required authority upon the city of B, there was no authority to hold the election of June 11, 1870, or to issue the bonds, and that the holders thereof could not enforce them. — *Norton v. Tax Dist.*, U. S. S. C., 9 S. C. Rep. 322.

105. RAILROAD COMPANIES—Municipal Aid. — The bonds issued by the city of B, upon an election held after the amended constitution Tenn. 1870 went into effect, were void where the owner of such bonds has obtained judgments on them, he is not entitled to *mandamus* to compel the city to levy a tax to pay such judgments, under the provision of the act of February 8, 1870, authorizing the city to tax to pay the interest on and create a sinking fund for the redemption of the bonds. The judgments do not estop the city to assert the abrogation of that act. — *Taxing District v. Loague*, U. S. S. C., 9 S. C. Rep. 327.

106. RAILROAD COMPANIES—Fires. — Where fire has been kindled by a locomotive without negligence of the railroad company, whether on land of the company or not, the company is bound to exercise such care to prevent the spread of the fire and resulting damage as a prudent man would deem proper under the circumstances. — *Missouri Pac. Ry. Co. v. Platzer*, Tex., 11 S. W. Rep. 160.

107. RAILROAD COMPANY—Injunction. — To entitle an abutting owner to enjoin the operation of a railroad in a street, which has been constructed by legislative sanction and with the consent of the city, it must clearly appear that he has been deprived of his right to the reasonable use of the street, and not merely that he has suffered an annoyance or inconvenience, though such as to entitle him to legal redress. — *Hyland v. Short-Route Ry. Transfer Co.*, Ky., 11 S. W. Rep. 79.

108. RAILROAD COMPANIES—Crossings. — The fact that a railroad crosses a highway on a trestle does not exempt the railroad company from the duty of giving warning of the approach of its trains to such crossing. — *Rupard v. Chesapeake & O. R. Co.*, Ky., 11 S. W. Rep. 70.

109. RAILROAD COMPANIES—Fences. — The provisions of section 18, art. 2, ch. 2, Comp. St., defining a "lawful fence," apply alone to the inclosing of lands, and do not apply to the fencing of a railway. That

matter is governed by § 1, art. 1, ch. 73, Comp. St.—*Chicago, B. & Q. R. Co. v. James*, 41 N. W. Rep. 992.

110. RECORD—Mortgages. — Though the general index required by Rev. St. Wis. § 789, to be kept in the office of the register of deeds, and in which a mortgage has been entered, does not contain a description of the mortgaged land, as required by the statute, yet, where the mortgage has been transcribed in the proper record book of the office, the defect is cured. — *Lane v. Duchac*, Wis., 41 N. W. Rep. 962.

111. REFERENCE—Contract. — A contractor worked on a building under a contract which fixed the sum to be paid, and provided that any additions to or deductions from the work as shown by the plans and specifications should be made according to certain rates: *Held*, in an action to enforce a mechanic's lien arising under such contract, where the account contained over ninety items for extra work, and defendant denied that there was anything due plaintiff, that a reference was proper, under Rev. St. Mo. § 8606.—*Itiner v. St. Louis Exposition & Music Hall Ass'n*, Mo., 11 S. W. Rep. 58.

112. REFERENCE—Findings. — In an action at law on an account, the trial court has power to set aside altogether the finding of a referee, but not to amend it. — *Clark v. Phillips*, Mo., 11 S. W. Rep. 53.

113. REFERENCE—Insurance. — Under Rev. St. Wis. § 2864, providing for the compulsory reference of cases where the trial of the issue requires the examination of a long account on either side, an action upon a policy of insurance cannot be referred, though an inquiry as to the list of articles destroyed by the fire may be necessary to determine the amount of loss. — *Andrus v. Home Ins. Co.*, Wis., 41 N. W. Rep. 966.

114. RESULTING TRUSTS — Husband and Wife. — *Quare*, whether a resulting trust arises in favor of a wife, if the husband acquires property with her separate estate, and without her knowledge and consent takes title in his name. If so the proof must be clear and explicit to establish it, especially against husband's creditors. — *Smith v. Turley*, W. Va., 9 S. E. Rep. 46.

115. REVIVAL OF JUDGMENT—Limitation. — Under §§ 11, 12, ch. 139, of the Code a judgment can be revived by *scire facias* against the personal representative of the debtor within ten years from the return-day of the last execution, though that time may be more than ten years from the date of the judgment. — *Sherrard's Admr. v. Keiter's Admr.*, W. Va., 9 S. E. Rep. 25.

116. SALE — Change of Possession. — Though the sale of a cow is not accompanied by sufficient change of possession to be valid as against creditors, yet her subsequent progeny raised on the farm on which both vendor and vendee reside, never having been the property of the vendor, belong to the vendee as against the vendor's creditors. — *Wolcott v. Hamilton*, Vt., 17 Atl. Rep. 39.

117. SPECIFIC PERFORMANCE—Jurisdiction. — In the case of a person, bound by a contract in writing to convey real estate, dying before making a conveyance, the proper probate court, on the application of any person interested in causing it to be made, may, under chapter 58, Gen. St. 1878, direct the administrator or executor to make it. — *In re Mousseau's Estate*, Minn., 41 N. W. Rep. 977.

118. TAXATION — Broker. — A cotton-broker who merely occupies desk-room in a city, where he keeps his account books, etc., carries on his correspondence, and receives samples of cotton, but makes no sales, and keeps no goods except the samples, which he does not offer for sale there, does not occupy a store or shop within the meaning of R. v. St. Me. ch. 6, § 14.—*Martin v. City of Portland*, Me., 17 Atl. Rep. 72.

119. TAX-DEED—Evidence. — Under the provisions of the Code of 1868 of this State, a tax-deed for land, executed in 1870, by a deputy-recorder, and duly acknowledged by him in his own name as such deputy, is admissible in evidence in an action of ejectment for said land. — *Davis v. Living*, W. Va., 9 S. E. Rep. 84.

120. TAX-DEED—Title. — A void tax deed may con-

stitute color of title, under the general statute of limitations. — *Bartlett v. Kauder*, Mo., 11 S. W. Rep. 67.

121. TAX-TITLES. — A certificate issued to the State for lands bid in at a tax-sale, made out and executed by the county auditor months after the expiration of the time reasonably needed for such purpose, although within the period of redemption provided in chapter 1, Gen. Laws 1874, is of no effect. — *Kipp v. Hill*, Minn., 41 N. W. Rep. 970.

122. TENANCY IN COMMON. — When a tenant in common, in possession of the entire tract, asserts exclusive title to the whole against his co-tenant, the statute of limitations begins to run. — *Mayer v. Manning*, Tex., 11 S. W. Rep. 126.

123. TRUSTS — Revocation. — A deed of trust executed by a husband and wife of land of the husband reserved a life-estate in the grantors as *cestui que trustent*, "and, at and immediately after the death of the survivors of them, the said property to vest in their children or their legal representatives in fee-simple, as tenants in common." *Held*, that the children's interest did not vest with the execution and delivery of the deed. — *Appeal of Gingrich*, Penn., 17 Atl. Rep. 53.

124. TRUSTS — Equity. — *Held*, under the circumstances of this case that the loss of the trust fund resulted from defendant's gross negligence in depositing it with a bank known to be insolvent and from his disobedience to the decree of the court and he was responsible for the whole thereof. — *Whitehead v. Whitehead*, Va., 9 S. E. Rep. 10.

125. VENDOR'S LIEN—Parties. — In a suit to enforce a vendor's lien on land, it is not error to decree a sale of such land to pay said lien, without making other creditors, having subsequent liens thereon, parties, and ascertaining the amounts and priorities of their debts. — *Arnold v. Corburn*, W. Va., 9 S. E. Rep. 21.

126. VENDOR'S LIEN — Homestead. — Though the execution of a note by the vendee for the purchase money, payable to a third person, operates, as to the vendor, as a payment, and therefore extinguishes his lien, yet in an action on the note the vendee is not entitled to claim a homestead, since as to him the note is a part of the purchase price. — *Greer v. Oldham*, Ky., 11 S. W. Rep. 73.

127. WAREHOUSEMEN — Pledge. — Under the grain warehouse law of 1876 no distinction can be made between the person who makes an actual delivery of his grain at a public warehouse and a pledgee of the grain of the warehouseman, (actually upon deposit in the warehouse,) who leaves it in store with the proprietor as his bailee, taking a warehouse receipt therefor. — *Eggers v. Hayes*, Minn., 41 N. W. Rep. 971.

128. WARRANTY—Damages. — Representations that a horse is "sound straight and all right" and just such a horse as the purchaser wants, constitute a warranty. — *Murphy v. McGraw*, Mich., 41 N. W. Rep. 917.

129. WATERS AND WATER-COURSES—Adverse Use. — In an action to determine the right to certain water which defendant claimed the right to use on alternate days, there were findings that defendant's predecessor in title leased from plaintiff's predecessor the right to so use the water; that more than five years before suit brought, defendant paid plaintiff's predecessor a certain sum, in consideration of which the latter waived all claim to one-half of the water; that defendant has since claimed the right to use, and has used, the water "as his own property;" and that his possession, claim, and use have been quiet, peaceable, open, and notorious: *Held*, that they did not show that defendant's use was adverse, and were insufficient to support a judgment in his favor on the ground of a prescriptive right. — *Oneto v. Restano*, Cal., 20 Pac. Rep. 745.

130. WILLS — Revocation. — The testamentary incapacity of a married woman having been removed by statute, the will of a *feme sole* is not now revoked by marriage. — *In re Hunt's Will*, Me., 17 Atl. Rep. 68.

The Central Law Journal.

ST. LOUIS, MAY 17, 1889.

CURRENT EVENTS.

MISSOURI and Minnesota have now joined the procession of ballot-reform States. Their legislatures have passed bills, framed upon the model of the Australian election system, with some few modifications. In Missouri, the law is made to apply only to cities of over five thousand population; in Minnesota to cities of over ten thousand. There are strong reasons for believing that Wisconsin and Connecticut will be added to the list before the close of their present legislative sessions. In Wisconsin, the senate has passed a bill extending the provisions of the present admirable Milwaukee law and making them applicable to the entire State. And thus the good work goes on.

It is a common saying, and one undoubtedly true, that there are "tricks in all trades," and even so virtuous and innocent an occupation as legislating for the people cannot expect to escape its application entirely. And that there are at least occasional tricks in that profession, a recent act of the Missouri legislature clearly discloses, if there is any virtue in language. It seems that a spasm of business morality struck at least the rural members of that body, who determined to put an end to what is known in polite language as option trading or trading in futures, and in vulgar parlance as grain gambling. As is well known to the profession, the courts of most of the States, in passing on contracts for future delivery of grain, have held them valid or otherwise, according to whether it was the intention, at the time of making the contract, to actually deliver the goods, or whether it was to be simply an adjustment or settlement of differences on the basis of the market value of the goods at the time of the pretended delivery. The above legislature framed a bill stringent and apparently invol-

nerable, constituting it an offense to buy and sell commodities for future delivery, and making it *prima facie* evidence of the guilt of the party accused to adjust or settle differences otherwise than by actual delivery of the article bought or sold. Whatever doubt there might be about the advisability, efficacy and constitutionality of such a law there certainly could be none as to its intendment, and its passage, no doubt, would have created some confusion in the ranks of those at whom it was aimed. But at this point the urban legislator, so to speak, made his appearance, and by representing that the bill, in its then shape, was unconstitutional, obtained the substitution of the simple phrase "intend to" throughout the statute, in effect making it an offense to buy and sell grain for future delivery where the buyer and seller do not intend to make actual delivery, thus, in reality, destroying the real aim and object of the statute, and simply putting the law in statutory form, as it has heretofore been declared to be by the courts, a matter of intention, and thus, we might add, of evasion; with this difference, however, that that has now been declared to be a crime which heretofore has had the effect only of preventing an enforcement of a contract. As a matter of fact, however, we do not see that the legislature had it in its power to pass such a law as at first was contemplated, as it seems clearly unconstitutional to make an offense out of the mere selling of goods for future delivery without reference to the intent of the parties.

NOR do we at all agree to the proposition that the statute, even as originally framed, would have been effective in accomplishing the object sought. A leading daily newspaper, in commenting upon it, calls attention to a similar law passed by congress twenty-five years ago, in effect an act to prevent sales of gold for future delivery and prohibiting sales by bankers or brokers for present delivery at any other place than their regular business houses. Congress supposed that this law would stop speculation in gold and at once force down the price of that metal. The law seeking to prohibit gold speculation went into effect June 21, 1864. Sales at once stopped on the gold board in New York. To this extent and no further was the law en-

forced. Men bought gold as they did before, but at other places. Gold instead of falling in price steadily advanced until the Washington legislators saw they had blundered and repealed the law. No doubt the statute which the Missouri legislature intended to enact would be as powerless to accomplish its end as the one passed by congress. It could not be enforced in the spirit and to the extent which its creators desire, and if it could be, public sentiment would at once demand its repeal. In all business enterprises, on a large scale, the speculative element enters, and from the necessities of the case must enter. The enforcement of a law as harsh and inflexible as that which the Jefferson City solons intended the anti-option act to be would create ten evils for the one which the act was designed to remove.

NOTES OF RECENT DECISIONS.

THE question as to the implied lien of bankers on securities in their possession came before the Supreme Court of the United States in *Reynes v. Dumont*, 9 S. C. Rep. 486. It is substantially held that any circumstance which shows that securities were held for some other purpose rather than the balance of account will defeat the claim of lien, and that in the case at bar there was no lien, as it appeared that the bonds upon which lien was claimed were not lodged in the hands of the bankers in the ordinary course of business between them and the owner. Chief Justice Fuller says:

Undoubtedly while "a general lien for a balance of accounts is founded on custom, and is not favored, and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it," and "general liens are looked at with jealousy, because they encroach upon the common law, and disturb the equal distribution of the debtor's estate among his creditors," 2 Kent's Commentaries, *636, yet a general lien does arise in favor of a bank or banker out of contract expressed, or implied from the usage of the business, in the absence of anything to show a contrary intention. It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien, *Brandao v. Barnett*, H. L. 3 C. B. 519, 582; *Exch. Ch. 6 Man. & Gr. 680*; *Bock v. Gorrisen*, 2 DeG. F. & J. 434, 443. It was held *In re Medewe*, 20 Beav. 588, that where a customer's security was specifically

stated to be "for the amount which shall or may be found due on the balance of his account" it could not be held for a subsequent floating balance, but only for the then existing balance. And see *Van Durgue v. Willis*, 3 Bro. C. C. 21. "A bankers' lien," said Mr. Justice Matthews, speaking for the court in *National Bank v. Insurance Co.*, 104 U. S. 54, 71, "ordinarily attaches in favor of the bank upon the securities and moneys of the customer, deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion." In *Bank of the Metropolis v. New England Bank*, 1 How. 234, 239, Mr. Chief Justice Taney, in delivering the opinion, referring to the general principle that a banker who has advanced money to another has a lien on all paper securities in his hands for the amount of his general balance, says: "We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties." "Here, then," said Caton, J., in *Russell v. Hadduck*, 3 Gilman, 233, 238, "is the true principle upon which this, as well as all other bankers' liens must be sustained, if at all. There must be a credit given upon the credit of the securities, either in possession or in expectancy," *Fourth National Bank v. City National Bank*, 68 Ill. 398. In *Duncan v. Brennan*, 88 N. Y. 487, 491, the language of the court is: "The general lien which bankers hold upon bills, notes, and other securities deposited with them for a balance due on general account, cannot, we think, exist where the pledge of property is for a specific sum and not a general pledge;" and in *Neponset Bank v. Leland*, 5 Metcalf, 259: "The notes were deposited under special circumstances; they were not pledged generally, but specifically; and this negatives any inference of any general lien, if, in the absence of such special agreement, the law would imply one; and in *Wyckoff v. Anthony*, 90 N. Y. 442, that "where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien on the securities for a general balance or for the payment of other claims." See also *Masonic Savings Bank v. Bang's, administrator*, 84 Ky. 135; *Bank v. Macalester*, 9 Barr, 475; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Biebinger v. Continental Bank*, 99 U. S. 143.

THE Supreme Court of Indiana, in *Enyeart v. Kepler*, 20 N. E. Rep. 539, hold that a husband's deed to his wife, she not joining, of land held by them by entireties is valid. They say:

This being the *status* of the parties, we can see no good reason why the husband cannot convey title to real estate to the wife, and the wife receive title from him. The decisions of this court only go to the effect that the husband cannot convey his interest in an estate by entirety without the assent of the wife. In the case of a conveyance by the husband to the wife of his interest, and her acceptance of the deed, it operates as a relinquishment of the husband's right as survivor. As in this case the husband conveys the real estate in question to the wife, and she accepts the deed, and

afterwards disposes of the real estate by will, this would constitute such an assent on the part of the wife, within the meaning of the decisions of this court, as would make the deed valid, and pass the title to the wife, if, indeed, it can be said in case of a conveyance of the husband's interest to the wife any assent is necessary, more than the acceptance of the deed, as such a conveyance does not attempt to take from, but rather adds to, her interest in the land. By some of the early decisions of this court it was held that a deed direct from the husband to the wife was void in law but would be upheld in equity. In the discussion of the validity of a deed direct from the husband to the wife, in the case of *Thompson v. Mills*, 39 Ind. 528, we think the court laid down the proper doctrine. The court in that case says: "As the fact is recognized that the husband may, by deed made directly to his wife, convey real estate to her, and the conveyance will be upheld, why not apply to such conveyances the same rules which are applied to conveyances between other parties; that is, hold them valid until some legal reason has been shown for setting them aside?" The deed from appellant to his wife was valid, and passed all the interest the husband had in the land to his wife. Suppose the husband and wife should have joined in a deed, and conveyed the land to a third person, and such third person conveyed the land to the wife. The legal title would have passed from the husband and wife, and been received back by the wife; and, if they could convey title in that manner, as they surely could have done, there is no sound reason why under our laws they could not by agreement pass the title by deed direct from the husband to the wife, he executing and she accepting the conveyance. And see *Dodge v. Kinzy*, 101 Ind. 102.

As to whether a covenant against incumbrances is broken by the existence of an easement over a portion of the land for the purpose of maintaining a dam, the Court of Appeals of New York, in *Huyck v. Andrews*, 20 N. E. Rep. 581, considers in an exhaustive opinion wherein they hold in the affirmative. Judge Earl says:

There is in this State one exception to the rule that the existence of an easement constitutes a breach of the covenant against incumbrances, and that is in the case of a highway. It was held in *Whitbeck v. Cook*, 15 Johns. 483, that it is not a breach of the covenant that the grantor was lawful owner of the land, was well selsed, and had full power to convey; that part of the land was a public highway, and was used as such; and that decision has ever since been regarded as the law in this State. It was based upon the peculiar nature of highway easements, and the general understanding with reference to them. Spencer, J., writing the opinion, said: "It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood-gate of

litigation would be opened, and for many years to come this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud." These reasons are not applicable to other easements, and the rule of that case has not been applied to any other. * * * *McMullin v. Wooley*, 2 Laws, 304; *Roberts v. Levy*, 8 Abb. Pr. (N. S.) 811; *Rea v. Minkler*, 5 Lans. 196; *Russ v. Steele*, 40 Vt. 310; *Scriven v. Smith*, 8 N. E. Rep. 675; *Mitchell v. Warner*, 5 Conn. 497; *Morgan v. Smith*, 11 Ill. 194; *Medlar v. Hiatt*, 8 Ind. 171; *Horey v. Newton*, 7 Pick. 29; *Beach v. Miller*, 51 Ill. 206; *Gerald v. Elley*, 45 Iowa, 323; *Britt v. Riffe*, 78 Ky. 352; *Kellog v. Malin*, 50 Mo. 496, cited and approved. To support the contention of the appellant, his counsel has placed much reliance upon the cases of *Kutz v. McCune*, 22 Wis. 628, and *Memmert v. McKeen*, 112 Pa. St. 315, 4 Atl. Rep. 542. In *Kutz v. McCune* it was held that an easement obviously and notoriously affecting the physical condition of the land at the time of its sale is not embraced in the general covenant against incumbrances. In *Memmert v. McKeen* it was held that incumbrances are of two kinds—First, such as affect the title; and, second, such as affect only the physical condition of the property; that, where incumbrances of the former class exist, the covenant is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title; that where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not the title but the physical condition of the property, it is presumed that the grantee took the property in contemplation of such condition, and with reference thereto. We do not yield assent to these authorities. They have no sanction in any of the cases decided in this State, and have no adequate foundation in principle or reason. They open to litigation upon parol evidence, in every action for the breach of the covenant against incumbrances caused by the existence of an easement, the question whether the grantee knew of its existence, and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest or dominion over the land, and that he may rely upon them for his security. If open, visible, and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title, or incumbrances upon the land.

THE effect of a clause in a policy of insurance that "this insurance shall not inure to the benefit of any carrier," was considered by the Supreme Court of Texas in *Insurance Co. v. Easton*, 11 S. W. Rep. 180. This case is almost the counterpart of *Inman v. South Carolina R. R. Co.*, 28 Cent. L. J. 230, wherein the effect of a clause in a bill of lading stipulating that the carrier shall have the

benefit of any insurance, was considered. In the present case, the question was whether the warranty in the policy that the insurance should not inure to the benefit of the carrier, is a valid and lawful stipulation in the contract of insurance, whether a violation thereof forfeits the policy, and whether the warranty was in restraint of trade and contrary to public policy. The court, in upholding the validity of the stipulation, says:

It must now be held that so much of the clause in the bill of lading as provided that "the carrier shall have full benefit of any insurance that may have been effected upon or on account of said cotton," is not invalid by reason of its contravening any rule based on public policy. *Insurance Co. v. Railway Co.*, 63 Tex. 475; *Insurance Co. v. Transportation Co.*, 117 U. S. 312, 6 S. C. Rep. 750, 1176; *Inman v. Railway Co.*, 9 S. C. Rep. 249; *Rintoul v. Railroad Co.*, 17 Fed. Rep. 906; *Platt v. Railroad Co.*, 15 N. E. Rep. 398; *Jackson Co. v. Insurance Co.*, 189 Mass. 508; *Tate v. Hyslop*, L. R. 15, Q. B. Div. 368; *Jackson Co. v. Ins. Co.*, 189 Mass. 508. * * * The cases referred to hold: (1) That contracts, such as contained in the carrier's contract before us, are valid as between the carrier and shipper. (2) That a policy issued with knowledge that the insured property is in transit, in the absence of inquiries as to the terms of shipment, misrepresentation as to this or other matter material to the risk, or fraud, will be deemed to have been issued in subordination to the contract of shipment, which may control the right of the insurer to subrogation. None of them, however, hold that a contract of insurance, existing when a contract of carriage is made, whether the carrier have knowledge of the insurance contract or not, can be controlled by a subsequent contract between the insured and the carrier, and the insurer's right to subrogation thus be destroyed, even when there is no express provision in the policy which forbids this. * * * The warranty which the insurance company seeks to assert to avoid liability to the carrier was one promissory in character, in which the parties contracted "that this insurance shall not inure to the benefit of any carrier." This, if a valid provision, cuts off any construction of the policy whereby it could possibly be held to confer any right to benefit under it on a carrier of the property insured, and it deprives the insured of the power to confer on such carrier any right to benefit under the policy by contract or otherwise. By the warranty we understand the parties to have contracted that the contract of insurance should be avoided—should cease to be operative—if during the time specified for its continuance the insured should so contract with a carrier of the property insured as, between themselves, to give to the carrier any right to benefit under the policy. The purpose of this provision evidently was to deny, in terms, to the insured the right of power to confer on the carrier any right to benefit through the policy, such as the cases to which we have referred hold may be conferred on the carrier by contract with the shipper made before insurance is obtained. The insurer, in effect, says in the face of the policy—and to this the insured assents: "This contract shall be binding on me only so long as you refrain from contracting with any carrier you may employ to transport the insured property that he shall have right to any indemnity from me for loss occurring, while the property is in his possession as car-

rier, from a cause which, under the rules of law applicable to the contract of carriage, would give you cause of action against such carrier; and I will not be longer bound by this contract if you in any manner release such carrier from that full liability to you and to me which will exist under a lawful contract of affreightment for loss of the insured property while in his hands as carrier." By requiring the carrier's liability to continue the ultimate liability, the insurer doubtless intended to make the carrier's own interest some guaranty against its own negligence or misconduct. In the very act of making the contract through which the carrier in this case claims, the policy ceased to be of any affect whatever, as to the particular cotton at least, and from that time forward neither the insured nor the carrier could assert a right under it based on the particular loss, if the warranty was valid. The court below held that the warranty was invalid, because in restriction of trade, and against public policy. The insurance company was under no legal obligation to issue a policy at all, but, if it did, it had the right to place a provision in the policy such as it did, and in so doing it neither contravened any public policy nor restrained trade.

THE right of a mother to the possession of her child was curiously, though correctly decided by the Supreme Court of Rhode Island, in *Hoxsie v. Potter*, 17 Atl. Rep. 129. It was there held, in an action of *habeas corpus* by a mother, that the child should be allowed to remain with her aunt, with whom she had been placed by the mother when quite young and remained with her nine years. It also appeared that the child was regarded by the aunt as her own, and the mother had visited her but once. Nothing appeared against the fitness or ability of the mother to provide for the child. The court said:

Upon petition for a writ of *habeas corpus*, the court is bound to free the child from illegal restraint, yet it is not bound to award the custody to any particular person. The relations between children and parents and foster parents are of an intricate and delicate character, involving the welfare and happiness of all the parties. Custody of children, therefore, cannot be awarded by a fixed and inflexible rule, as if it were a right of property. Recognizing the ordinary rights of a parent, the courts of this country nevertheless hold that when these rights cannot properly be exercised, or when they have been waived by the voluntary establishment of new relations, then all the circumstances must be considered, and that course followed which, in the judgment of the court, appears to be best adapted to the interests, feelings, and rights of the parties concerned. Primarily the welfare of the child is to be considered; but when, as in this case, that is not the controlling consideration, the court may look beyond it to existing relations. Thus in *Pool v. Gott*, 14 Law Rep. 269, where a father sought to recover the custody of his child from its grandparents, Shaw, C. J., says: "Although there is no agreement proved, yet the conduct of the father, during nearly the whole life of the child, furnishes reason for supposing that he surrendered his rights over the child by a tacit under-

standing, if not by an express agreement. He has, for eight years or more, been able to retake the child, and has made no offer to do so. No demand or offer has been made on either side that he should contribute to her support. His present assertion of his right is in consequence of what he deems an unreasonable refusal of a different request. By his own acquiescence he has allowed the affections on both sides to become engaged in a manner he could not but have anticipated, and permitted a state of things to arise which cannot be altered without risking the happiness and interest of his child. He has allowed the parties to go on for years in the belief that his legal rights were waived, and this relation of adoption sanctioned and approved by him. Under such circumstances I do not think that the petitioner is in a position to require the interference of the court in favor of a controlling legal right on his part, against the rights, such as they are, the feelings, and the interests of the other parties." And see *Jones v. Darnell*, 108 Ind. 569; *Chapsky v. Wood*, 26 Kan. 650; *Clark v. Boyer*, 32 Ohio St. 299; *Verser v. Ford*, 37 Ark. 27; *Bonnett v. Bonnett*, 61 Iowa, 199.

* * * The case is not without difficulty, but we do not feel called upon to sunder the ties that have been permitted to grow up, believing that the happiness of the boy and the rights and feelings of his foster parents will be best subserved by leaving the custody where it now is.

QUESTIONS as to removal of causes under the new act came before the United States Circuit Court of Tennessee in *Huskins v. Cincinnati, N. O. & T. P. Ry. Co.*, 37 Fed. Rep. 504. There it was held that under the removal act of March 3, 1887, authorizing the defendant to file his application on the ground of diverse citizenship in the State court at any time before he is required to plead or answer the complaint, where, on the last day of the term of the State court, and after the time to answer or plead, the complaint is amended, demanding \$10,000 instead of \$2,000, a petition for removal to the federal court before the next term of the State court is filed in time, and that under the clause relating to removal for "local prejudice or influence," the application must be made to the federal court, and may be made at any time before final hearing in the State court. Upon the latter point Judge Key says:

In *Lookout Mountain Co. v. Houston*, 32 Fed. Rep. 711, in which there was an application for removal because of local prejudice or influence, it was held that an application in such case must be filed at the return-term of the cause, or before. If that be correct, the application in this suit would be in time, if the positions assumed upon the first ground of removal be tenable. The weight of opinion, however, so far as cases have been adjudged, is that such removal may be made at any time before the final hearing of the case. Judge Deady, an excellent authority, so holds in *Fisk v. Henarie*, 32 Fed. Rep. 417. And so does that eminent jurist, Judge Jackson, of this circuit, in *Whelan v. Railroad Co.*, 35 Fed. Rep. 849-886. A very

able, clear, and well-considered opinion has been rendered by him in this case; and the case decided by Judge Jackson is identical with the case in hand in most of the points of contention raised for determination. The opinion of the circuit judge will be accepted as the law of this case, not only because of the authority of the decision as a judicial exposition, but also for the sake of the harmony and agreement that should prevail, if practicable, in the administration of the law by different judges presiding over the same court. In passing, it may be observed that the words "local prejudice or influence" are used. They are connected disjunctively. If there be local prejudice, the cause may be removed, or if no local prejudice exists, and there be local influence so powerful and operative as to prevent the defendant from obtaining justice, he may remove. If there be prejudice against the defendant, or if the influence and power of the plaintiff or any other local influence dominate the public mind at the place where the suit is instituted, so that he cannot have justice, the cause may be removed.

A QUESTION as to the validity of an agreement to take shares in a corporation to be afterwards formed was considered by the Supreme Court of Alabama in *Knox v. Childersburg Land Co.*, 5 South. Rep. 578. There, an agreement was entered into by several persons to convey designated lands to a trustee, and to form a land company, to which, when incorporated, the lands should be conveyed by the trustee, and stock issued to each subscriber to an amount equaling the land conveyed. At that time stock could be made payable in money or in property at its money value. Prior to the incorporation of the company, by Code 1886, § 1662, it was declared that all subscriptions to capital stock of such a corporation must be payable in money. It was held that, as the agreement to subscribe had become illegal before it was accepted by the act of incorporation, it could not be enforced. The court said:

An agreement to take shares in a corporation to be afterwards formed, while it may be and often is, a binding contract, for the breach of which an action may be maintained, is, by force of the mere agreement, in no sense a subscription of stock. Something more must be done before it can be affirmed that the subscription is a completed contract. Till a charter is obtained or incorporation otherwise perfected, such agreement is a mere offer, or it is an option, revocable or not as the nature of the agreement may determine. The terms of the offer, and the consideration it rests on, may render it binding and irrevocable; or a failure to withdraw such offer, even when in its nature it is revocable, until it has been accepted by actual incorporation, may so bind the offerer that he cannot afterwards withdraw it. When it rests on a valuable consideration, such as a promise for a promise, then, as a rule, it becomes an irrevocable option, provided incorporation according to the terms of the offer is perfected within a reasonable time. This would con-

stitute the offerer in substance a stockholder. So, if an offer, which has no valuable consideration to rest on, be permitted to stand until it is accepted by incorporation according to its terms, this, it seems, would be an irrevocable subscription of stock. 1 Mor. Priv. Corp. § 47 *et seq*; Music Hall Co. v. Carey, 116 Mass. 471; Road Co. v. Lancaster, 79 Ky. 552; Land Co. v. Aldrich, 86 Ill. 504; Publishing Co. v. Jack, 6 Pac. Rep. 20; Ferry Co. v. Balch, 8 Gray, 303; 2 Wat. Corp. § 184; 1 Mor. Priv. Corp. § 123.

To authorize the application of this principle, however, the corporation, both in its frame and objects, must correspond with the terms of the agreement. If there be a material departure in the character or purpose of the corporation from that which was contemplated in the agreement or offer, this absolves from all obligation to comply, unless the party sought to be charged has agreed to the change, or has done some act by which he estopped himself from setting it up as a defense. So if, between the time of the agreement and the grant of the charter, the law be so changed as that the objects of the agreement as made cannot be carried into effect, this destroys the obligation. No one can be sued for the breach of an agreement the observance of which would be a violation of the law. 2 Wat. Corp. § 178; Mercer Co. v. Railroad Co., 27 Pa. St. 389; Thrasher v. Railroad Co., 25 Ill. 393. It will be remembered that the agreement which this bill seeks to enforce was entered into May, 1887. At that time stock in such corporation could be made payable "in money, or in labor or property at its money value." Code 1876, § 1806. The charter or act of incorporation of the Childersburg Land Company was applied for and obtained in January, 1888. The Code of 1888 became the law of the State, December 25, 1887. By that Code, § 1662, it was declared that "all subscriptions to or for the capital stock [of corporations like the present one] must be payable in money." True, it was added, that "the commissioners may receive subscriptions payable in money, the subscriber having the privilege of discharging the same by the rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at the reasonable value of such services or labor, or in property at the reasonable value thereof, [such as] the corporation has capacity to acquire and hold." One difference between the two systems is that by the latter statute, requiring money subscriptions, the exact amount of the capital stock subscribed can be known; by the former, it depended on the value of the services or property, to be ascertained afterwards. Under the one system, the subscriptions *per se* show the amount and value of the stock taken, and furnish a basis for incorporation. Code 1886, § 1660. Under the other they would not. The one may be, and generally is, a completed contract of subscription. The other is, at most, an agreement to subscribe. We need not, however, enter upon an inquiry as to the reasons for the change. Enough for us that the legislature made it, and we have no option but to obey its will. And the fact that the agreement to form and incorporate the company was entered into before the law was changed can exert no influence in the decision of the question we are discussing. Until incorporation was applied for and obtained, the agreement was, at most, an unaccepted offer. Before the acceptance, or attempt to accept, the offer had become illegal by force of the statute, and the power to accept was thereby taken away.

TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Introductory.—The law of married women is constantly undergoing change. It has been the tendency of legislation to remove the common law disability of coverture, until now it may be said that disability of coverture is the exception and ability the rule.¹ The principal exception is the disability which still exists against the *feme covert* in regard to dealings directly with her husband, and it is with this class of transactions, showing the rights and duties arising therefrom, and the manner in which they may be enforced, that this article will treat.

Common Law Rule.—By the inflexible rule of common law, contracts between husband and wife are void *in toto*. For reasons of public policy, the husband and wife are regarded as one flesh, and since it requires two competent persons to enter into a valid contract, all contracts between them are nullities, as no person can contract with himself.² A contract between husband and wife cannot be the basis of any legal procedure. Where a note given by the husband to the wife is indorsed by the latter to a third party, the indorsee has no right of action against the husband on the note,³ even though he be a *bona fide* holder for value.⁴ On account of this incapacity to contract with each other, the wife cannot be the immediate grantee of her husband, but she may take an estate from him through the intervention of a trustee.⁵

Exceptions.—A husband can make a valid gift *causa mortis* to his wife, for the gift is not completed until the death of the husband, which *ipso facto* terminates the coverture.⁶ He may also make a devise, or bequest to her for the same reason,⁷ and a wife may be the agent of her husband, since she acts in that capacity for him and does not bind herself personally.⁸

In Equity.—"A contract between hus-

¹ Elliot v. Gregory, 14 West, 830.

² Campbell v. Galbreath, 12 Bush (Ky.), 459.

³ Woodward v. Spurr, 2 N. E. Rep. 232; Morrison v. Thistle, 67 Mo. 601.

⁴ Ellsworth v. Hopkins, 2 N. E. Rep. 793.

⁵ Chadbourne v. Gilman, 5 N. E. Rep. 65; Warlick v. White, 86 N. C. 139.

⁶ Marshall v. Jaquith, 184 Mass. 188.

⁷ 2 Kent's Com. 129.

⁸ Gulick v. Groom, 2 Vroom. 183; Goodman v. Kelly, 42 Barb. 194.

band and wife will be held good in equity, as a general rule, when it would be valid and binding at law if made with the trustees of the wife for her benefit, and in equity the intervention of trustees is not an indispensable prerequisite to the validity of the contract."⁹ They may sue and be sued, contract and be contracted with, and become the creditor or debtor of each other with like effect, so far as regards equitable contemplation and rights, as if they had never become one flesh;¹⁰ but the doctrine of equity, allowing the wife to enter into engagements with her husband, was never extended to enforce her obligations under them *beyond the separate estate to which they referred*.¹¹

Grantor and Grantee.—Since, in contemplation of equity, the husband and wife are regarded as distinct persons, and may have separate possessions, the husband may make a valid conveyance of real or personal property to his wife,¹² without the intervention of a trustee,¹³ and the estate conveyed becomes her separate property, as if purchased with money obtained before marriage.¹⁴ It is not necessary that such conveyance should be expressed to be for the sole and separate use of the wife. It will be presumed that such was the intention of the parties.¹⁵ Conveyances from husband to wife will be set aside at the instance of his creditors, unless made in good faith and for a valuable consideration.¹⁶ An extravagant gift is fraudulent as to creditors, and will not be sustained against them.¹⁷ On account of the frequency with which

such conveyances have been made the covers for fraud, they are scrutinized very closely, and if in the slightest degree tainted with fraud, will be set aside.¹⁸ As the husband may make a deed of realty or gift of personalty to his wife, so *vice versa*, the latter may make a conveyance or gift of her separate property to her husband. In those States where the husband must join with his wife in an alienation of the latter's statutory separate estate, a deed from wife to husband of such statutory separate estate is void, but good if her equitable separate estate is transferred.¹⁹

Evidence of Gift to Husband.—The gift from wife to husband must be shown by the clearest evidence not to have been tainted by the influence growing out of the trust relation, and one that was prudent and that a trustee could conscientiously have made if made to another for whom the wife entertained affection.²⁰ The law presumes that the wife's money, even in the possession of the husband, remains her own, and there must be the strongest evidence of an intention to make a gift.²¹ The mere receipt of money or property by the husband is but slight if any evidence of a gift on account of the confidential relations existing between the two.²² In some States, under late acts, the same evidence is required to prove the transfer of property by the wife to her husband as husband to wife,²³ and where by statute she has power to contract with him, she will not be supposed in such cases to act under the marital influence, but will be affected by the rules applicable to other persons.²⁴

Creditor and Debtor.—It has been repeatedly held that husband and wife may become the creditor and debtor of each other in equity,²⁵ and when a wife loans to her husband money which is her separate property, upon his promise to repay, it creates an equity in her favor which a court of equity will enforce in the absence of fraud.²⁶ Such

⁹ *Tennison v. Tennison*, 46 Mo. 81; 2 Story Eq. Jur., §§ 1368, 1372-4; *Barron v. Barron*, 24 Vt. 375; *Wallingsford v. Allen*, 10 Pet. 583; *Kenny v. Kenny*, 5 Johns. Ch. 463; *Resor v. Resor*, 9 Ind. 847; *Valensin v. Valensin*, 28 Fed. Rep. 599; *Barnett v. Harsbarger*, 5 N. E. Rep. 718; *Clark v. Hezekiah*, 24 Fed. Rep. 663; *McClure v. Lancaster*, 24 S. C. 273; *Lawrence v. Lawrence*, 14 Oreg. 77.

¹⁰ *Morrison v. Thistle*, 67 Mo. 601; *Gardner v. Gardner*, 7 Paige, 112; *Willard's Eq. Jur.* 634 and ff.

¹¹ *Jenne v. Marble*, 37 Mich. 319, 7 Cent. L. J. 282.

¹² *Chadbourne v. Gilman*, 10 Atl. Rep. 701; *Putnam v. Bicknell*, 18 Wis. 333; *Smith v. Dean*, 15 Neb. 432; *Craig v. Chandler*, 6 Colo. 543.

¹³ *Furrow v. Athey*, 21 Neb. 671.

¹⁴ *Wing v. Goodman*, 75 Ill. 159; *Indiana, etc. R. Co. v. McLaughlin*, 77 Ill. 275.

¹⁵ *Smith v. Selberling*, 35 Fed. Rep. 681; *Sims v. Ricketts*, 35 Ind. 181.

¹⁶ *Fisher v. Williams*, 56 Vt. 586; *Warlick v. White*, 36 N. C. 139; *Woodworth v. Tanner*, 7 S. W. Rep. 104; *Dull v. Merrill*, 36 N. W. Rep. 677; *Myers v. King*, 42 Md. 65.

¹⁷ *Warlick v. White*, *supra*.

¹⁸ *Thomas v. Mackay*, 5 Cent. L. J. 253.

¹⁹ *Morrow v. Turner* (Mo.), 15 West, 250; *Breit v. Yeaton*, 101 Ill. 242.

²⁰ *Smyley v. Reese*, 53 Ala. 89.

²¹ *Hileman v. Hileman*, 35 Ind. 1.

²² *McNally v. Weld*, 30 Minn. 209.

²³ *Houston v. Clark*, 50 N. H. 479.

²⁴ *Rencher v. Wynne*, 36 N. C. 268.

²⁵ *Butterfield v. Stanton*, 44 Miss. 15; *Hyde v. Powell*, 47 Mich. 156; *Murphy v. Carpenter*, 22 Hun, 15; *McCampbell v. White*, 31 Am. Rep. 623; *Schouler on Husband and Wife*, § 895.

²⁶ *Pillow v. Sentelle*, 5 S. W. Rep. 783; *Thoms v.*

equity will be enforced not only against him but as well against his representatives, including his assignee in bankruptcy.³⁷ The jurisdiction of equity to enforce the obligation of the husband in such cases is founded upon the protection of the separate property rights of the wife.³⁸

Requisites of Relation of Creditor and Debtor.—Every loan of money by the wife to her husband does not create the relation of creditor and debtor between them. It must be money loaned from her separate equitable estate,³⁹ and there must be an express promise by the husband at the time to repay, clearly shown in any of the modes known to the law.⁴⁰ If she allows him to use her property without exacting from him a promise to repay, no such promise will be presumed by the law.⁴¹ On account of the relation of the parties a gift will sometimes be presumed.⁴² Mere expectation of the wife at the time of the loan to him that he will repay is not sufficient;⁴³ nor testimony of the parties to a general understanding that he should be accountable to her.⁴⁴ Where he uses her income for their common benefit, a gift will be presumed, and she cannot afterwards come in as a creditor of the husband.⁴⁵

Husband may be Wife's Creditor.—Where a married woman, having a separate estate or business, employs her husband to manage the same, and agrees to pay him a stated compensation for his services, a chose in action in his favor against her is created, which, on her failure to pay, can be reached by a judgment creditor of the husband.⁴⁶

Mortgagor and Mortgagee.—Since the relation of creditor and debtor may exist between husband and wife, and conveyances may be

made directly from one to the other, either of the parties may make an assignment of property to the other in payment of a debt,⁴⁷ or execute a mortgage to secure its payment.⁴⁸ To support such conveyances against the claims of attacking creditors, the indebtedness must have been made in good faith and for a valuable consideration.⁴⁹

Trustee and Cestui que trust.—A promise of the husband to the wife is often enforced in equity through the medium of a trust. Where the husband invests the wife's money in land, but takes the title in his own name, he will be considered as holding the same in trust for her, and will be compelled to convey the land to her or restore the money.⁵⁰ Where he receives her money for investment, but fails to so use it, he will be compelled to account to her for it.⁵¹ If the purchase money for land conveyed to the husband is paid by the wife, she has an equity to have a trust declared and enforced against him to the extent of her payment. When, on the other hand, the consideration is paid by the husband and the deed taken to the wife, it is presumed to be a gift by him and no trust arises in his favor, unless he overcome the presumption by evidence of a different intention.⁵² Such a conveyance is held to be an advancement.⁵³

Principal and Surety.—The relation of principal and surety may exist between husband and wife, and when such a relation is established, the law is well settled that the wife may as readily avail herself of all the beneficial rights and remedies conferred thereby, as any other surety whatsoever.⁵⁴

³⁷ Rowland v. Plummer, 50 Ala. 182.

³⁸ Booker v. Worrill, 55 Ga. 332; Kauffman v. Whitney, 50 Miss. 132; Miller v. Krueger, 18 Pac. Rep. 641; Clough v. Russell, 55 N. H. 279; Chadbourne v. Gilman, 5 New Eng. Rep. 66.

³⁹ Bronson v. Maxwell, 20 Cent. L. J. 362; Terry v. Wilson, 63 Mo. 499; 1 Bish. Law Married Women, § 720; Huber v. Huber's Admr., 10 Ohio, 371; Wood v. Warden's Admr., 20 Ohio, 518; Denning v. Williams, 26 Conn. 226.

⁴⁰ Cade v. Davis, 96 N. C. 139; Heberd v. Wines, 2 West. Rep. 754; Fresch v. Wirtz, 34 N. J. Eq. 124; Derry v. Derry, 19 Cent. L. J. 498; Bangert v. Bangert, 13 Mo. App. 144; Payne v. Twyman, 68 Mo. 339; Martin v. Colbern, 88 Mo. 229; City Nat. Bank v. Hamilton, 34 N. J. Eq. 158; Kidwell v. Kirkpatrick, 70 Mo. 216.

⁴¹ Walker v. Walker, 9 Wall. 743.

⁴² Kline v. Ragland, 47 Ark. 111.

⁴³ Darrier v. Darrier, 58 Mo. 222.

⁴⁴ Wilcox v. Gibbs, 64 Mo. 388; Niemcewicz v. Gahn, 3 Paige, 614; John v. Reardon, 11 Md. 465; Wright v. Austin, 56 Barb. 13.

Thoms, 45 Miss. 263; Rowland v. Plummer, 50 Ala. 182; George v. High, 85 N. C. 99; Woodworth v. Sweet, 51 N. Y. 8; Logan v. Hall, 19 Iowa, 491.

³⁷ Jaycox v. Caldwell, 51 N. Y. 395; Taggard v. Talcott, 2 Edw. Ch. 628; Marsh v. Marsh, 43 Ala. 677; Clark v. Hezekiah, 24 Fed. Rep. 664.

³⁸ Clark v. Hezekiah, 24 Fed. Rep. 664.

³⁹ Medsker v. Bonebrake, 108 U. S. 66; Terry v. Wilson, 63 Mo. 493.

⁴⁰ Clark v. Clark, 86 Mo. 114; Farmers', etc. Bank v. Jenkins, 3 Cent. Rep. 710.

⁴¹ Knowlton v. Mish, 17 Fed. Rep. 198.

⁴² Patterson v. Hill, 61 Iowa, 534.

⁴³ Levi v. Rothschild, 12 Cent. Rep. 861.

⁴⁴ Farmers', etc. Bank v. Jenkins, 3 Cent. Rep. 710.

⁴⁵ Re Jones, 6 Biss. 68.

⁴⁶ Kingman v. Frank, 19 Cent. L. J. 470; Hanford v. Booke, 20 N. J. Eq. 101; Alward v. Alward, 2 N. Y. 842.

Principal and Agent.—The wife may be the agent of her husband,⁴⁵ and the husband the agent of his wife when he acts with reference to her separate estate.⁴⁶ A married woman having separate property may carry on business through her husband, as her agent, and he may bind her separate property by acts done in connection with the business, in like manner as though the relation of husband and wife did not exist.⁴⁷ To establish an agency for the wife on the part of the husband, the evidence must be cogent and strong, and more satisfactory than would be required between persons occupying different relations.⁴⁸ It must be shown: *First*, That the act of the husband was within the power delegated to him by his wife: and *second*, that it was a transaction and for a consideration, in respect to which she was at liberty to contract and bind her separate estate.⁴⁹

Partnership.—With respect to the separate property of a married woman, under her sole control, she may form a valid partnership, even with her husband.⁵⁰ Where the husband furnishes only a portion of the labor and skill, or capital and credit, used in carrying on business, the wife will be entitled, even as against his creditors, to such portion of the profits as will compensate her for what she has contributed to the business, either in the shape of capital or trade.⁵¹ A married woman who has no separate estate cannot, save in a few excepted cases, make a valid partnership contract.⁵²

Landlord and Tenant.—Where it appears that a wife who holds the estate in a farm to her sole and separate use, lives upon it with her husband, and he manages and controls it, as if he were the absolute owner, it is to be presumed in the absence of any evidence to the contrary, that he holds and oc-

cupies it with her consent, as her tenant under some lease, verbal or written, rather than that he manages the farm for her in the capacity of servant or hired man.⁵³

Confession of Judgment.—The rule has been established in some of the States that where a husband is honestly indebted to his wife, he may confess a judgment in her favor, and execution thereon may issue in her name. Since he may make a valid transfer of real or personal estate to secure a debt owing to her, so he may confess a judgment in her favor, and his property may be taken on execution to satisfy the judgment.⁵⁴ Such indebtedness must be clearly established, and not contracted for a fraudulent purpose.⁵⁵ A confession of judgment by the husband to the wife may be made without the intervention of a trustee.⁵⁶

Enabling Statute.—In some of the States the unity of the wife and husband with reference to contracts between them, has been abrogated by statute.⁵⁷ But unless the statute expressly provides that husband and wife may contract with or sue each other, the rule remains as at common law that contracts between them are void. Such statutes are in derogation of the common law, and are not to be extended by construction.⁵⁸

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⁴⁵ *Albin v. Lord*, 39 N. H. 205.

⁴⁶ *Kinkade v. Cunningham*, 15 Atl. Rep. 905; *Bronson v. Maxwell*, 20 Cent. L. J. 362; *Contra*, *County v. Markling*, 30 Ark. 17.

⁴⁷ *Thomas v. Mueller*, 106 Ill. 36.

⁴⁸ *Rose v. Latschaw*, 90 Pa. St. 238.

⁴⁹ *Wilson v. Wilson*, 86 Cal. 447; *May v. May*, 9 Neb. 16; *Hall v. Hall*, 52 Tex. 294; *Thoms v. Mueller*, 106 Ill. 36; *Alexander v. Alexander*, L. A. R. 125; *Clark v. Clark*, 56 N. H. 105.

⁵⁰ *Lord v. Parker*, 3 Allen, 127; *Barnett v. Harshberger*, 3 Cent. Rep. 760.

⁴⁵ *Gulick v. Groom*, 2 Vroom. 182; *Goodman v. Kelley*, 42 Barb. 194.

⁴⁶ *Keating v. Korfhage*, 88 Mo. 533; *Walker v. Carrington*, 74 Ill. 446; *Vail v. Meyer*, 71 Ind. 159; *Wood v. Wood*, 88 N. Y. 575; *Harper v. Dall*, 92 N. C. 394; *Kansas City Planing Mill Co. v. Brundage*, 25 Mo. App. 268.

⁴⁷ *Louisville Coffin Co. v. Stokes*, 78 Ala. 372.

⁴⁸ *Eyster v. Capelle*, 61 Mo. 580; *Rowell v. Kleln*, 44 Ind. 291; *McClaren v. Hall*, 26 Iowa, 297.

⁴⁹ *Nash v. Mitchell*, 6 Cent. L. J. 167.

⁵⁰ *Dunifer v. Jecko*, 87 Mo. 282; *In re Klnkead*, 3 Biss. 405; *Contra*, *Fairlee v. Bloomingdale*, 67 How. Pr. 292; *Haas v. Shaw*, 91 Ind. 364.

⁵¹ *Penn v. Whitehead*, 17 Gratt. 503; *Contra*, *Nat. Bank v. Sprage*, 20 N. J. Eq. 13.

⁵² *Lindley on Partnership*, 84.

STOCK EXCHANGES — BOARDS OF TRADE — SEATS AND MEMBERSHIPS — LIABILITY THEREOF FOR OWNERS DEBTS.

HABENICHT V. LISSAK.

Supreme Court of California, March 8, 1889.

1. A seat in a stock exchange is liable for its owners debts.

2. In such a case the appointment of a receiver to sell the seat, and an order directing its owner to assign his interest therein to the purchaser, is the proper method to follow.

PATERSON, J., delivered the opinion of the court:

In March, 1884, the plaintiff recovered judgment against defendant for several thousand dollars. About a year later a writ of execution was issued on the judgment, and placed in the hands of the sheriff, by whom it was afterwards returned wholly unsatisfied. In June, 1885, the proceedings to be reviewed herein—proceedings supplementary to execution—were instituted by the plaintiff upon the unsatisfied judgment in his favor. Upon the examination of the judgment debtor, it was disclosed that he owned a seat or membership in the San Francisco Stock and Exchange Board, and another seat or membership in the San Francisco Produce Exchange. In September, 1885, upon due notice given, plaintiff made a motion for the appointment of a receiver of the two seats above named, with power to sell the same, and apply the proceeds thereof in satisfaction of the judgment. The motion was accompanied by an affidavit setting forth the facts above stated, and the additional facts that defendant had refused to apply the seats in satisfaction of the judgment, and that each of said seats exceeded in value the sum of \$1,000. Upon the hearing of the motion, the defendant filed affidavits, in one of which the constitution and by-laws of the two boards were fully set forth. It appears from the constitution and by-laws of the San Francisco Stock and Exchange Board that the legal title and ownership of the property of the association is vested in certain officers "in trust for the benefit and enjoyment of its members;" that "no member, under any circumstances, shall be deemed to have, or claim, or possess any individual right, title or interest in the property or assets of the association, except when the same shall be finally dissolved, and its affairs wound up by its then remaining members;" that every application for membership is subjected to the scrutiny of a committee, whose report, if favorable, entitles the applicant to be balloted for, and, whether favorable or unfavorable, the applicant may be rejected by twenty negative votes; that if a member of the association join any similar organization in this State he may be immediately expelled; that it is "distinctly understood and agreed between the board and each member thereof that the board reserves the right to reject any nominee."

The constitutions and by-laws of the two boards are, so far as the questions before us are concerned, similar in character; and so far as the rights, duties, and interests of the members are concerned, the laws of the two boards are essentially the same as those of other stock and produce exchanges in New York and other States of the Union.

After the hearing upon the motion, the court below made an order appointing C. K. Bonestell, Esq., a receiver of both seats, with power to sell the same and apply the proceeds thereof, after payment of the expenses, to the satisfaction of the judgment, and requiring the defendant to execute

any assignment or other instrument necessary for the purpose of vesting his title to the seats in such person or persons as might become purchasers thereof from the receiver, and might be qualified to hold the same under the rules of the respective boards. No provision was made in the order as to the manner of sale,—whether it should be a public or private sale. Thereafter the receiver reported to the court that he had sold the seats to one H. L. E. Meyer for the sum of \$2,200. This sale was confirmed by the court, the amount realized from the sale was credited on the judgment, and the appellant was directed to execute and deliver assignments of the two seats within five days thereafter, said assignments to be deposited, pending the appeal, with the clerk of the court. Appellant excepted to the order appointing the receiver, and directing him to sell the seats, and also excepted to the order directing the execution and delivery of the assignments, but no objection was made to the order confirming the sale.

As stated by appellant, two questions are presented here for consideration:

1. Did the seats or any interest therein constitute property within the reach of the appellant's judgment creditors?

2. If they did, was the order appointing a receiver, and the order directing the appellant to execute assignments of all his right, title, and interest in and to the seats a proper mode of reaching that property?

On the first question presented there is an apparent conflict of judicial opinions. In *Thompson v. Adams*, 93 Pa. St. 55, the court said: "The seat is not property in the eye of the law; it could not be seized in execution for the debts of the members. It is the mere creation of the board, and, of course, was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it." In *Pancoast v. Gowen*, Id. 71, the court said: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license, to buy and sell at meetings of the board. It certainly could not be levied on and sold under a *f. fa.* The sheriff's vendee would acquire no title which he could enforce." It may be said, before passing to the authorities cited on the other side of the question, that in *Thompson v. Adams* "the plaintiff below was not a member but had furnished the money by which Richards obtained a seat." He therefore contended that he was the equitable owner of the seat, and that the defendant had no right to apply the proceeds to debts due by Richards to other members, in pursuance of the terms of the constitution of the club. The question for the decision of the court there was whether or not plaintiff was entitled to the proceeds of the seat, either in full or *pari passu* with the other creditors of said Richards, who at the time of his decease were members of the board, or whether the claims of such members were

paramount to the plaintiff's until the former were satisfied. The court decided that the seat "was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it." And in *Pancoast v. Gowen* it did not appear whether there were any claims against the seat by members of the board, but "the answers of the garnishees admitted that Houston, the defendant in the judgment, owned a seat in the stock exchange, against which there were no claims by the members of that body at the time the attachment was issued, but they alleged that claims had since been presented." In the case before us it is not claimed that the defendant was, at the time of the proceedings in the court below, indebted to any of his associates in either board.

In *Hyde v. Woods*, 94 U. S. 523, the court decided that the proceeds of a sale of the seat in the hands of members of the board, after payment of the preferred claims of members of the board, could be reached by the assignee in bankruptcy, and of the person whose seat had been sold. While this was the only matter for decision before the court, Mr. Justice Miller, speaking for the court, said: "There can be no doubt that the incorporeal right which Fenn had to his seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy. * * * Though we have said it is property, it is incumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of article 15, neither when Fenn bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it, into whose hands soever it may come."

In *Clute v. Loveland*, 68 Cal. 254, 9 Pac. Rep. 133, this court said: "The rules expressly authorize each member to dispose of his seat, subject however, to the condition that before the purchaser can participate in the proceedings of the board he must be elected a member thereof. The power to dispose of the seat includes the power to dispose of it absolutely or conditionally. If a member should sell his seat to one who should not be elected a member of the board, it cannot be doubted that such purchaser would take, subject to the conditions imposed by the rules of the association, the interest of the seller in the property of the association. * * * Whether the disposition be absolute at the beginning, or subsequently becomes so through judicial proceedings, the result is the same." It is true, in that case there was an agreement between the parties, *Clute and Loveland*, by which the latter mortgaged his seat to the former as security for the repayment of moneys due from the one to the other. But this particular feature of the case, if

the seat is property, is not enough to distinguish it in principle from the one before us. The constitution and by-laws of the association seem to regard the seats as property. Article 13 of the constitution provides that a member in good standing "shall have the right to dispose of his privileges in the board, and to nominate a successor to fill the vacancy occasioned by his retirement, * * * but the board reserves the right to reject any nominee. In the event of the death of a solvent member, the board will dispose of the vacant seat to the best advantage for the benefit of his widow and children, or those persons who shall be designated by him in his last will and testament," etc. Whenever a member has been deprived of his privileges, or surrenders his membership, it is provided that his seat may be sold, and the president of the board, as trustee, shall hold the proceeds "to discharge the obligations due by such person to members of the board, and any surplus remaining shall, after having satisfied all other claims against him, be delivered to the delinquent, or to any person authorized to receive the same."

In *Londheim v. White*, 67 How. Pa. 467, the court said: "It must be conceded, I think, in the light of all the decisions, that a seat or membership in the stock exchange is property, and should be applied in the same manner as other property of a debtor to the payment of his debts. It may be surrounded and clogged with conditions and restrictions, but still it is property available for the payment of debts, and can be made available for that purpose, subject to and by an observance of those restrictions and conditions. *

* *. This question has been passed upon so frequently by the courts as to make it no longer doubtful or debatable." In *Bank v. Murphy*, 60 How. Pr. 426, the court, referring to the contention that such a seat is not tangible property, said: "If such a result may be attained the effort of active imagination cannot circumscribe the associations human ingenuity will produce to thus transmute veritable assets into intangible, and yet most substantial and valuable, shadows." Judge Choate, in the United States district court, Southern district, New York, upon an application for an order requiring a bankrupt to make a transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee may procure as a purchaser of the seat, said: "It (the seat) is a part of the bankrupt's business assets, or more generally of his property, which it was the primary design of the bankrupt law to distribute among his creditors, and that the peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the bankrupt law, mere technicalities—cobwebs, which the law is strong enough to break through." *In re Ketchum*, 1 Fed. Rep. 842. See, also, *Powell v. Waldron*, 89 N. Y. 328.

We conclude, therefore, that the weight of authority and the better reasoning support the prop-

osition that such a seat or membership is property, and should be applied, as other property of a debtor, to the payment of his debts. To hold that it cannot be thus applied would establish a rule giving to the members of such associations the power to invest fortunes under the name of licenses and privileges, and by their constitutions and regulations to establish a law of exemption for the same.

Upon the other question raised we think there can be little doubt. In *Bank v. Robinson*, 57 Cal. 520, it was held that proceedings supplementary to execution are intended to take the place of the creditors' bill, and in such a proceeding it was proper to order the execution debtor to make an assignment to a receiver of his patent right to an invention. It was always the rule in a proceeding known as a "creditors' bill," as we understand it, to appoint a receiver after the execution had been returned *nulla bona*. Note to *Ward v. Beebe*, 15 Abb. Pr. 373; *Stoors v. Kelsey*, 2 Paige, 417; *Hadden v. Spader*, 20 Johns. 554; *Londheim v. White*, *supra*; *In re Ketchum*, *supra*. Freeman, referring to such seats says: "They have been spoken of by the courts as property, and it has been said that on bankruptcy they would pass to the assignee, subject to the rules of the stock board. If this be true, they must be subject to execution in some mode, perhaps by creditor's bill, or by proceedings supplemental to execution, in which a receiver could be appointed and a transfer to him compelled." 1 *Freem. Ex'ns* (2d ed.) § 110; 2 *Freem. Ex'ns* (2d ed.) § 419; *Code Civil Proc.* § 564, subd. 4.

No claim was made in the court below that a better price could have been realized for the seats than was obtained through the sale by the receiver, and, as stated before, no objection was made to the order of the court confirming the sale of the seats for \$2,200, nor has any appeal been taken therefrom.

The orders are affirmed.

NOTE.—An attempt will be made in this note to cite the principle authorities touching upon the question as to whether a seat in a stock exchange is liable for its owners' debts.

Cases in the Affirmative.—The United States Supreme Court held, in the case of *Hyde v. Woods*,¹ that a membership in the stock exchange of San Francisco, was property, subject only to the rules of the exchange. The same question arose in the Superior Court of New York in 1877 in *Ritterbaud v. Baggett*,² and the same view was taken by the court as in the above case. Also in *Grocers Bank v. Murphy*, 60 How. Pr. 426. Beach, J., observed in this case, with reference to the contention of counsel, that a seat in an exchange is not tangible property and cannot be reached by creditors. "If such a result may be attained, the efforts of an active imagination cannot circumscribe the associations, human ingenuity will produce to thus transmute veritable assets into intangible and yet most substantial and valuable shadows." In 1880, in the United States District Court, for the Southern District of New York, reported as *In re Ketchum*, 1 Fed. Rep.

840, a case in bankruptcy, in which there was an application for an order requiring the bankrupt, Ketchum, to make a transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee might procure as a purchaser, the court sustained the motion and made the order. The court, Choate, J., says: "I think the case cannot be distinguished in principle from the case of *Gallagher v. Lane*, 19 N. B. E. 224, in which it was determined that a Washington market lease was property that belonged to the assignee. * * * The seat has a pecuniary value, which the rules of the society, as interpreted and applied in practice, permit the holder to realize by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid, and the right or privilege is to all interests and purposes a business right or privilege, useful for business purposes only. I see nothing in the rules of the exchange which renders it impossible for the seat to be disposed of by the assignee in bankruptcy, with the co-operation of the bankrupt, subject to the condition above mentioned. The equity of the creditors is as obvious as in the case of the market lease. This seat in the board was actually used as a part of the business capital of these bankrupts as stock brokers. To suffer the bankrupts still to hold it, virtually withdraws several thousand dollars in value of their business assets from the creditors." The same view was taken in *Londheim v. White*.³

In *Clute v. Loveland*,⁴ it was held that a member of the San Francisco Stock and Exchange Board might pledge or mortgage his seat, and that the lien thereby created might be enforced and the seat sold, subject to the conditions imposed by the rules of the association.

It was held in *Durkee v. Stringham*,⁵ where certain parties associated in the formation of a joint stock company for the purposes of holding (in the name of a trustee) and improving real estate, and manufacturing lumber, etc., and to that end, fixed the nominal amount of their capital stock and apportioned the same, issuing transferable certificates therefor to the several parties in interest, that these certificates represented an interest in the real and personal property of the association, which a court of equity would protect, and which could be sold or mortgaged by the owner like other species of property; which sales or pledges had the effect to convey or incumber his proportion of the joint property, subject to the indebtedness of the association and the equitable rights of the other parties.⁶ And it was held in *Eliot v. Merchants Exchange*,⁷ that certificates of membership in the Merchants Exchange of St. Louis are property, and are liable for the debts of the owner, and may, by creditor's bill, be subject to the payment of a judgment creditor. And, furthermore, that a debtor member of the exchange may, in a proceeding in which he and the exchange are joined, be restrained from disposing of his certificate of membership, and may be compelled to transfer the certificate to such purchaser, at sheriff's sale, as possesses the qualifications of membership in the exchange.

Cases in the Negative.—It was held in 1880, in *Pan-coast v. Gowan*,⁷ that a seat in the Philadelphia Stock

¹ 67 How. Pr. 467.

² 68 Cal. 254.

³ 8 Wis. 1.

⁴ 14 Mo. App. 234. See also *Powell v. Waldron*, 89 N. Y. 323; *In re Werder*, 15 Fed. Rep. 800; *The State v. Ga. Medical Society*, 38 Ga. 626; *Jones v. Fisher*, 2 W. Rep. 590; *Weaver v. Fisher*, 110 Ill. 146.

⁷ 98 Penn. 66.

¹ 94 U. S. (4 Otto), 523.

² 4 Abb. (N. C.) 67.

Exchange is not property subject to execution in any form, on the ground that it is a mere personal privilege or license to buy and sell at the meetings of the board. And a like view was taken in *Thompson v. Adams*.⁸ "Scrutinizing the Pennsylvania cases closely, it cannot be strictly said that they are authorities for the negative of the above proposition. In both cases, whatever was said by the court as to the property nature of exchange memberships, was *obiter dicta*. An analysis will clearly indicate this: Thompson loaned Richards money, wherewith the latter purchased a seat in the Philadelphia Stock Exchange, an unincorporated association. Some time thereafter Richards died, being indebted to several members of the board, when his seat was duly sold, subject to a by-law of the association, and the proceeds applied toward the extinguishment of his indebtedness to fellow-members. Thompson and Richards were both members of the exchange. Thompson contended that he was the equitable owner of the seat, and was entitled as such to the entire proceeds of the sale. The supreme court decided that he was not, and that there was nothing unlawful or unreasonable in the regulation under which the seat was held.

In the other case, *Pancoast* had obtained a judgment against one Houston, who was also a member of the Philadelphia Stock Exchange. *Pancoast* garnished Gowen and others, comprising the exchange. The proceedings were instituted in the light of a Pennsylvania statute, providing for a levy upon stocks belonging to, and debts due a judgment debtor. The garnishees answered that Houston did own a seat in the exchange, against which there were no claims by the members of that body at the time the garnishee process was issued, but alleged that the seat was owned, subject to certain conditions imposed by its rules and regulations, and that the seat was the property of the exchange until all questions of claims against its owner by members of the association were settled. The board claimed that until it had some means of knowing that all such debts had been fully settled, or that none existed, that it could not be lawfully garnished or attached, or the seat sold. The court held that had there been left in the hands of the defendant any balance, after paying the debts due to the members, it could properly be reached. What was really before the court in both cases, was not whether a seat in the exchange was property, but the validity or invalidity of certain by-laws, and what was their obligatory force. The learned judges were willing to vest the property question upon their judicial *dictum*, simply, and to treat the matter as a foregone conclusion—a self-evident proposition.

In *Barclay v. Smith*,⁹ on the other hand, the Illinois Supreme Court albeit viewing the Pennsylvania decisions as *stare decisis*, *et non quæta movere*, nevertheless, seem to recognize their meagerness in the matter of reason and authority. This is evidenced by Justice Craig's studied and ingenious argument. But with all due respect for the learned court, their logic will hardly stand the test of analysis.¹⁰ And it has been held in New York, that where the constitution of a stock exchange under which such member binds himself in respect to the manner of his transaction of business, and of his right to continue in membership, provides that, when one has lost his membership or seat, the proceeds of the sale of such seat may, by force

of constitutional provision, be appropriated to his creditors in the exchange, or to any of the corporate objects of the association, a member who, by offending against the laws of the exchange, may have forfeited his seat, has no further interest or title in it or its proceeds, and the privileges of membership having only been conferred upon him on condition that all the rights should revert to the exchange on the happening of certain events, he, having assented to the rules of the association, cannot be heard to complain of them as being against public policy, nor can his assignee.¹¹ It will thus be seen that the weight of authority, including all the recent cases, favors the affirmative view.

SOLON D. WILSON.

¹¹ *Belton v. Hatch*, 17 N. E. Rep. 225.

JETSAM AND FLOTSAM.

THE Supreme Court of Texas recently reversed a negligence case for the use by counsel for plaintiff in his opening argument of the following language, "Gentlemen, these powerful railroad corporations will not do justice to any one unless compelled to do it. If they were to kill your horse to-day, they would not pay you anything for it, but they would tell you to sue, and go to the court for your money, and then they would fight you with all their power. They will take any advantage of you they can, no matter how just your case. Now, I hope you will make them pay the last cent you can in this case for killing their mother."

THE New York Court of Appeals has just rendered a decision of considerable importance in regard to the liability of banks on certified checks. The decision was rendered in the case of *Henry Clews & Co.* against the Bank of New York, which had been before the court twice before, having been tried four times and each time appealed to the general term. A draft on the defendant bank fell into the hands of a person other than the one for whom it was intended, was presented at the bank and certified; but the bank on being notified of the theft, stopped payment of the draft and entered a note of the matter in its proper books of record. The draft was raised from \$245 to \$2,450 and was by a stranger tendered to the plaintiffs in payment for some bonds. On sending to the bank to make inquiries, the paying teller having forgotten to consult the records, said it was all right. When the draft was deposited by Clews & Co. the bank refused payment. The bank is held liable for the full amount of the draft.

THE *Albany Law Journal* calls attention to the fact, which may not be generally known, that Congress on August 1, of last year passed a law regulating the lien of judgments of the federal courts, and providing that those judgments shall be liens in the state in which they are rendered to the same extent and on the same conditions only as if rendered by a court of general jurisdiction of the State; but such judgment need not be docketed in any state office in the same country where it was rendered.

EXECUTION BY ELECTRICITY.—With the new year the law took effect in this State substituting executions by electricity for hanging, in the case of all convicted of murder hereafter committed. There has been what a daily newspaper calls "a carnival of death and crime" in New York since the new law took effect. Whether there is any relation between the change in the law and this sudden outbreak of homicidal fury it

⁸ *Id.* 56.

⁹ 107 Ill. 349.

¹⁰ *Law of the Produce Exchange: Blisbee v. Simonds*, pp. 68 91. In line with the Pennsylvania cases above referred to, see *In re Sutherland*, 6 Biss. 525.

would be rash at present to say, but the coincidence is at least suspicious. One man was murdered fifteen minutes after the new year began, and there were a half-dozen shooting and stabbing affrays within the first twenty-four hours, some of which will probably have fatal results. There is little doubt that the criminal classes look with less horror on the new method of execution than on the gallows. One of our papers, with characteristic "enterprise," sent an interviewer through the "murderers' row" of the Tombs not long ago, and questioned the men under sentence of death. With one accord they pronounced in favor of the new law, and regretted that, if they must die, the law did not apply to their cases. Is the approval of the criminal classes the best kind of endorsement that a change in the law can have?—*N. Y. Examiner.*

RECENT PUBLICATIONS.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. IV. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1888.

This volume of the American State Reports sustains the reputation of its predecessors. It contains many important cases, notably, *Sheehy v. Kansas City Cable Co.*, on subject of damages to property by changing grade of street; *Masonic Savings Bank v. Bangs*, where it is held that a banker has no lien on securities for general balance, where the securities were pledged to him to secure payment of a particular loan; *Ninde v. Clark*, where the effect of judgment *nunc pro tunc* on *bona fide* purchaser for value is considered. There is a very good note to *Commonwealth v. Arnold*, on the question whether granting new trial in criminal case may subject defendant to conviction for a higher grade of offense.

BOOKS RECEIVED.

A SUMMARY OF THE COMMERCIAL LAW OF THE UNITED STATES, WITH BUSINESS FORMS AND PRACTICAL SUGGESTIONS. Designed for the uses of Merchants, Bankers, Manufacturers, Farmers, Mechanics, Factors, Brokers and other agents; Clerks, Conveyancers, Commissioners, Notaries and Justices of the Peace; Shippers, Carriers, and Insurance, Telegraph and Telephone Companies, and men of business of all classes in all the States and Territories. Also, adapted to use as a Text Book in Commercial and other schools and colleges, by Lee Knowlton Mithills, L.L. B., of the Akron (Ohio) Bar, and late Professor of Law in Buchtel College, Des Moines, Iowa: Mills Publishing Company. 1889.

AMERICAN AND ENGLISH CORPORATION CASES. A Collection of Corporation Cases, both Private and Municipal (Excepting Railway Cases), Decided in the Courts of Last Resort in the United States, England and Canada. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor, Vol. XXII. Northport, Long Island, N. Y.: Edward Thompson Co., Publishers.

TREATISE ON THE AMERICAN LAW OF ADMINISTRATION. By J. G. Woerner, Judge of the Probate Court of the City of St. Louis. In Two Volumes. Boston: Little, Brown & Company. 1889.

AMERICAN AND ENGLISH RAILROAD CASES. A Collection of all the Railroad Cases in the Courts of Last Resort in America and England. Jas. M. Kerr, Editor, Wm. M. McKinney, Associate Editor. Vol. XXXV. Northport, Long Island, N. Y.: Edward Thompson Company, Publishers. 1889.

QUERIES AND ANSWERS.

[Subscribers are invited to send short answers to the following.]

QUERY No. 18.

Have cities of the fourth-class in Missouri authority by ordinance to prohibit riding on bicycles on its streets? Please cite authorities bearing upon this point? F. C.

QUERY No. 19.

A, who has no title whatever, but who has had constructive possession for many years, leases and to farm lets, under a parol agreement, to B, who knew that A had no title (or who at least knew that it was generally understood in the neighborhood that he had no title) certain lands, the title to which was in the United States, although the land had never been surveyed, for a term of one year, reserving as rent one-third of the crop. B cultivated the land and appropriated to his own use all the crop. After he has removed the crop and left the land is he estopped from denying A's title as landlord, and has A a right of action against B? A.

HUMORS OF THE LAW.

A NEGRO preacher in Virginia, soon after the close of the late war, who had been convicted of larceny on cogent proof, was put to his election by the court between three months' confinement in jail or thirty-nine stripes at the whipping-post. Calling to his aid some of his flock, he was earnestly advised to go to jail rather than subject himself to the suffering and ignominy of the whipping-post. To this he replied: "Dat's all so, but what's gwine to come ob de Gospel while I's in dat prison."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. **APPEAL.**—Where a plaintiff in an action tried in the city of St. Louis prays judgment for \$2,800, but his real demand, as gathered from the record, is for a sum less than \$2,500, the case falls properly within the jurisdiction of the St. Louis court of appeals, Const. Mo. art. 6, § 12, limiting the jurisdiction of the supreme court, on appeal from such court, to cases where the amount in dispute, exclusive of costs, exceeds the sum of \$2,500.—*Anchor Milling Co. v. Walsh*, Mo., 11 S. W. Rep. 217.

2. **APPEAL.**—Points decided by the supreme court on appeal will not be reviewed on a second appeal in the same case.—*Davenport v. Kleinschmidt*, Mont., 20 Pac. Rep. 828.

3. **APPEAL**—Jurisdictional Amount. — Courts look first to the record in order to determine the question of appellate jurisdiction. It is only when the record fails to fix the amount in dispute that an appeal can be sustained by affidavits fixing such amount. — *Webb v. Holt*, La., 5 South. Rep. 586.

4. **APPEAL**—Transcript—Mistake. — The fact that the clerk of the circuit court, in preparing transcripts on appeal to this court, labored under a mistake as to the time within which the transcripts were required to be filed, is not a valid excuse for a failure to file them within the time prescribed by the established rules. — *Richardson v. Green*, U. S. S. O., 9 S. O. Rep. 443.

5. **ASSUMPTION.**—In the absence of an express contract one cannot recover for board or clothing furnished to a relative living with him as a member of the family.—*Wiley v. Bull*, Kan., 20 Pac. Rep. 855.

6. **ATTACHMENT.**—Where a motion to discharge an attachment is sustained, and the plaintiff fails to file an undertaking for the retention of the attached property, while he thereby loses his attachment lien on such property, yet, as the order discharging the attachment is a final order, he may have it reviewed on error.—*Adams County Bank v. Morgan*, Neb., 41 N. W. Rep. 998.

7. **ATTORNEY AND CLIENT.**—An agreement reciting that a firm, the holders of certain claims have constituted K, their true and lawful attorney to demand, and receive, and to take all lawful means to collect said claims, and agreeing, in consideration of the services of K that he and his legal representatives shall be entitled to retain 25 per cent. of the amount collected, is more than a power of attorney, and was not revoked by the subsequent dissolution of the firm and the death of the surviving partner. — *Hodges v. Grapel*, N. Y., 20 N. E. Rep. 542.

8. **BANKS**—National Banks—Increase in Capital.—National banks have no authority to increase their capital stock except as provided by Rev. St. U. S. § 5142, and act Cong. May 6, 1898.—*Winters v. Armstrong*, U. S. C. Ohio, 37 Fed. Rep. 508.

9. **BANKS AND BANKING.**—A bank having delivered a box deposited with them to the bearer of ticket or card which called for the delivery of the box to "bearer," had legally complied with its contract, and was therefore exonerated from all responsibility in the premises.—*Fisk v. Germania Nat. Bank*, La., 5 South. Rep. 582.

10. **CARRYING WEAPONS.**—Evidence that defendant carried a pistol concealed in a hand-basket, which he carried in his hand, or on his arm, from his residence to a street-railway station, and that when he entered the car he put the basket on the seat beside him, is sufficient to convict of carrying a weapon "concealed about his person." — *Difey v. State*, Ala., 5 South. Rep. 876.

11. **CARRIERS**—Venue. — An action for the refusal by a railroad company to issue a through bill of lading over its road and to a point on the line of a connecting carrier should be brought in the county where the refusal occurred, that is, the point of shipment, or in the county of defendant's residence. — *Coles v. Central Railroad & Banking Co.*, Ga., 9 S. E. Rep. 127.

12. **CARRIERS**—Connecting Carriers. — Each of sev-

eral connecting carriers is liable to the owner on a through bill of lading issued by the first, for damages to goods shipped, with recourse against the one in fault.—*Richardson v. The Charles P. Chouteau*, U. S. C. O. La., 37 Fed. Rep. 582.

13. **CARRIERS**—Passengers. — A railroad company, being bound to protect its passengers from the violence and insult of its own servants, is liable for the damages caused by an assault on a passenger by the conductor in charge of the train, though the assault is made willfully and maliciously, and in no manner connected with the discharge of the conductor's duties. — *Dillingham v. Anthony*, Tex., 11 S. W. Rep. 189.

14. **CARRIERS OF PASSENGERS**—Negligence. — Where plaintiff was injured by being struck in the eye by a piece of coal supposed to be from a passing train: Held, that an instruction that the jury should begin the consideration of the case with the fact established that the injuries were the result of the negligence of defendant was error.—*Penn. R. Co. v. McKinney*, Penn., 17 Atl. Rep. 14.

15. **CARRIERS.** — A railroad company operating a line of railroad in this State is a common carrier, and cannot under the provisions of the constitution limit its liability, as such, by special agreement with a shipper.—*Missouri Pac. Ry. Co. v. Vandevanter*, Neb. 41 N. W. Rep. 908.

16. **CARRIERS**—Goods—Limiting Liability. — A stipulation in a bill of lading that the carrier will not be "liable for damages (neither from fire or other cause) as common carriers for any article after it has been transported to its place of destination, and been placed in the depot of the company," is valid.—*Western Ry. Co. v. Little*, Ala., 5 South. Rep. 568.

17. **CHattel MORTGAGES.** — A description of property in a chattel mortgage is sufficient where it will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property. — *Ravellins v. Kennard*, Neb., 41 N. W. Rep. 1004.

18. **COMMUNITY PROPERTY.**—A husband who at the time of his marriage is merchandizing, and has a stock of goods which he sells, replaces, and gradually increases during thirteen years of coverture, the profits going to increase the community property, should, after his wife's death, be repaid out of the community estate the value of the goods at the time of the marriage.—*Schmidt v. Huppmann*, Tex., 11 S. W. Rep. 175.

19. **CONVEYANCES**—Convict. — Under Rev. St. Mo. 1879, § 1667, providing that a sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights, a conveyance of land by a convict sentenced for a term of years is void, and passes no title.—*Williams v. Shackelford*, Mo., 11 S. W. Rep. 222.

20. **CONSTITUTIONAL LAW**—Railroad Company. — Gen. St. Colo. p. 812, § 2798, which provides that "every railroad corporation operating its line of road, or any part thereof, in this State, shall be liable for all damages by fire that is set out or caused by operating any such line of road, or any part thereof" is constitutional.—*Union Pac. Ry. Co. v. DeBush*, Colo., 20 Pac. Rep. 752.

21. **CONSTITUTIONAL LAW**—Titles of Acts. — Act N. Y. 1868, authorizing the formation of a corporation under the manufacturing company laws to carry on the business, is not invalid under Const. art. 3, § 16, forbidding the passage of any private or local bill embracing more than one subject, which shall be expressed in its title. — *Astor v. New York A. Ry. Co.*, N. Y., 20 N. E. Rep. 594.

22. **CONTRACT**—Rescission. — A person *bona fide* and casually told his partner that he was worth \$30,000 above his debts. Afterwards he purchased his partner's interest in the partnership, agreeing to indemnify him against the firm debts. Subsequently it appeared that in fact his debts exceeded his assets: Held, that the partner had no right to consider the statement as entering into the negotiations for the purchase, and could not, because of its inaccuracy, rescind the transfer.—*Arnold v. Hagerman*, N. J., 17 Atl. Rep. 95.

23. **CORPORATIONS**—Contracts. — Where the con-

tract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown.—*Fidelity Ins. T. & D. Co. v. Shenandoah Val. R. Co.*, W. Va., 9 S. E. Rep. 180.

24. CORPORATION—Dissolution.—The stockholders of an insolvent corporation are not necessary parties to a bill by a creditor against the corporation, and the trustees to whom it has conveyed all its property for the benefit of creditors, filed to enforce collection of the unpaid subscriptions to the capital stock, they being represented by the corporation and its officers.—*Hambleton v. Glenn*, Va., 9 S. E. Rep. 129.

25. CORPORATIONS—Stockholders.—A subscription to the stock of a corporation, constitutes, first, a contract between the subscribers themselves to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, second, it is the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber a contract between him and the corporation.—*Minneapolis Threshing Machine Co. v. Davis*, Minn., 41 N. W. Rep. 1026.

26. CORPORATIONS—Ultra Vires.—Acts *ultra vires*, or in excess of powers, are not necessarily a misuser of franchises, such as will warrant their forfeiture. To justify such forfeiture the *ultra vires* acts must be so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. *Ultra vires* acts may be such as to justify interference by the State by injunction, while they would not be sufficient ground for a forfeiture of the corporate franchises in proceedings by *quo warranto*.—*State v. Minn. Threshing Manuf. Co.*, Minn., 41 N. W. Rep. 1120.

27. CORPORATIONS—Stockholders.—An original stockholder who signs without qualification a subscription for new stock to increase the original stock is not entitled to cancellation of his subscription and repetition for the amount paid in, on the ground that all the new shares were not subscribed for.—*Avegne v. Citizens' Bank of Louisiana*, La., 5 South. Rep. 537.

28. COSTS.—A motion for security for costs, under § 4, of act 136 of 1880, is not an appearance which goes to the merits of the suit. It is an *ex parte* proceeding, a matter of right, which the court has no legal discretion to refuse.—*Collier v. Morgan's L. & T. R. Co.*, La., 5 South. Rep. 537.

29. COURTS—Jurisdiction.—The county court, where the amount sued for is within its jurisdiction, has jurisdiction to render a judgment foreclosing a mechanic's lien on realty.—*Wheatley v. Blalock*, Ga., 9 S. E. Rep. 168.

30. COURTS—Federal Question.—Rev. St. U. S. § 709, providing for the review by the supreme court of a judgment or decree of a State court upon three stated grounds, does not authorize the review of a decree of a State court setting aside conveyance made by a bankrupt before his petition in bankruptcy was filed, in a suit brought by his assignee, when no other question is raised or determined than the intent of the grantor to defraud his creditors.—*McKenna v. Simpson*, U. S. S. C., 9 S. C. Rep. 365.

31. COURTS—Federal Jurisdiction—Citizenship.—Where a cause is removed into the federal court on the ground of diverse citizenship of the parties, and the declaration simply avers that the plaintiff is a joint stock company organized under the laws of a State other than the State of the defendant, the members of the company not being shown to be citizens of some State other than the State of the defendant, it is not shown that the federal court has jurisdiction.—*Chapman v. Barney*, U. S. S. C., 9 S. C. Rep. 426.

32. COVENANT.—Effect of recital in a deed, intended to show clearly grantor's title and held not to amount to a covenant of warranty.—*Clark v. Post*, N. Y., 20 N. E. Rep. 573.

33. CRIMINAL LAW—Bail—Offense.—An undertaking of bail taken before a magistrate upon a criminal examination must state briefly the nature of the crime charged, or it will be invalid.—*Belt v. Spaulding*, Oreg., 20 Pac. Rep. 627.

34. CRIMINAL LAW—Homicide—Penalty.—Under Comp. Laws Utah 1876, p. 586, providing that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor for life, at the discretion of the court, the failure of the court, on a trial for murder, to instruct the jury as to their right to make such recommendation, is reversible error where a verdict of guilty of murder in the first degree is returned.—*Calton v. People of the Territory of Utah*, U. S. S. C., 9 S. C. Rep. 435.

35. CRIMINAL LAW—Arrest.—In cases of ordinary misdemeanors, a constable cannot arrest the offender without warrant, unless he is present at the time of the offense.—*Webb v. State*, N. J., 17 Atl. Rep. 113.

36. CRIMINAL LAW—Rape—Bail.—Rape, which is punishable under Rev. St. Mo. 1879, § 1258, by death or imprisonment, in the discretion of the jury, is not a bailable offense under § 24 of the Missouri bill of rights.—*Ex parte Dusenberry*, Mo., 11 S. W. Rep. 217.

37. CRIMINAL LAW—Jurisdiction.—Court has jurisdiction to try a criminal for offense within its jurisdiction though he is illegally brought from a foreign country with which the United States has no treaty.—*People v. Pratt*, Cal., 20 Pac. Rep. 731.

38. CRIMINAL LAW—Homicide—Res Gestæ.—In a case of homicide the narration of the transaction given by the injured man, a few minutes after the affair, and after the defendant had left, is not admissible in evidence as part of the *res gestæ*.—*Estell v. State*, N. J., 17 Atl. Rep. 118.

39. CRIMINAL LAW—Appeal.—Where a defendant in a criminal case in preparing a bill of exceptions relies upon a waiver of the two-days' notice of presentation for settlement, required by Pen. Code Cal. § 1171, such waiver should be made of record, or by some writing, and not left to the uncertainty of parol evidence.—*People v. Hull*, Cal., 20 Pac. Rep. 862.

40. CRIMINAL LAW—Former Acquittal.—Where one indicted for unlawful cohabitation with his daughter E, was acquitted because the proof showed that E was his step-daughter, a plea of former acquittal to a subsequent indictment for unlawful cohabitation with his step daughter E, constituted no defense.—*Sims v. State*, Miss., 5 South. Rep. 525.

41. CRIMINAL LAW—Burglary.—An information for burglary is not fatally defective for not asserting that the offense was committed in the day or in the night time. The offense may consist merely in the entry with felonious intent, and is equally punishable whether committed in the day or in the night time, under the terms of the same statute.—*State v. Allen*, La., 5 South. Rep. 531.

42. CRIMINAL LAW—Carrying Weapons.—The Mississippi act of March 8, 1888, amending the law in regard to carrying concealed weapons, changed the character of and the penalties for the offense, so as to render it an *ex post facto* law as to such offenses committed prior to that date, and left no law in force by which they could be punished.—*Hodnett v. State*, Miss., 5 South. Rep. 518.

43. CRIMINAL LAW—Adultery.—On a trial for living in adultery, under Code Ala. 1886, § 4012, the jury were properly instructed that occasional acts of adultery do not make out the offense; but if there was adulterous intercourse, and such a condition of the minds of the parties that, when opportunity offered, the act would be repeated, defendant was guilty.—*Boydfield v. State*, Ala., 5 South. Rep. 659.

44. DEED—Description.—Construction of deed to lands on lake shore and question as to meaning of word "beach."—*People v. Jones*, N. Y., 20 N. E. Rep. 577.

45. DEED—Or Will.—An instrument, executed by a man and wife in the ordinary form of a deed, contained

the clause: "And we, the said [grantors] agree that at and after our death the said [grantee] is to have all the benefits of said lands in fee-simple, but it is to belong to us as long as we or either of us shall live." *Held*, a deed, and not a testamentary disposition. — *Griffith v. Marsh*, Ala., 5 South. Rep. 569.

46. DEED—Reservation. — A deed granting "unto my three sons the lands above described, the same being their *pro rata* share of my entire estate both real and personal, that I do now or may hereafter own. The remainder of my estate, both real and personal, I reserve for the use and benefit of my younger children, J and N." does not operate as a present conveyance to J and N of any of the land included in "the remainder of" the grantor's estate. — *Hall v. Hall*, Miss., 5 South. Rep. 523.

47. DOWER—Fraudulent Conveyances. — A relinquishment of dower by joining with the husband in a conveyance falls when the conveyance is set aside as fraudulent as to creditors, and the wife's right of dower thereupon revives. — *Bohannon v. Combs*, Mo., 11 S. W. Rep. 232.

48. DOWER — Merger. — Where a married woman acquires, during coverture, the fee in her husband's lands, her inchoate dower right ceases to exist, in analogy with the doctrine of merger. — *Youmans v. Wagener*, S. Car., 9 S. E. Rep. 106.

49. EJECTMENT—Disclaimer. — Under the Indiana statute, a disclaimer does not bar an action for the wrongful and unlawful withholding of possession of real property, nor defeat the right to damages therefor. — *McAdams v. Lotton*, Ind., 20 N. E. Rep. 523.

50. EJECTMENT—Inconsistent Pleas. — Under Code Miss. § 2433, plea of not-guilty in ejectment admits defendant's possession. Therefore such a plea and also special plea denying possession are inconsistent and where made one or the other should be stricken from the files. — *Powell v. Watson*, Miss., 5 South. Rep. 513.

51. ELECTIONS AND VOTES — Citizenship. — The presumption is that votes cast are legal, and the burden of proof is on the party asserting their invalidity. It is not sufficient proof of the invalidity of votes, on the ground that a person casting it was not a citizen of the United States, to show that such person is of foreign birth. — *Gumm v. Hubbard*, Mo., 11 S. W. Rep. 62.

52. EMINENT DOMAIN—Injunction. — Act Ark. April 28, 1873, "for the better regulation and efficiency of railroad companies," which prescribes a mode for ascertaining damages, and compensating land owners for property appropriated by railroad companies, repeals the act of January 22, 1835, "prescribing mode of procedure in obtaining the right of way by railroads." — *Organ v. Memphis & L. R. Co.*, 11 S. W. Rep. 96.

53. EQUITY — Undue Influence. — Question under the facts as to undue influence in deed of gift from ward to his guardian after coming of age. — *Ralston v. Turpin*, U. S. S. C., 9 S. C. Rep. 420.

54. ESTATES—Remainder men. — A purchase by a life-tenant at a sale under a trust deed cannot operate to the disadvantage of the remainder-men. — *Allen v. De Groodt*, Mo., 11 S. W. Rep. 240.

55. ESTOPPEL — In Pais. — A corporation, whose authorized officers have attempted to convey its property, cannot appropriate the purchase money, and then, on the ground of a defective execution of the power of conveyance by such officers, recover the property in equity. — *McIcer v. Abernethy*, Miss., 5 South. Rep. 519.

56. EXECUTORS—Bonds. — If an executor converts assets, after which, and before he is finally charged therewith by the probate court, the sureties on the bond in force at the date of the receipt of the assets are released by the execution of a new bond, the sureties on both bonds are liable to the distributees for the failure of the executor to pay over the assets. — *Dugger v. Wright*, Ark., 11 S. W. Rep. 213.

57. EXEMPTION—Wrongful Levy. — Facts sufficient to constitute a cause of action against a sheriff for

wrongfully selling exempt property under a final process. — *Hamilton v. Fleming*, Neb., 41 N. W. Rep. 1002.

58. FALSE IMPRISONMENT. — Evidence that plaintiff was restrained of his liberty at defendant's instance, under a search-warrant, which the justice had no authority to issue, based on an insufficient affidavit made by defendant, is sufficient to sustain a count for false imprisonment. Neither malice nor want of probable cause need be proved. — *Boeger v. Langenberg*, Mo., 11 S. W. Rep. 223.

59. FRAUD — Statute of — Representations. — In an action based on false representation made by defendant as to credit and business of a lumber company of which defendant was president, by which representation credit was given to said company by plaintiff, the representation was that the company had already negotiated for the sale of such large quantities of lumber that it was unable to fill these sales without obtaining lumber from other mills, and that the lumber proposed to be purchased from plaintiff would be appropriated to filling these sales: *Held*, that this representation was within the statute. — Ala., 5 South. Rep. 560.

60. FRAUDS—Statute of. — Letters in evidence held sufficient agreement in writing to answer for debt of another and good under statute of frauds. — *Kenny v. News*, 41 N. W. Rep. 1006.

61. GIFTS—Fraud. — Where a person of the age of eighty years, infirm, feeble, and usually under the influence of opiates as medicine, gives to his trusted friend, agent, and adviser, in whom he reposes great confidence, a promissory note comprising substantially all his personal estate, the burden of proving the fairness and validity of the transaction is upon the donee. — *Hall v. Knappenberger*, Mo., 11 S. W. Rep. 239.

62. HIGHWAYS—Bicycle. — A bicycle is a "carriage" or "vehicle," within the meaning of Pub. St. R. I. ch. 66, § 1, requiring every person travelling with any carriage or other vehicle, on any highway or bridge, to turn to the right on meeting another person so travelling. — *State v. Collins*, R. I., 17 Atl. Rep. 131.

63. HIGHWAYS—Improvement. — Under Laws N. Y. 1869, ch. 355, § 2, supervisors have the power to improve that portion of an existing highway lying wholly in the town of N, and apportion the expenses between the towns of N, F and H, through which the highway runs; the town of H being separated from the town of N by the town of F. — *People v. Board of Supervisors*, N. Y., 20 N. E. Rep. 549.

64. HIGHWAY—Repairs. — Acts Ind. 1883, § 16, does not confer upon the road supervisors unlimited power to enter upon private lands and construct ditches. — *Cawble v. Hultz*, Ind., 20 N. E. Rep. 515.

65. HOMESTEAD—Descent and Distribution. — Under Rev. St. Mo. § 2693, a husband cannot devise his homestead so as to prevent its passing by operation of law to his widow and minor children. — *Rockhey v. Rockhey*, Mo., 11 S. W. Rep. 225.

66. HOMESTEAD — Mortgage. — A mortgage on a tract of land including a homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting, such homestead or its appurtenances. — *McCreery v. Shaffer*, Neb., 41 N. W. Rep. 996.

67. HUSBAND AND WIFE—Wife's Separate Estate. — Where creditors of a husband levy on certain personal property which the wife, who has a separate estate, claims to have purchased from a third party with her own means, the burden of proving fraud on the part of the wife is on the creditors. — *Richardson v. Subers*, Ga., 9 S. E. Rep. 172.

68. HUSBAND AND WIFE. — On the purchase of a stock of goods by a partnership, L participated in the purchase, asserting however, that he was acting as the agent of his wife, the notes being signed by him as "L, Agent," and his share of the cash payment being so charged to him: *Held*, that a levy upon an interest in the partnership effects as the property of L would be

sustained, it appearing that the wife had not contributed from her separate estate towards such purchase until after the levy. — *Liddell v. Miller*, Ala., 5 South. Rep. 571.

69. HUSBAND AND WIFE. — Since the Alabama act of February 28, 1887, defining the rights of married woman, a deed from a husband directly to his wife vests the legal title in her, and ejectment may now be maintained based on such title. — *Manning v. Phippen*, Ala., 5 South. Rep. 572.

70. HUSBAND AND WIFE — Community Property. — The rights which children have against their surviving father or mother for their shares of the community property, adjudicated to the surviving spouse, and which she held in usufruct, must not be confounded with the rights accruing to them by reason of the tutorship. — *Ashbey v. Ashbey*, La., 5 South. Rep. 589.

71. HUSBAND AND WIFE. — Under Code Miss. § 1300, providing that if any person shall merchandise with the addition of the words "Agent," "and Co.," and shall fail to have the name of his principal or partner conspicuously placed on a sign at his place of business, all goods, etc., used in or accruing in such business, shall, as to his creditors, be deemed his property, the stock used in merchandising under the firm names of "H. & C.," the surnames only of two partners, of whom the junior is a married woman, the business being conducted by her husband and the senior partner under partnership articles constituting the husband and wife's agent to manage her interest therein, are liable to the husband's creditors. — *Evans v. Henley*, Miss., 5 South. Rep. 592.

72. INSOLVENCY. — Under the California insolvent act of April 16, 1880, providing that no discharge shall be granted if the debtor has not kept proper books of account, an application by a firm to be adjudged insolvent, will be denied where it appears that, owing to the omission of certain entries of moneys lent to the firm to use in its business, the firm was wrongfully made to appear solvent, although such omissions were made in good faith. — *In re Good*, Cal., 20 Pac. Rep. 880.

73. INSURANCE—Alienation. — Deed to creditor to secure a debt with reservation of balance is not an alienation of property insured prohibited by the State statute. — *Mabson v. Northern Ins. Co.*, U. S. C. C., Ga., 37 Fed. Rep. 524.

74. INSURANCE—Mutual Benefit Society. — When a mutual benefit life insurance association, incorporated under the laws of this State, and dependent upon securing such amounts as may be required to meet and liquidate death claims through assessments upon its members, refuses to make an assessment in a proper case, the remedy is by an action for a breach of contract. — *Bentis v. Northwestern Aid Ass'n.*, Minn., 41 N. W. Rep. 1087.

75. INSURANCE—Mutual Benefit Society. — Where the certificate of an order allowed a substitution of another beneficiary by complying with the laws of the order: Held, that it meant the laws in existence at the time of the substitution and not at the time of issue. — *Sup. Council v. Morrison*, R. I., 17 Atl. Rep. 57.

76. INSURANCE—Mutual Benefit Society. — The intestate having complied with all other provisions of the society, the fact that he had not taken out a certificate, nor designated to whom his benefit should be payable, did not preclude a recovery against the society, but that in the absence of such certificate the family of the deceased would be entitled to the benefit. — *Bishop v. Grand Lodge, etc.*, N. Y., 20 N. E. Rep. 562.

77. INSURANCE—Company Retiring from Business. — Where a life insurance company has for ten years done no new business, and the premium receipts do not pay its running expenses, and its corporate existence is only maintained to wind up its business, equity will entertain a bill by policy-holders to enforce the termination of their contracts, and the payment of the present value of their policies. — *Ingersoll v. Missouri Val. Life Ins. Co.*, U. S. C. C., 37 Fed. Rep. 590.

78. INTEREST—Conflict of Laws. — Where parties in

Illinois contract with a resident of Texas to furnish him money to buy cattle to ship to them in Illinois, on an accounting between the parties the amount of interest to be recovered is to be determined by the laws of Illinois. — *City Nat. Bank v. Hunter*, U. S. S. C., 9 S. C. Rep. 347.

79. JUSTICE OF PEACE—Jurisdiction. — A justice of the peace cannot take jurisdiction of a purely equitable action; and on an appeal from a justice of the peace to the district court, the district court can take jurisdiction of only such matters as were within the jurisdiction of the justice. — *Berrath v. McElewin*, Kan., 20 Pac. Rep. 850.

80. LANDLORD AND TENANT. — Held, that owner of tenement was bound, in absence of express agreement to suitably care for and maintain a common stairway used by all the tenants. — *Sawyer v. McGillicuddy*, Me., 17 Atl. Rep. 124.

81. LANDLORD AND TENANT. — Question upon the facts whether the relation of landlord and tenant existed. — *Houston v. Smythe*, Miss., 5 South. Rep. 520.

82. LANDLORD AND TENANT—Lien on Crop—Conflict of Laws. — Rev. St. Ark. 1884, § 4458, provides that every landlord shall have a lien upon the crop grown upon the demised premises. Rev. Code La. arts. 2705, 2709, limits the landlord's lien to the "movable effects of the lessee which are found on the property leased, the movables before the lessee takes them away, etc. The owner of cotton raised on leased premises in Arkansas, the rent for which was unpaid, shipped it to defendants, brokers in Louisiana, who sold it to pay advances. Sess. Acts La. 1874, p. 114, § 2, giving a lien therefor: Held, that the law of Louisiana, and not that of Arkansas, must govern. — *Walworth v. Harris*, U. S. S. C., 9 S. C. Rep. 340.

83. LIBEL. — Where the language in an alleged libelous charge is in itself so vague and uncertain that it could not be intended to have been used in reference to any particular person or persons, it is not actionable. — *Petsch v. St. Paul Dispatch Printing Co.*, Minn., 41 N. W. Rep. 1084.

84. LIMITATION OF ACTIONS—Personal Injuries. — Under Code Civil Proc. N. Y. § 382, and subdivision 5 of the following section, the three years' limitation of the latter section is a good defense to an action to recover damages for a negligent injury to plaintiff's wife. — *Mason v. Delaware, L. & W. R. Co.*, N. Y., 20 N. E. Rep. 544.

85. LIMITATION OF ACTIONS. — A tea company took an insurance policy on teas, "their own or held in trust, or on commission, or sold but not delivered," and, a loss occurring, the amount was paid to defendant's testator. Plaintiff alleged that his teas were included in the policy, and that testator took the moneys impressed with a trust in his favor to the extent of his interest: Held, that as an action for money had and received would lie, the cause of action was subject to the six-years' limitation of Code Proc. N. Y. § 91. — *Roberts v. Ely*, N. Y., 20 N. E. Rep. 606.

86. MASTER AND SERVANT—Fellow-servant. — Chap. 18, Gen. Laws 1887, making railroad companies liable to an employee for injuries caused by the negligence of a co-employee, applies only to those engaged in operating railroads, and so exposed to the peculiar dangers attending that business. — *Lavallee v. St. Paul M. & M. Ry. Co.*, Minn., 41 N. W. Rep. 974.

87. MASTER AND SERVANT—Fellow-servants. — It appeared that intestate was a servant of another railroad company, and while at work in their pit as an ash-man was run over by an engine of defendant company, which had permission from the other company to use the track: Held, that intestate and defendant's engineer and fireman were not fellow-servants so as to relieve defendant from liability for their negligence. — *Sullivan v. Toga R. Co.*, N. Y., 20 N. E. Rep. 569.

88. MASTER AND SERVANT—Fellow-servant. — Application of the general rule which precludes recovery for damages by servant injured through negligence of

another servant in common employment. — *Fussey v. Coper*, N. Y., 30 N. E. Rep. 556.

89. MEASURE OF DAMAGES. — The measure of damages for the breach of a contract under which defendant, for a sum paid, who was to keep and maintain in his own family the infant daughter of plaintiff for life, and in case of her death to pay her funeral expenses, the infant being dead at the institution of the action, is the difference between the value of the care and maintenance actually given and the value of such care, etc., stipulated for in the contract. — *Vancleave v. Clark*, Ind., 20 N. E. Rep. 537.

90. MECHANICS' LIENS. — Construction of Rev. St. S. O. § 2354, as amended in 1884, relating to mechanics' liens. — *Murphy v. Falk*, S. Car., 9 S. E. Rep. 101.

91. MECHANICS' LIENS. — The fact that after the completion of a building, the owner finds it necessary to make some alterations and additions thereto does not have the effect of extending the time for filing a mechanic's lien against the building on account of its original construction. — *Appeal of Horman*, Penn., 17 Atl. Rep. 140.

92. MORTGAGES—Homestead. — Where a mortgage covers an exempt homestead and additional lands, the mortgagor is entitled, upon the foreclosure, to have the non-exempt property first sold and applied to the satisfaction of the mortgage debt. — *Horton v. Kelly*, Minn., 41 N. W. Rep. 1031.

93. MORTGAGES — Condemnation Proceedings. — Where mortgaged land has been damaged for public use, the mortgagee has an equitable lien on the award to the extent of the deficiency on the mortgage debt remaining after foreclosure. — *Utter v. Richmond*, N. Y., 20 N. E. Rep. 554.

94. MORTGAGE — Redemption. — There is no common law or equitable right of redemption after foreclosure sale, in the absence of any statutory provision on the subject. — *Parker v. Dacres*, U. S. S. O., 9 S. O. Rep. 453.

95. MUNICIPAL CORPORATIONS — Public Officers. — A public officer who, willfully and with evil intent, disobeys a rule of official duty prescribed by statute, renders himself liable to indictment. — *State v. Kern*, N. J., 17 Atl. Rep. 114.

96. MUNICIPAL CORPORATIONS—Trespass. — Defendant village having taken steps which authorized it to build a sidewalk in a street opposite to plaintiffs' premises, and plaintiff having refused to build the walk herself within the time prescribed by law, the fact that defendant proceeded to do the work sooner than it was authorized to do it by law, constitutes at most but a technical trespass. — *Benson v. Village of Waukesha*, Wis., 41 N. W. Rep. 1017.

97. MUNICIPAL CORPORATIONS. — An owner of land who, when ordered by the city council to construct a sidewalk on a highway in front of his premises, lays the walk, first necessarily repairing the sea wall on which the walk rests, and which it was the city's duty to repair, cannot, in the absence of any contract with the city for compensation for such repairs, recover therefor. — *President v. City of New Haven*, Conn., 17 Atl. Rep. 139.

98. NAVIGABLE WATERS. — The doctrine that a stream of water is navigable, if of sufficient extent and capacity to float logs and timber from mountainous regions to market, cannot be extended so as to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent. — *Haines v. Hall*, Oreg., 20 Pac. Rep. 831.

99. NEGLIGENCE—Railroad Crossing. — Question of negligence in speed of train and failure to show signals where decedent was killed at crossing in city. — *Dyson v. N. Y. & N. E. R. Co.*, Conn., 17 Atl. Rep. 137.

100. NEGLIGENCE—Railroad Crossing. — Question of negligence where plaintiff's decedent was killed crossing track by freight car, going at moderate rate of speed. — *C. & E. I. Ry. Co. v. Hedges*, Ind., 20 N. E. Rep. 530.

101. NEGLIGENCE. — Question upon the facts as to

negligence of deceased, an old man and deaf, who was killed while walking on railroad track. — *Artus v. Mo. Pac. R. R. Co.*, Tex., 11 S. W. Rep. 177.

102. NEGOTIABLE INSTRUMENTS — Indorsement. — The indorsee of a note who takes it in payment of a pre existing debt is not a *bona fide* holder for value, and cannot enforce it when its consideration has failed, and the voidable contract in pursuance of which it was given has been rescinded. — *Ferress v. Trel*, Tenn., 11 S. W. Rep. 93.

103. NEGOTIABLE INSTRUMENT — Note. — In an action by a vendor on a note given for the price of some cattle, an answer averring that the plaintiff falsely represented that he was the owner of the cattle is not sufficient to sustain the charge of fraud or deceit in making the sale. — *Budd v. Power*, Mont., 20 Pac. Rep. 820.

104. NEGOTIABLE INSTRUMENTS—Extension. — Defendant was indorser of a note held by plaintiff. After its maturity defendant agreed that on transfer to him of the note, and of the trust deed securing it, he would indorse a new note for the amount due. He indorsed the new note, but the old note and trust deed were not assigned to him: *Held*, that in the absence of a showing that he was damaged by the failure to assign and deliver the old note, defendant was liable on the new note. — *Sanders v. Smith*, Miss., 5 South. Rep. 514.

105. PARTITION—Judgment for Rents and Profits. — In partition, while the court has jurisdiction to take account of the rents and profits received by defendant as co-tenant in possession, and charge them upon his share of the proceeds of sale, it has no authority to declare the amount to which plaintiff is entitled on account thereof a special lien on the growing crops on the premises. — *Holloway v. Holloway*, Mo., 11 S. W. Rep. 233.

106. PARTNERSHIP — Evidence. — The defendants were owners of a mine, having unequal interests, and it was agreed between them that the mine should be worked for the purpose of obtaining ore, each to furnish money for that purpose in proportion to his interest, and that the profits and losses should be shared in the same proportion: *Held*, that there was sufficient evidence of the existence of a mining partnership. — *Randall v. Meredith*, Tex., 11 S. W. Rep. 170.

107. PARTNERSHIP—What Constitutes. — The fact of a party advancing money to pay the wages of the employees of a commercial partnership, and discharging its other expenses, does not constitute him a partner. — *Gresend v. Kummel*, La., 5 South. Rep. 555.

108. PROHIBITION—Writ of. — A prohibition cannot issue to a district judge to prevent him from doing an act which he denies to have done, which he refuses to do, and which is not shown to have been done by him. — *State v. Ellis*, La., 5 South. Rep. 530.

109. PUBLIC LANDS—Towns-sites. — The act of the judge of probate in establishing under Rev. St. Mont. § 1207, by plat a street over lands actually occupied as a residence when the entry was made was in conflict with the execution of his trust to convey the lands to occupants, and the public acquired no right as against the occupant. — *City of Helena v. Albertose*, Mont., 20 Pac. Rep. 817.

110. PUBLIC LANDS—Laches. — When parties have been engaged in a contest, both before the local courts and the land-office with regard to their rights in a deposit of mineral or a lode, and action has been taken in both tribunals, by which one party is put out of court and his application for a patent dismissed, and he has a right of appeal, he cannot, after remaining silent for over eight years, and permitting the successful party to remain in possession of the lode, and work out its mineral, resume the contest, the legal title in the mean time having passed from the United States. — *United States v. Marshall Silver Min. Co.*, U. S. S. C., 9 S. C. Rep. 343.

111. PUBLIC LANDS—Spanish and Mexican Grants. — Under act Cong. July 22, 1854, directing the surveyor general to make inquiries in regard to Spanish and Mexican grants in New Mexico and report to congress for its action, his report is no evidence of title or right

to possession, unless congress shall have confirmed the title reported favorably by him.—*Pinkerton v. Ledoux*, U. S. S. C., 9 S. C. Rep. 399.

112. PUBLIC LANDS—Surveys. — In Pennsylvania, where a survey has been returned more than twenty-one years, the presumption that it has been actually and legally made is conclusive. — *Schrader Mfg. & Manuf'g. Co. v. Packer*, U. S. S. C., 9 S. C. Rep. 385.

113. RAILROAD COMPANIES—Negligence. — In an action against a railroad company for damages for injury to grass, etc., caused by sparks from one of its engines, evidence was admissible of other fires originating from defendant's engines; such evidence having a tendency to show lack of care in this respect on the part of defendant. — *Missouri Pac. Ry. Co. v. Donaldson*, Tex., 11 S. W. Rep. 163.

114. RAILROAD COMPANY—Killing Stock. — In an action against a railroad company to recover damages for stock alleged to have been killed by the negligence of the defendant, the refusal of an instruction that if the stock was killed accidentally, and not by reason of negligence on the part of the defendant, then plaintiff cannot recover, is ground for a new trial. — *Davis v. Richmond & D. R. Co.*, S. Car., 9 S. E. Rep. 105.

115. REFERENCE—Report. — Where the report of a referee does not contain separate findings of law and fact, as required by Code Civil Proc. N. Y. § 1022, the supreme court can set aside the report and the interlocutory judgment entered *ex parte* thereon.— *Matcas v. Leony*, N. Y., 20 N. E. Rep. 586.

116. REFERENCE—Effect of Report. — Where the parties consent to a reference to a master in chancery to hear and decide all the issues, and report his findings both of fact and law, and such reference is entered as a rule of the court, his findings are to be taken as presumptively correct, and subject only to be reviewed under the reservation in the consent and order of the court, when there has been manifest error in the consideration given to evidence, or in the application of the law.—*Kimberly v. Arms*, U. S. S. C., 9 S. C. Rep. 555.

117. SALE—Rescission. — Under the facts an offer to rescind a sale for false representations, was held as made too late, as it was impossible to place parties in *statu quo*.—*Bailey v. Fox*, Cal., 20 Pac. Rep. 868.

118. SCHOOLS AND SCHOOL DISTRICTS. — Facts sufficient to entitle child, though its parents live out of the district, to be enumerated among school children of the district, under Rev. Stat. Wis. § 462.—*State v. Thayer*, Wis., 41 N. W. Rep. 1014.

119. SPECIFIC PERFORMANCE—Contract. — An oral agreement to rescind a contract of sale of land is a good ground for refusing to specifically enforce the original contract.—*Perry v. McLain*, Miss., 5 South. Rep. 518.

120. TAXATION—Assessment. — Under Rev. St. Ohio, prescribing the character of statement to be made by persons holding moneys, etc., subject to taxation, etc., there is no principle which forbids the State from taking the whole period of a business year already past as the best means of ascertaining how much the tax-payer shall be assessed on taxable property, and how much shall be deducted for his non-taxable federal and State securities. And, where a person converts the entire amount of his bank account into treasury notes just before the day to which the assessment relates, for the sole purpose of avoiding the assessment, and a few days later surrenders the notes, and has his account restored, he cannot object to having the amount of his account assessed under the above act. — *Shatwell v. Moore*, U. S. S. C., 9 S. C. Rep. 382.

121. TAX-TITLES. — Where a tax deed of land forfeited to the State under § 156, ch. 11, St. 1866, issued to a purchaser by the county auditor at private sale, fails to show by its recitals that the instructions of the State auditor for the sale of such lands were complied with, it is insufficient to establish a valid legal title to the land. — *West v. St. Paul & N. P. Ry. Co.*, Minn., 41 N. W. Rep. 1031.

122. TRIAL—Exception. — It is a general rule of

practice that a defendant, who does not insist upon the trial of an exception before the case is tried on the merits, is presumed to have waived the exception. But the rule admits of at least one exception, and that is when the exception suggests a defect which the court may notice *ex proprio motu*. — *Ashbey v. Ashbey*, La., 5 South. Rep. 546.

123. TRUSTEE—Liability. — A trustee, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be held responsible for the loss or depreciation of the trust fund, or the insolvency or misconduct of any person who may have possessed it.—*Key v. Hughes' Exrs.*, W. Va., 9 S. E. Rep. 77.

124. USURY—Conflict of Law. — A corporation of this State having in New York made its promissory note, payable there, with indorsers, the contract being at a larger rate of interest than the general statute of such State permitted: *Held*, that by force of another act of New York, neither the corporation nor its indorsers could set up the defense of usury. — *Lane v. Watson*, N. J., 17 Atl. Rep. 117.

125. VENDOR AND VENDEE—Parol Contracts. — A contract for the sale of lands cannot rest partly in writing and partly in parol.—*Heisley v. Swannstorm*, Minn., 41 N. W. Rep. 1029.

126. VENUE—Civil Cases. — Under Code Miss. § 1847, as to venue of cases, an action by an administrator against one to whom he has sold the personal property of the estate for the purchase price, a bank, with which the purchaser had deposited the funds for the payment of the debt being also a defendant, can only be brought in the county in which one of the defendants resides or is found.—*Pate v. Taylor*, Miss., 5 South. Rep. 515.

127. VERDICT—Remittitur. — Trial court has right to require plaintiff to remit excessive damages as a condition of denying motion for new trial. — *Murry v. Bull*, Wis., 41 N. W. Rep. 1010.

128. WILLS—Revocation by Birth of Child. — Where a testator devised his real estate to his wife for life, "and after her death to the heirs of her body begotten," a child born to him after the execution of the will is not "provided for in the will," in the sense of § 5959, Rev. St.—*Rhodes v. Weldy*, Ohio, 20 N. E. Rep. 461.

129. WILLS—Construction. — A testatrix by her will bequeathed the balance of her estate "to be divided equal between my brothers and sisters, and the children of deceased brothers and sisters, and the brothers and sisters of Perry J. Brinegar, deceased, (husband of testatrix,) and the children of the deceased brothers and sisters," etc.: *Held*, that the distribution among the children of the deceased brothers and sisters mentioned should be made *per stirpes*, and not *per capita*. — *Henry v. Thomas*, Ind. 20 N. E. Rep. 519.

130. WILLS—Nuncupative. — One of the formalities required by the Civil Code in the confecton of a testament nuncupative in form, and received by public act, is that the act must be received by a notary in the presence of three witnesses residing in the place where the will is executed; that is to say, in the parish where the instrument is made. — *Weick v. Henne*, La., 5 South. Rep. 528.

131. WITNESS—Cross-examination. — On a trial for perjury, alleged to have been committed on a trial for larceny, a witness having stated on re examination that a hog killed and cleaned at the house of the alleged thief was the stolen hog, was properly asked on cross-examination, as to how he knew it was the stolen hog. — *Tate v. State*, Ala., 5 South. Rep. 875.

132. WRITS—Corporations. — Under Code Civil Proc. Colo. § 40, providing that, in a suit against a corporation, service shall be made on the president, cashier, treasurer, or general agent, a suit against a mining company is not properly commenced by service on the foreman of one of its mines, who is under the orders of, and makes his reports to, its general agent.—*Great West Min. Co. v. Woodmas of Alston Min. Co.*, Colo., 20 Pac. Rep. 770.

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CURRENT EVENTS.

It seems that the United States Supreme Court, which for a long time has been behind with its docket, has of late made some progress toward catching up with the business. The chief justice of that court is reported to have said, that the cases on the docket are but two years and eight months behind as compared with three years, which heretofore has been the time. This is a step in advance at least. But the delay is still too great. The chief justice is also reported to have suggested that the business before the court would be expedited by the establishment of an intermediate appellate court, as proposed by the bill of Senator Davis. The chief justice says that a similar plan was tried in Illinois, and as a result in about two years the Supreme Court of the State was enabled to catch up with the business that had accumulated on its docket.

THE decision of the interstate commerce commission, in the case of Heard against the Georgia Railroad Company, will affect many railroads throughout the South. The complainant, a colored man, averred that "he was compelled to ride from Augusta to Atlanta in a second-class, dirty smoking and passenger coach, although he was traveling on a first-class ticket." These averments having been proved to the satisfaction of the commission, it was held that the railroad company had violated the law in that it did not provide cars for both white and colored passengers "equal in comforts, accommodation and equipment without any discrimination where the same price is charged," and an order was issued to the company directing them in the future to furnish these accommodations to passengers, irrespective of color. If a railroad sells a colored man a first-class ticket, which carries with it certain privileges, it seems only fair that it should furnish him with all such privileges, regardless of race or

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other conditions. Although, as the commission stated, there are "occasionally embarrassments and difficulties arising to carriers in the transportation of persons of different race, social peculiarities and characteristics," we believe that the decision, in this case, will commend itself to all fair-minded men, irrespective of political creed or opinion. The decision does not necessarily imply that the white and colored races must occupy the same cars, but merely directs that if separate cars be provided for each class there must be no distinction made in the comfort, accommodation and equipments. The law, Federal and State, will not tolerate the doctrine any more in the transportation of persons than of property, that one class is to be favored by the carrier over another.

THE United States District Court of Maryland, in a similar case, where a colored man holding a first-class ticket on defendant's steamboat claimed the right to eat at the table with white people, and sued the owners of the boat for damages in being forced to sit and eat at another table, ruled very properly that although the petitioner suffered some discomfort and humiliation, he was not discriminated against in any manner which could be made the ground of a legal action. When public sentiment demands a separation of passengers, it must be gratified to some extent. While this sentiment prevails among the traveling public, although in some instances unreasonable and foolish, it cannot be said that the carrier must be compelled to sacrifice his business in order to combat it. Within reasonable limits the carrier must be allowed to manage his own affairs.

THE views of the commission in the Heard case on the subject of the duty required of carriers in the protection of its passengers against all disorderly conduct, and the special duty required of conductors of trains in that regard, are of interest and value, as containing a clear succinct statement of the law pertaining to that duty. They cite *Pittsburg, Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. St. 512; *Pittsburg & Connellsville R. R. Co. v. Pillow*, 76 Pa. St. 513, and *New Orleans, St. L. & C. Ry. Co. v. Burk*, 53 Miss. 200,

all of which establish the doctrine that the undoubted power which is vested in railroad officials to preserve peace and good order on their trains, and if necessary for this purpose to eject therefrom turbulent and disorderly persons, carries with it the absolute duty to exercise the power when called upon to do so in a proper case by the passengers; that a failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty, and upon the maxim, *respondeat superior*, renders the corporation liable. The commission holds that the sound rules of law laid down by these eminent courts, asserting as they do established principles of the common law as to the powers and duties of conductors and carriers, when taken in connection with the provisions of the act to regulate commerce, which forbid unjust discrimination, or undue prejudice or disadvantage to any person or persons while being transported as passengers, are of vital importance to all railway carriers engaged in interstate commerce and the conductors of their passenger trains, and give such passengers rights to equal protection against disorderly conduct which cannot be overlooked.

NOTES OF RECENT DECISIONS.

A FORCIBLE illustration of a contract void as against public policy is found in *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 9 S. C. Rep. 402, decided by the Supreme Court of the United States. There an extension company which had a contract with a railroad company to locate and construct the road "by the nearest, cheapest, and most suitable route," between two points, for \$20,000 per mile, agreed to locate the road through the town of A in consideration of being paid a bonus by defendant. In locating the road through A it was necessary to deflect the same from the nearest, cheapest, and most natural route a distance of five miles, at an additional cost of \$100,000. It was held that the contract between the extension company and defendant, being an agreement by an employee to violate his obligation to his employer, was against public policy, and void. The court, Bradley and Miller JJ., dissenting, say:

In the light of these facts, there can be but one answer given to the question presented respecting the

contract between the iron company and the extension company, namely, that it was a void contract, immoral in its conception, and corrupting in its tendency. It was a contract by an employee of a railroad company with a third party, for a consideration to be received from that third party, to violate its engagement with its employer in the important business of locating and constructing a railroad, and instead of selecting the shortest, cheapest, and most suitable route, to locate the road by a longer route, and thus impose an unnecessary and heavy burden upon its employer. The proposition of the iron company, which was accepted, was to pay the extension company for a breach of its duty. In plain language, it was nothing less than the offer of a bribe to the latter company to be faithless to its engagements, and to do with reference to the business in which it was engaged what would amount to little less than robbery of its employer. The transaction on the part of the iron company was none the less offensive because of the threats of the extension company, made by its vice-president, who was also a director and stockholder of the railroad company, that, if the land and money mentioned were not donated, it would cause the road to be located away from Anniston by the rival town of Oxford. The threats did not excuse, much less justify, the offer. We have thus far considered the case as one only between private parties, where an employee has agreed, for a money consideration, to violate his obligation to his employer; but there are other circumstances which add to the offensiveness of the transaction. The business of the extension company was one in which the public was interested. Railroads are for many purposes public highways. They are constructed for the convenience of the public in the transportation of persons and property. In their construction without unnecessary length between designated points, in their having proper accommodations, and in their charges for transportation, the public is directly interested. Corporations, it is true, formed for their construction, are private corporations, but, while their directors are required to look to the interests of their stockholders, they must do so in subordination to and in connection with the public interests, which they are equally bound to respect and subserve. All arrangements, therefore, by which directors or stockholders or other persons may acquire gain, by inducing those corporations to disregard their duties to the public, are illegal, and lead to unfair dealing, and, thus being against public policy, will not be enforced by the courts. In this case the extension company, to which the duty of locating and constructing the railroad between its *termini* was intrusted, in agreeing, for a consideration offered by a third party, to disregard that duty, and locate and construct the road by a longer route than was required, not only committed a wrong upon the railroad company by thus imposing unnecessary burdens upon it, to meet which larger charges for transportation might be called for, but also a wrong upon the public. The case of *Fuller v. Dame*, 18 Pick. 472, is instructive on this head. * * * The case before us is much stronger than the one thus decided by the Supreme Judicial Court of Massachusetts. There the contract was held invalid because made with a stockholder of the company, by which he promised, for a pecuniary consideration, to endeavor to procure the company to locate one of its deposes at a particular place in the city. Here the contract was with an employee of the company to induce it to disregard its obligations, and the principal person making that contract on the part of the employee was a director and stockholder of the company which was to be thus

seriously affected. The principle, which is so clearly and forcibly stated in *Fuller v. Dame*, has been applied in numerous instances by the highest courts of different States, to avoid contracts made to influence railroad companies in selecting their routes and locating their depots and stations, by donations of land and money to some of its directors or stockholders or agents. *Bestor v. Wathen*, 80 Ill. 188. The doctrine of this case was approved by the Supreme Court of Illinois in *Linder v. Carpenter*, 62 Ill. 309, and in *Railroad Co. v. Mathers*, 71 Ill. 592. *Holladay v. Patterson*, decided by the Supreme Court of Oregon (5 Or. 177), is also in harmony with *Fuller v. Dame* and *Bestor v. Wathen*, the court following a similar course of reasoning to that adopted in those cases. That doctrine and reasoning are also often applied where the reward or money consideration for taking a particular route or establishing a station or depot at a particular place is offered directly to the railroad company instead of to its directors, stockholders, or agents. But we do not refer to them, because there are exceptions or qualifications in the application of the doctrine in such cases requiring explanation, as where a subscription is conditioned upon the adoption of a particular route, or the construction of a station or depot at a particular place. *Railroad Co. v. Seely*, 45 Mo. 212; *Bank v. Ayres*, 12 Wis. 570; *Plank-Road Co. v. Payne*, 15 N. Y. 583. There is no exception in any decision called to our attention as to the character of a contract, when, for a pecuniary consideration, directors, stockholders, or agents of a company undertake to influence its conduct in these matters. Indeed, the law is general that agreement upon pecuniary considerations, or the promise of them, to influence the conduct of officers charged with duties affecting the public interest, or with duties of a fiduciary character to private parties, are against the true policy of the State, which is to secure fidelity in the discharge of all such duties. Agreements of that character introduce mercenary considerations to control the conduct of parties, instead of considerations arising from the nature of their duties, and the most efficient way of discharging them. They are therefore necessarily corrupt in their tendencies. As we said in *Tool Co. v. Norris*, 2 Wall. 48, "that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments of public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution," so we say of agreements like the one in this case. They are against public policy, because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution. "The law," as said in that case, "looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Oscanyan v. Arms Co.*, 103 U. S. 261.

THE effect of the alteration of a note was considered by the Supreme Court of New Mexico in *Ruby v. Talbott*, 21 Pac. Rep. 72. There a note was executed to the plaintiff, who, being dissatisfied with its form, returned it to the maker for the purpose of having him execute a different note; and the plaintiff alleged that, without his knowledge or con-

sent, the maker, in good faith, with the intention of carrying out plaintiff's wishes, instead of executing a new note, altered the old one, by substituting a different amount, date, and rate of interest. It was held that an indorser who had not consented to such alteration was discharged by it, and that a petition in equity to have the note restored to its original form was properly dismissed, as to such indorser. Long, C. J., dissented in a very exhaustive opinion, taking the position that the alteration did not invalidate plaintiff's rights on the original note. The court says:

In *Lubbering v. Kohlbrecher*, 22 Mo.; the court held that where material alteration is made in a promissory note by one unauthorized by and without the knowledge or consent of the owner of such note, the note is not thereby avoided as against such owner." The words "with interest from date," were added to the note after its execution. In *Evants v. Strobe*, 11 Ohio, 480, the court said: "Where an instrument, by a mistake of the parties as to the legal effect of the terms used, fails to carry out their intention, relief may be afforded in equity;" and that "a mistake of law may be corrected in equity." In *Langenberger v. Kroeger*, 48 Cal. 147, the court held: "If a person who has no authority to do so, and who is not the agent for the payee for that purpose, writes across the face of a draft payable generally in money the words 'payable in United States gold coin,' it is not such an alteration of the draft as vitiates it." So, in the case of *Bank v. Emerson*, 10 Paige, 359. Counsel for Talbott, the appellee, contends that as the alteration of the note was made by one of the makers and the agent of the appellant, without the knowledge or consent of the appellee, it operated to discharge him from liability on the note. The case of *Wood v. Steele*, 6 Wall. 80, was an action upon a promissory note made by Steele and Newson, bearing date October 11, 1858, payable to their own order, one year from date, and indorsed by them to Wood, the plaintiff. It appeared on the face of the note that "September" had been stricken out, and "October 11th" substituted as the date. The court said: "It was a rule of the common law, as far back as the reign of Edward III., that a rasure in a deed avoids it. The effect of alterations in deeds was considered in *Pigot's Case*, 11 Coke, 27, and most of the authorities upon the subject down to that time were referred to. In *Master v. Miller*, 4 Term R. 320, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled in both English and American jurisprudence that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. * * * The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson cannot affect the result. He had no authority to change the date. The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed. Another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. * *

* To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged. * * * The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must suffer the loss. * * * The defendant could no more have prevented the alteration than he could have prevented a complete fabrication, and he had as little reason to anticipate one as the other. The law regards the security after it is altered as an entire forgery with respect to the parties who have not consented, and, so far as they are concerned, deals with it accordingly,"—referring to the following cases: *Goodman v. Eastman*, 4 N. H. 456; *Waterman v. Vose*, 43 Me. 504; *Outhwaite v. Luntley*, 4 Camp. 180; *Bank v. Russel*, 8 Yeates, 391; *Mitchell v. Ringgold*, 8 Har. & J. 159; *Stephens v. Graham*, 7 Serg. & R. 509; *Miller v. Gilleland*, 19 Pa. St. 119; *Heffner v. Wenrich*, 32 Pa. St. 423; *Stout v. Cloud*, 5 Litt. 207; *Lisle v. Rogers*, 18 B. Mon. 529. Story, in his *Equity Jurisprudence* (volume 1, § 138), says: "It is a matter of regret that, in the present state of the law, it is not practicable to present in any more definite form the doctrine respecting the effect of mistakes of law, or to clear the subject from some obscurities and uncertainties which still surround it. But it may be safely affirmed upon the highest authority, as well as established doctrine, that a mere naked mistake of law, unattended with any such special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity; and the present disposition of courts of equity is to narrow, rather than to enlarge, the operation of exceptions." *Id.* §§ 110, 111; *Story*, Cont. § 407. Though it may be difficult to reconcile these conflicting decisions, it is believed, on the weight of authority, that the alteration of the note was material; and being done by one of the makers and by John Borrodalle, or one of them, without the consent of Talbott, he was thereby discharged from liability on the note.

THE much disputed question as to the right of a real estate broker to his commission, came before the Supreme Court of Kansas in *Lockwood v. Halsey*, 21 Pac. Rep. 98. The court, after stating the question in the case to be whether a real estate broker is an insurer of the title where an exchange of lands is made by him, says:

In other words, did Lockwood contract or agree that the representations made by Graham or his agents in relation to the land were true, or does the law impose such a burden upon an agent? The rule seems to be well settled by authority and good reason that, to entitle a real estate agent to his commission in a sale or exchange of lands, it is only necessary for him to furnish a purchaser who is willing to purchase or exchange upon the terms and conditions agreed to or proposed by the seller. This would *prima facie* entitle the agent to receive a commission. Where such a proposition is not accepted by the owner of the land, then, before an agent can recover his commission, he must still further show that the purchaser he has found is willing and able to purchase or exchange upon the terms offered by the owner of the land. *Hamlin v. Schulte*, 27 N. W. Rep. 303; *Stewart v. Murray*, 92 Ind. 543; *Moses v. Bierling*, 31 N. Y. 462; *Mooney v. Elder*,

56 N. Y. 238; *Gillett v. Clorum*, 7 Kan. 156; *Short v. Millard*, 68 Ill. 203; *McGavock v. Woodlief*, 20 How. 221; *Gireman v. Meade*, 13 Bush, 358; *Redfield v. Tegg*, 38 N. Y. 212; *Rees v. Spruance*, 45 Ill. 308; *Potvin v. Curran*, 13 Neb. 303, 14 N. W. Rep. 400; *Montgomery Emigrant Co.*, 47 Iowa, 91; *Fraser v. Wyckoff*, 63 N. Y. 445; *Everhart v. Searle*, 71 Pa. St. 256; *Fisk v. Henaire*, 9 Pac. Rep. 322. But where they are brought together in person or by correspondence, and the purchaser is accepted and the exchange is authorized, the principal at the time being in the possession of all the knowledge and facts known to the agent, and the whole transaction on the part of the agent is done in good faith, so far as the agent is concerned the transaction is completed, and he has fully earned his commission, although afterwards it may turn out that there is a defect in the title and quality or condition of the land. In this case Halsey accepted the trade, directed the exchange of papers with a full knowledge of all the facts possessed by Lockwood, and, applying the rule established by the authorities to these facts, we must conclude that the court erred in overruling the demurrer to the plaintiff's evidence, as the evidence offered by the plaintiff discloses no cause of action.

CONCERNING the liability of railroad companies for injuries to trespassers on their tracks, the Supreme Court of Missouri says, in *Barker v. Hannibal & St. J. Ry. Co.*, 11 S. W. Rep. 254, a case where deceased, a trespasser, knowing that a train was due from behind him, but did not look in that direction, the train having given no signal, though the engineer could have seen plaintiff at a distance of nearly 200 yards:

Barker knew the train was due when he got upon the track. There was a tie train standing on the Wabash track at the time, and it seems probable that his attention was attracted to the men at work on the train. He was a little hard of hearing, but could hear ordinary conversations. The evidence tends to show that no signal was given by sounding a whistle or ringing a bell, and that the train, if on a level track, could have been stopped in a distance of 100 yards. It does not appear within what distance it could have been stopped on this down grade. There can be no doubt but Barker was guilty of negligence in going upon the track, at a time when he knew the train was due, without looking or listening for it. Besides this, he got upon the track at a place other than a crossing, and was making a foot-path out of the railroad track, and that, too, at a place where the defendant was required to and had fenced its road. In short, he was a trespasser, declared to be such by the statute law of this State. Section 809, Rev. St. 1879. Being a trespasser, the company owed him no duty, except not to wantonly, willfully, or with gross negligence injure him. The company was not in duty bound to look out for him. *Maher v. Railroad Co.*, 64 Mo. 267; *Hallihan v. Railroad Co.*, 71 Mo. 114; *Maloy v. Railroad Co.*, 84 Mo. 270; *Rine v. Railroad Co.*, 88 Mo. 392; *Williams v. Railroad Co.*, 9 S. W. Rep. 573; *Langan v. Railroad Co.*, 72 Mo. 394; *Comly v. Railroad Co.*, 12 Atl. Rep. 496. Some of the authorities just cited and many others show that though a person is a trespasser on a railroad track, still, if such person is in a dangerous position to the knowledge of the servants of the rail-

road company, then it becomes their duty to use all reasonable efforts within their power and at their command to avoid injuring such person thus in the wrong. *Shear. & R. Neg.* § 38. But this duty on the part of the defendant's servants only arises when and after the perilous position of the person is discovered. Now, in this case, there is no evidence whatever of a wanton or willful injury; nor is there any evidence tending to show that the engineer saw the deceased on the track in time to have avoided the calamity. The fact that no signal was given tends to show that the deceased was not seen by the engineer, in the absence of any other evidence. But the argument is made on behalf of the plaintiff that if the engineer was at his post of duty, and on the lookout, he could have seen the deceased, and if he was not, then he was guilty of negligence. The answer to all this is that the company owed the deceased no duty to be on the watch for him. As to passengers, it was of course the duty of the engineer to see that he had a clear track, but the defendant owed no such a duty to the deceased. As to him there was no breach of duty for a simple failure to discover him in the commission of a trespass. As stated by a reliable text-writer, the general duty of a railroad company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to complain of neglect. *Cooley, Torts*, 660. *Ray, C. J. & Barclay, J., dissent.*

THE power of a court of chancery to enjoin the governor of a State from issuing a certificate of election to congress to an applicant, and to compel him to deliver a certificate already issued to complainant, was denied by the Supreme Court of Tennessee in *Bates v. Taylor*, 11 S. W. Rep. 266. It was held that the issuance of such commission or certificate, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the courts. The court says:

An attempt on the part of the courts to control his action under the statute would be an invasion by one department of the government of the rights of another department, and, for that reason, a violation of the constitution. It is well settled by all the authorities that *mandamus* will not lie to compel the governor of a State to perform duties of a purely executive or political nature, involving the exercise of official judgment and discretion, but the decisions are wide apart as to the power of the courts to compel him to discharge those duties which, as to other officials, are called ministerial. The courts of Ohio, Alabama, California, Maryland, and North Carolina are together in holding that the governor may be required by *mandamus* to perform duties of the latter class, while the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, Missouri, New Jersey, and Rhode Island have uniformly held the contrary, upon the ground that the powers of government in the States are distributed among three departments, which under the organic law are to be and remain independent of each other. *High, Extr. Rem.* §§ 118-121. This author cites the cases from the different States mentioned. We have examined them, and also a very instructive case from Michigan (*Sutherland v. Governor*, 29 Mich. 321), which is in accord with those from the States last mentioned, and we are fully persuaded not only that the

weight of authority, but also the weight of reason, is against the power of the courts to coerce the chief executive of a State into the performance of any official duty. * * * We do not think the decisions of the Supreme Court of the United States stand in the way of the conclusion we have reached, though the federal courts have, in several instances, taken jurisdiction of proceedings against the governors of certain States, and put them under restraint by injunction. *Davis v. Gray*, 16 Wall. 208; *Rolston v. Commissioners*, 120 U. S. 391. Now the most that can be said of these cases is that they show the jurisdiction of the federal courts to restrain the governor of a State from doing a wrongful act to the injury of individual rights. It is not even intimated in any one of them that the State courts have any such jurisdiction. There is a wide difference between the relation of the federal judiciary and the State judiciary to the governor of the State, and because of that difference the federal decisions referred to are not at all in point in this case. A State's judiciary sustains the same relation to its governor that the federal judiciary does to the president of the United States; and as a State court, by reason of that relation, has no jurisdiction to coerce or restrain the governor with respect to his official duties, so the federal courts, for the same reason, have no power to interfere with the official acts of the president. *State v. Johnson*, 4 Wall. 499.

THE validity of a deed of land to a corporation not in existence, was considered by the Supreme Court of West Virginia in *Spring Garden Bank v. Hulings Lumber Co.*, 9 S. E. Rep. 243. There, after the corporators had signed an agreement to become a corporation and before the charter was obtained, a deed conveying land to such corporation was signed, acknowledged and delivered to a third party, with directions to retain it until the corporation was organized. It was held that the deed operated as a valid conveyance to the corporation. The court says:

The important question, however, in this cause, is whether or not the aforesaid deed from Marcus Hulings and wife to the Hulings Lumber Company is void and ineffectual for the want of a grantee. It is admitted that a grant *in presenti* to a person not *in esse* at the time the deed is delivered would be inoperative; and, likewise, a deed to a corporation never created or organized would be void. *Hulick v. Scovill*, 4 Gilman, 191; *Harriman v. Southam*, 16 Ind. 190; *Russell v. Topping*, 5 Maccl. 202. These cases and others of the same character fully sustain the doctrine that a deed to a corporation not in existence, or to one incapable by its charter of holding real estate, or to a person not *in esse* at the time of the delivery of the deed, is void; but I have been unable to find any case in which it has been decided that a deed made to a corporation having a potential existence at the date of the deed, and which had obtained its charter and completed its organization at the time the deed was delivered to it, was void or ineffectual as a conveyance to the corporation. On the contrary, in *Wharf Co. v. Judd*, 108 Mass. 224, the court held that a deed conveying land to a corporation, dated after the date of its charter and before its organization, was a valid conveyance. *Bank v. Bellis*, 10 Cush. 276; *Ward v. Lewis*, 4 Pick. 518; *Bank v. Dandridge*, 12 Wheat. 64.

THE ASSIGNABILITY OF PERSONAL CONTRACTS.

The question of the right of the assignee of a contract to demand and enforce the performance to himself of the covenants and conditions which the other party to the contract originally made with the assignor, is one of no little importance and difficulty.

The general principle is well settled that "every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'you have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.'"¹

Well settled as this principle is, however, the courts have experienced great difficulty in determining the class of cases to which it is properly to be applied, for, notwithstanding the rule of the common law—of which the principle above referred to is but another form of statement—that choses in action are not assignable,² the tendency of courts of law and legislatures in modern times, following the lead of the courts of equity, has been to remove the disabilities which limited the free assignment and enforcement of contracts.³

Mr. Justice Gray, of the Supreme Court of the United States, in a recent case,⁴ from which the foregoing statement of the principle was selected, has divided the cases which involve the topic under discussion into four classes, as follows:

"First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted, or by an assignee."⁵

¹ Mr. Justice Gray in *Arkansas Smelting Co. v. Belden Mining Co.* 127 U. S. 379, citing *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305, s. c., 93 Am. Dec. 93; *Boston Ice Co. v. Potter*, 123 Mass. 28, s. c., 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 120, s. c., 43 Am. Rep. 13; *Lansden v. McCarthy*, 45 Mo. 106.

² *Coke Lit.* 266a.

³ See 1 *Parsons Cont.* 224-226.

⁴ *Arkansas Smelting Co. v. Belden Mining Co.* 127 U. S. 379.

"Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator."⁶

"Third. Cases of assignment by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons."⁷

"Fourth. Other cases of contracts assigned by the party who was to do certain work—not by the party who was to pay for it—and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only."⁸

To these may be added two other classes of cases, resting upon analogous principles, and involving:

Fifth. The right of an undisclosed principal to enforce performance of contracts made with his agent as the ostensible principal.⁹

Sixth. The right of one, who has contracted as an agent, to enforce performance of the contract to himself as being, in fact, the principal.¹⁰

The questions arising under the fifth and sixth subdivisions have been considered in a recent work on Agency¹¹ and will not be discussed in this paper. The second and third classes of cases will also be omitted, and an attempt will be here made to throw some

⁵ Citing *Sears v. Conover*, 8 Keyes, 113, and 4 *Abbott N. Y. App.* 179; *Tyler v. Barrows*, 6 Robt. (N. Y.) 104.

⁶ Citing *Hambly v. Trott*, Cowp, 371, 375; *Wentworth v. Cock*, 10 Ad. & El. 42, and 2 *Per. & Dav.* 251; *Williams on Executors* (7th ed.) 1723-1725, "Assignment by operation of law" proceeds the learned judge, "as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question, *Dickinson v. Calahan*, 19 Penn. St. 227."

⁷ Citing *Taylor v. Palmer*, 31 Cal. 240, 247; *St. Louis v. Clemens*, 42 Mo. 69; *Philadelphia v. Lockhardt*, 73 Penn. St. 211; *Devlin v. New York*, 63 N. Y. 8. This case contains a full discussion of the general question.

⁸ Citing *Robson v. Drummond*, 2 B. & Ad. 303; *British Wagon Co. v. Lea*, 5 Q. B. Div. 149, s. c., 29 *Eng. Rep.* (Moak.) 236; *Parsons v. Woodward*, 2 *Zabr.* (N. J.) 196.

⁹ See *Mechem on Agency*, §§ 769-774.

¹⁰ See *Id.* § 760.

¹¹ *Mechem on Agency*, *ubi supra*.

light upon the questions involved in cases of the first and fourth classes. The writer deems that this can best be done by a brief review of the cases—not numerous—falling under these respective classes.

1. *Contracts which are not Assignable.*—*Robson v. Drummond*,¹² is one of the oldest and leading cases upon this subject. In this case a carriage had been hired by the defendant of one Sharpe, a coachmaker, for five years, at a yearly rent payable in advance, Sharpe agreeing to keep the carriage in repair and to paint it once a year. Robson was then a partner in business with Sharpe, but the defendant did not know it. After three years Sharpe retired, making over all interests in the business and property in the goods to Robson, who brought an action to enforce defendant's performance of the contract. It was held, however, that he had no right of action, Lord Tenterden basing his judgment on the ground that "the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharpe, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person." Littledale and Parke, JJ., put their judgment also upon the additional ground that the defendant had a right to the personal services of Sharpe, and to the benefit of his judgment and taste, to the end of the contract.

The principle upon which this case rests was said by Cockburn, C. J., in a later case,¹³ to be "that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is,

in such a case, of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party." But the same judge expressed the opinion that, in the case referred to, the principle had been pushed "to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another."

*Humble v. Hunter*¹⁴ followed and approved *Robson v. Drummond*. There Humble and Hunter had entered into a charter-party, the former describing himself as the owner of the ship. Humble's mother brought an action upon the agreement and offered to show that she was in fact the owner and that the son was but her agent in the transaction, but the court held that as the defendant had contracted with the son expressly as being the owner of the ship, he could not be held to answer to another.

Boulton v. Jones,¹⁵ furnishes another illustration of the same principle. There the defendants, who had been in the habit of dealing with B, sent a written order for goods directed to B. The plaintiff, who on the same day had bought B's business, filled the order without giving the defendants any notice that the goods were not supplied by B. Upon the plaintiff's rendering his account, to defendants, they disclaimed any transactions with him and he brought an action for the price of the goods, but was held not to be entitled to recover. Martin, B, said: "This is not a case of principal and agent. If there was any contract at all, it was not with the plaintiff. If a man goes to a shop and makes a contract intending it to be with one particular person, no other person can convert that into a contract with him."

Lansden v. McCarthy,¹⁶ is to the same effect. There defendant had entered into a contract with B & K, to supply their hotel with meat for the period of one year at a certain rate per pound, payment to be made at the expiration of each month for the meat furnished during that month. During the year B & K sold out to plaintiff, and assigned to him their meat contract with defendant. Plaintiff notified defendant of the assignment

¹² 2 B. & Ad. 203.

¹³ *British Wagon Co. v. Lea*, 5 Q. B. Div. 149, 29 Eng. Rep. 236.

¹⁴ 12 Q. B. 310, (12 Ad. & El. N. S.)

¹⁵ 2 Hurl. & Nor. 564.

¹⁶ 45 Mo. 106, citing *Robson v. Drummond*, *supra*.

and demanded the further performance of the contract to himself, offering upon his part to perform all of the covenants of his assignors. The defendant refused to continue to furnish the meat and the plaintiff brought an action against him, but was not permitted to recover. "The defendant," said the court, "may have been willing to deliver his meats in advance of payment by reason of the confidence he reposed in the credit and solvency of the parties with whom he originally contracted. The readiness and offer of the plaintiffs to pledge themselves to a faithful performance of the stipulations of the contract obligatory upon their assignors, is not to the purpose. It does not meet the exigency of the case. The question presented was one of personal trust and confidence, which it was the right of the defendant to decide for himself."

Boston Ice Co. v. Potter,¹⁷ furnishes another illustration. Here the defendant had made a contract with the Citizens' Ice Co. to supply him with ice. Without his knowledge, the Citizens' Ice Co. sold its business to the plaintiff with the privilege of supplying ice to all its customers, and the plaintiff furnished ice to the defendant's house for more than a year before he was notified of the change. Defendant had formerly purchased ice of the plaintiff company, but had been dissatisfied with its performance and had terminated his contract with the plaintiff at the time of making the contract with the Citizens' Ice Co. Plaintiff sued to recover for the ice so furnished, but it was held that it had no cause of action. *Endicott, J.*, said: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or quality of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company

could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know.¹⁸ If he had received notice and continued to take the ice as delivered, a contract would be implied."¹⁹

*King v. Batterson*²⁰ is to the same effect. There Batterson had guaranteed the payment by one Haley for such goods as the latter should procure of Horton, for use upon a certain undertaking. King furnished the goods, instead of Horton, and sued Batterson upon his guaranty of payment, but it was held that neither as an assignee nor as an undisclosed principal could he maintain the action. *Potter, J.*, said: "When a contract is for the purchase of goods, and the quality and quantity of the goods and the price are defined, no injury might result, and in such cases it might be within the contemplation of the parties that the work, *e. g.*, repairing wagons, should be, or from the known situation of the party must be, done by subcontract. See *British Wagon Co. v. Lea*.²¹ But when the contract is such as to imply peculiar confidence in the honesty, pecuniary ability, knowledge, or skill of the person to whom a guaranty is addressed, there is good reason for holding it to be strictly personal, unless its language implies the contrary."

Arkansas Smelting Co. v. Belden Mining Co.,²² furnishes the latest illustration of the rule. In this case, defendant had contracted with Billing & Eilers to furnish to them at their smelting works, ten thousand tons of lead ore in certain amounts daily, upon the understanding that the ore should, upon delivery, become the property of Billing & Eilers, and should afterwards be paid for at current New York quotations, in one hundred ton lots, according to an assay of each lot, with a further provision for arbitration in case the parties could not agree upon the

¹⁸ Citing *Orcutt v. Nelson*, 1 Gray (Mass.), 536, 542; *Winchester v. Howard*, 97 Mass. 303, s. c., 98 Am. Dec. 93; *Hardman v. Booth*, 1 H. & C. 803; *Humble v. Hunter*, 12 Q. B. 310; *Robson v. Drummond*, 2 B. & Ad. 303.

¹⁹ Citing *Mudge v. Oliver*, 1 Allen (Mass.), 74; *Orcutt v. Nelson*, *supra*; *Mitchell v. Lapage*, Holt's N. P. 253.

²⁰ 13 R. I. 117, 43 Am. Rep. 13.

²¹ *Supra*.

²² 127 U. S. 379.

¹⁷ 123 Mass. 28, 25 Am. Rep. 9.

assay. After part of the ore had been delivered, Billing & Eilers dissolved partnership and all rights in the business and in the contract for ore were transferred to Billing and defendant continued after notice of the dissolution to furnish ore to him under the contract. Soon afterwards, and while nearly nine thousand tons remained undelivered, Billing sold all of his interest in the works and the ore contract to the plaintiff company, of which sale defendant had notice. Thereupon, defendant ceased to deliver ore under the contract and gave plaintiff notice that it considered the contract cancelled and annulled. Plaintiff, alleging its ability and willingness to carry out the contract on its part, brought an action for damages. The circuit court sustained a demurrer to the complaint, and, upon appeal to the United States Supreme Court, the judgment was affirmed. "During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price," said Mr. Justice Gray, "the defendant had no security for its payment, except in the character and solvency of Billing & Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing & Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in *Murray v. Harway*,²³ cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the

lessor's consent, has no application to this case."

Certain other contracts are so obviously personal in their nature as to lie beyond the range of reasonable controversy. Of this nature are contracts for the rendition of personal services, as to serve as a farm-bailiff,²⁴ or as an actor;²⁵ contracts of apprenticeship;²⁶ contracts to enter into partnership;²⁷ contracts to render support,²⁸ and the like, which do not require extended discussion.

2. *Contracts which are Assignable.*—It is not, of course, the purpose here to discuss the general question of the assignability of contracts, but simply to notice a few, lying along the line of the present inquiry, which have been held to be assignable.

*British Wagon Co. v. Lea*²⁹ furnishes an excellent illustration of the cases of this class. Here the Parkgate Wagon Co. had let to the defendants, who were coal merchants, certain railway wagons for a period of seven years at a certain yearly rent payable in quarterly installments. By the agreement, the wagon company was to keep the wagons in repair. In the same year the Parkgate Wagon Co. went into liquidation, and all of its assets, including the contract with defendants, were turned over to the British Wagon Co. which agreed to perform all of the undertakings of the Parkgate Co. The defendants thereupon took the position that the Parkgate Co., by going into liquidation and assigning the contracts, had incapacitated itself from performing the contract; that there was no privity between themselves and the British Co., and that therefore they were no longer bound.

But the court of Queen's bench, while recognizing the principle of personal performance as laid down by the cases referred to in the foregoing subdivision, held it to be inapplicable to that case, "inasmuch as we cannot suppose that in stipulating for the repair of

²⁴ *Farron v. Wilson*, L. R. 4 C. Pl. 744.

²⁵ *Hayes v. Willio*, 4 Daly (N. Y.), 259.

²⁶ *Davis v. Coburn*, 8 Mass. 299; *Handy v. Brown*, 1 Cranch (U. S. C. C.), 610; *Stringfield v. Helskell*, 2 Yerg. (Tenn.) 546; *Nickerson v. Howard*, 19 Johns (N. Y.) 118; *Castor v. Aicles*, 1 Salk. 68; *Coventry v. Woodhall*, Hob. 184a; *Hern v. Dryden*, 11 Mod. 272; *Boast v. Firth*, L. R. 4 C. Pl. 1.

²⁷ *Williamson v. Wilson*, 1 Bland 418; *Gillespie v. Hamilton*, 3 Madd. 251; *Bank v. Christie*, 8 Cl. & F. 214; *Pearce v. Chamberlain*, 2 Ves. Sr. 33.

²⁸ *Joslyn v. Parlin*, 54 Vt. 670; *Bethlehem v. Annis*, 40 N. H. 84, 77 Am. Dec. 700.

²⁹ 5 Q. B. Div. 149, 29 Eng. Rep. 236.

²³ 56 N. Y. 337.

these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the court of Queen's bench in *Robson v. Drummond*,³⁰ went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference should be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases, the maxim *Qui facit per alium, facit per se* applies."

In *Parsons v. Woodward*,³¹ it appeared that Parsons had agreed to deliver to Woodward four thousand trees of a certain description, in the fall of the same year, and upon the ground where the same should grow, for which the latter agreed to pay a certain price. Before the time for performance, Parsons assigned his interest in the contract to one Hitchens who tendered the trees, but Woodward refused to receive them. The action was brought in Parson's name to recover damages for the refusal to accept and pay. Among others, the objection was urged that the contract was not assignable, but the objections were overruled and the plaintiff re-

covered. When this case was decided, however (1849), none of the cases referred to in the foregoing subdivision, except *Robson v. Drummond*³² had arisen, and the case seems irreconcilable with some of the later ones.

In the same line is *Tyler v. Barrows*,³³ where a contract for the delivery of a certain number of barrels of oil was held to be assignable, so as to vest the assignee with the right to demand and receive the delivery; and a like ruling was made in *Sears v. Conover*,³⁴ where the right to receive a crop of potatoes under a contract was held to be assignable.

Roorbach v. Dale,³⁵ involving the question of the assignability of contracts for carrying the mail, and *Hornor v. Wood*³⁶ involving an assignment of the right, under a contract, to convict labor, were decided in view of statutory provisions, which determined the result.

3. *Conclusions*.—"At the present day, no doubt," says Mr. Justice Gray,³⁷ "an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable."

"But," he proceeds in the language already quoted, "every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'you have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' The rule upon this subject * * * is well expressed in a recent English treatise. 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party, whose agreement conferred those rights, must have intended them to be exercised only by him in whom he actually confided.'"³⁸

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³⁰ 2 B. & Ad. 303.

³¹ 6 Robt. (N. Y.) 104.

³² 3 Keyes (N. Y.), 113, s. c. 4 Abb. App. Dec. 179.

³³ 6 Johns. (N. Y.) Ch. 469.

³⁴ 23 N. Y. 350.

³⁵ In *Arkansas Smelting Co. v. Belden Mining Co.* 127 U. S. 379.

³⁶ Pollock on Contracts (4th ed.), 425.

³⁰ 2 B. & Ad. 303.

³¹ 2 Zabriskie (N. J.) 196.

CHattel MORTGAGE—POSSESSION BY MORTGAGOR—WHEN FRAUDULENT.

MURRAY V. MCNEALY.

Supreme Court of Alabama, February 28, 1889.

A chattel mortgage is not invalid as against creditors, although it authorizes the mortgagor to continue in possession and sell the mortgaged goods, where it also provides that such sales shall be exclusively for the benefit of the mortgagee, and there is no evidence of actual fraud.

SOMERVILLE, J., delivered the opinion of the court:

The point chiefly discussed, both at the bar and in the brief of counsel, is the validity of the mortgage executed by the defendants McNealy & Cureton to Davis and Son on November 18, 1887, transferring to the mortgagees a stock of merchandise then in the possession of the mortgagors for the purpose of securing a debt described in the instrument. As to the *bona fides* of this debt there is no serious controversy. Nor is any actual fraud established by the testimony which can in any way vitiate the transfer of the goods. It is contended that the mortgage is rendered fraudulent on its face by the provision contained in it authorizing the mortgagors, McNealy & Cureton, to continue the sale of the goods, although it is expressly stipulated that such sale shall be exclusively for the benefit of the mortgagees. It is provided that "all moneys arising from the sales of said goods" shall *eo instanti* be the property of the mortgagees, and shall be paid over to them at the end of each week, or oftener if required, and shall go as credits on the mortgage debt, the mortgagors expressly agreeing that all such sales "shall be for and on account" of said mortgagees. If any of the goods are sold on a credit, the accounts are also to pass to the mortgagees as their property, and be credited as so many payments on the mortgage debt. The law day is fixed on February 1, 1888, the day the secured debt fell due. There is no clause anywhere contained in the mortgage which can be construed, expressly or by implication, as evincing an intention to permit the mortgagors to reserve any benefit to themselves, or any power of disposition over the goods inconsistent with the idea that the property is not to be held strictly subject to the lien of the mortgage as a *bona fide* security for the debt.

In *Benedict v. Renfro*, 75 Ala. 121, we discussed at length the subject of mortgages on stocks of merchandise, where the mortgagor was permitted to remain in possession, and to sell the goods in due course of trade for his own benefit. We held that such a power, accompanied with continued possession, conferred on the mortgagor a dominion over the property, which was utterly inconsistent with and subversive of the mortgage lien, rendering the mortgage itself virtually a conveyance "made in trust for the use of the person making it," and stamping it with the invalidity for fraud, as tending inevitably to hinder and

delay the creditors of the mortgagor. Anticipating such a case as that now before us, we then said: "We are not to be understood as intending, in this opinion, that a mortgage of merchandise would be rendered conclusively invalid where the mortgagor is in good faith left in possession of the goods, with power to sell for the exclusive use of the mortgagee, holding the proceeds of sale for his benefit. In such a case, he may well be deemed the mere agent of the mortgagee acting for him and in his behalf." In *Robinson v. Elliott*, 22 Wall. 513, 524 (1874), where this subject is elaborately discussed by the Supreme Court of the United States, it was observed by Mr. Justice Davis, that the court was not prepared to say that a mortgage would not be sustained "which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt." "Indeed, it would seem," he observed, "that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors." The mortgage in that case was held fraudulent and void on the same ground stated by us in *Benedict v. Renfro*, 75 Ala. 121, that the mortgagors were permitted to deal with the property as their own, without covenant to account with the mortgagees for the proceeds of sale, and without recognition that the property was sold for their benefit. The principle controlling this case is not distinguishable from that decided in *Insurance Co. v. Foster*, 58 Ala. 502. There an assignment was made conveying to a preferred creditor, in the early part of the year, a plantation, and the crops to be raised during the year, and the personal property used in cultivating them. It was stipulated that the property should remain in the possession of the grantors to be used by them in making the crops which were to be delivered to the grantee as soon as made and gathered, the proceeds to be applied to the payment of the secured debts. No actual fraud being shown, the assignment was sustained on the ground that it was contemplated that the whole property was to be devoted to the satisfaction of the mortgage debt, without the reservation of any benefit to the grantor. Said Brickell, C. J.: "If the crops to be produced are, with the existing property, to be devoted to the payment of the secured debts, it has not been supposed such a stipulation is a reservation of a benefit to the debtor, though thereby the residuum which must revert to him may be increased. It is not unusual in assignments to provide that the assignees, or the debtor under their direction, may continue the business; and if it appears this is done, not for the benefit of the debtor, and to the prejudice of the unsecured creditors, but to promote the interest of the creditors who are preferred, they are sustained." Many cases are cited illustrative of the principle involved, and sustaining the conclusion reached by the court.

The precise question here involved has been

many times considered by the New York Court of Appeals. It arose in *Conkling v. Shelley*, 28 N. Y. 360 (1863), where the court sustained such a mortgage of a stock of merchandise as valid, it being declared to be neither unlawful nor fraudulent *per se*. It was said: "Such an agreement made the mortgagors agents of the mortgagees. Their possession and their sales were, in effect, those of the mortgagees. It was as if the latter had taken possession and placed a third person in charge as agent to sell and account to them. They could not have escaped from crediting on their indebtedness the proceeds of sales made by such an agent, because he had fraudulently or dishonestly misapplied or employed the money." A like conclusion was reached in *Ford v. Williams*, 24 N. Y. 359, and *Miller v. Lockwood*, 32 N. Y. 293. The question again came up before the same court in *Brackett v. Harvey*, 91 N. Y. 215, decided as late as 1883, and the doctrine declared in these cases was reaffirmed without dissent by any member of the court. It was said by Finch, J.: "These cases went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish. It devotes, as it should, the mortgage property to the payment of the mortgage debt." The controlling principle of the case is that the mortgagee is not prohibited by any rule of law or of public policy from employing the mortgagor as his agent to sell the goods on his (the mortgagee's) exclusive account, without authority to use or appropriate the proceeds of sale to any other purpose than paying the mortgage debt. A like principle has been recognized by the English courts, where trustees, under general assignments made for the benefit of creditors, have been permitted to stipulate for the employment of the debtor as their agent to dispose of the goods. *Janes v. Whitbread*, 5 Eng. Law & Eq. 431. The New York doctrine seems to us to be sound in principle, and it has been followed in Virginia, New Hampshire, Illinois, Connecticut, Wisconsin, Ohio, and other States, and in the circuit courts of the United States. *Marks v. Hill*, 15 Grat. 400; *Wilson v. Sullivan*, 58 N. H. 260; *Goodheart v. Johnson*, 88 Ill. 58; *Kendall v. Carpet Co.*, 13 Conn. 383; *Fisk v. Harshaw*, 45 Wis. 665; *Kleine v. Katzenberger*, 20 Ohio St. 110; *Hawkins v. Bank*, 1 Dill. 462; *Overman v. Quick*, 8 Biss. 134; *Pierce, Mortg. Mdse.* §§ 43-49; 139. The mortgage is not void on its face, and there is nothing in the testimony which proves that it was intended otherwise than a *bona fide* and fair appropriation of the debtor's property to secure a debt honestly due, without reservation of benefit to the grantors. *Gazzam v. Poyntz*, 4 Ala. 374. The deed of assignment made January 25, 1888, by which McNealy & Cureton, the mortgagors, reaffirmed their

assent to the mortgage of November 18, 1887, need not be noticed, as it exerts no influence on the question in hand.

The decree of the chancellor correctly pronounces the mortgage free from all fraudulent intent, and legally valid, and is affirmed.

NOTE.—The leading case upon the subject involved in the principal case is *Robinson v. Elliott*.¹ In that case the Supreme Court of the United States, following what was supposed to be the rule in Indiana, where the cause arose, gave unqualified approval to the doctrine that a chattel mortgage providing that the mortgagor shall retain possession of the mortgaged property, with power to dispose of it in the usual course of trade, is void as to creditors. In a very recent case, however, the same court held that such a mortgage could not be said to be invalid as a matter of law.² But the opinion of Mr. Justice Harlan expressly bases the decision on the statutes of Michigan and the decisions of the supreme court of that State, as the controversy arose there. The statements of Mr. Justice Davis, in the case of *Robinson v. Elliott*, approving the contrary doctrine as just and reasonable, were not criticised, and it is, perhaps, reasonable to presume that the Supreme Court of the United States, if untrammelled by the decisions of the State courts, would hold a mortgage giving the mortgagor the right to retain possession and sell the property for his own benefit, invalid as a matter of law.

Few questions have been more discussed, and the decision in the case of *Robinson v. Elliott* soon brought forth a heated controversy, Mr. Jones leading the attack upon the doctrine therein approved and Mr. Pierce earnestly defending it.³ The leading case in opposition to the rule declared in *Robinson v. Elliott* seems to be *Brett v. Carter*,⁴ decided by Judge Lowell, of the United States District Court for Massachusetts. The principal reasons given by Judge Lowell and others in support of their views are that fraud is never presumed, but is to be determined from the evidence as a fact; that it is often right and useful that the mortgagor should remain in possession with power to sell, and that if such mortgages are to be held conclusively fraudulent as matter of law merely because the mortgagor is to retain his possession, the main object of the registry laws will be defeated. Many authorities may be cited in support of the rule laid down in *Brett v. Carter*, that such mortgages are, at the most, no more than *prima facie* fraudulent,⁵ while about an equal number may be

¹ 22 Wall. 513.

² *People's Sav. Bank v. Bates*, 7 Sup. Ct. Rep. 679.

³ "Fraudulent Mortgages of Merchandise," by L. A. Jones, 5 South. L. Rev. (N. S.) 617; "A Reply," by Mr. Pierce, 6 South. L. Rev. (N. S.) 96; "Frauds in Chattel Mortgages," by Mr. Jones, 7 South. L. Rev. (N. S.) 95. See also "Fraudulent Mortgages of Merchandise," 10 Cent. L. J. 281; "Possession as Evidence of Fraud," 11 Cent. L. J. 21; "Chattel Mortgage," 17 Cent. L. J. 222.

⁴ 3 Cent. L. J. 286, 2 Lowell, 458.

⁵ *Hughes v. Cory*, 20 Iowa, 399; *Gay v. Bidwell*, 7 Mich. 519; *Fletcher v. Powers*, 131 Mass. 333; *Sleeper v. Chapman*, 121 Mass. 401; *Lister v. Simpson*, 38 N. J. Eq. 428; *Miller v. Pancoast*, 29 N. J. L. 250; *Hedman v. Anderson*, 6 Neb. 392; *Turner v. Killian*, 12 Neb. 560; *Ross v. Wilson*, 7 Bush (Ky.), 29; *Vanmeter v. Estill*, 78 Ky. 456; *Stedman v. Vickery*, 41 Me. 182; *Frankhouser v. Ellett*, 23 Kan. 127, 81 Am. Rep. 171; *Munic. Nat. Bank v. Brown*, 112 Ind. 474; 14 N. E. Rep. 588; *New v. Sailors*, 16 N. E. Rep. 600; *Williams v. Winsor*, 12 R. I. 9; *Hirshkind v. Israel*, 18 S.

cited as upholding the doctrine of *Robinson v. Elliott*, that they are conclusively fraudulent as matter of law.⁶

It is said that, "whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle;"⁷ but in Alabama, a mortgage authorizing the mortgagor to retain possession and sell the goods, was held invalid, notwithstanding a parol agreement that the proceeds should be applied for the benefit of the mortgagee,⁸ while in the principal case, the same court held such an agreement, when written in the mortgage, sufficient to render the mortgage valid. In Mississippi, it is held that where a mortgage does not expressly provide that the mortgagor may retain possession and sell the goods, the mere fact that the mortgagee permits him to do so, will not render the mortgage void *per se*,⁹ although an agreement *aliunde* permitting the mortgagor to retain possession and sell the goods, may render the mortgage fraudulent in fact.¹⁰ A similar distinction is also made in Missouri.¹¹

From the authorities already cited it will be seen that the State courts are about equally divided upon the general subject under consideration. The following seem to hold that possession by the mortgagor, with power to dispose of the mortgaged property, does not make the mortgage invalid *per se*, but is, at the most, only *prima facie* evidence of fraud, which is a question of fact for the jury, in ordinary cases: Arkansas, Dakota, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nebraska, Nebraska, New Jersey, North Carolina, Rhode Island, South Carolina and Wyoming Territory. The courts of the following States and Territories have held such mortgages fraudulent *per se* and invalid as a matter of law: Alabama, Colorado, Illinois, Minnesota, Mississippi, Missouri, Montana Territory, New Hampshire, New York, Ohio, Oregon, Tennessee, Texas, Washington Territory, Virginia and Wisconsin.¹² It will be observed, however, that the Supreme Court of Alabama, which is placed in the latter class, holds in the principal case that a mortgage authorizing the mortgagor to continue in possession is not invalid, in the absence of proof of actual fraud, where it provides that the proceeds arising from sales

made by him shall be applied exclusively to the benefit of the mortgagee. And such is the rule in New York,¹³ although the courts of that State have steadily supported the doctrine that possession by the mortgagor renders a mortgage invalid as matter of law in ordinary cases. This would seem, therefore, to constitute a well defined exception to the rule laid down by those courts in which possession by the mortgagor is held sufficient to render a chattel mortgage void *per se*.

Much may be said upon both sides of the general question, but the writer is inclined to agree in the conclusion of Mr. Jones, namely: "That the doctrine of absolute fraud arising in a mortgage of merchandise from the mortgagor's retaining possession, with a power of disposal in the usual course of trade, is not supported by any preponderance of authority; that it is contrary to sound principles of jurisprudence; that it has no reason for its existence, derived from general observation and experience, and that it is contrary to sound policy."¹⁴ W. F. ELLIOTT.

¹³ *Brackett v. Harvey*, 17 Cent. L. J. 112, 91 N. Y. 221. See also *Wilson v. Sullivan*, 58 N. H. 260; *Hawkins v. Hasting Bank*, 1 Dillon, 462; *Marks v. Hill*, 15 Gratt. 400; *Abbott v. Goodwin*, 20 Me. 408; *Crow v. Red River Co. Bank*, 52 Tex. 362; *Goodheart v. Johnson*, 88 Ill. 58; *Bannon v. Bowler*, 84 Minn. 416.

¹⁴ *Jones on Chattel Mortgages*, § 423.

JETSAM AND FLOTSAM.

THOSE who wish to learn something about the administration of justice on the other side of the Atlantic cannot do better than read Professor Bryce's excellent book on America. The chapter on the State judiciary is especially interesting to lawyers. The differences between the powers of an English and American judge are very remarkable. According to that learned writer, an American judge "is not allowed to charge the jury on questions of fact, but only to state the law. He is sometimes required to put his charge in writing. His power of committing for contempt of court is often restricted. Express rules forbid him to sit in causes wherein he can have any family or pecuniary interest. In one constitution his punctual attendance is enforced by the provision that if he does not arrive in court within half an hour of the time fixed for the sitting, the attorneys of the parties may agree on some person to act as judge and proceed forthwith to the trial of the cause. And in California he is not allowed to draw his salary till he has made an affidavit that no cause that has been submitted for decision for ninety days remains undecided in this court." We learn from a note appended to this statement, that "the Californian judges are said to have contrived to evade this." The salaries paid to State judges of the higher courts range from one to two thousand pounds; in most States they are elected by the people, and they hold office for a short term of years. It is therefore not surprising that the States fail to secure the best legal talent for the bench, and that it is necessary to impose restriction upon the judges which would be thought degrading in this country.—*Law Times*.

THE LIABILITY OF A MASTER FOR THE UNAUTHORIZED ACTS OF HIS SERVANT.—The law of liability to strangers of a master for the act of his servant is so bare of clear definition that lawyers will be thankful to the Lord Chief Justice for his distinction of the case of *Ruddemann & Co. v. Smith*, decided in the Queen's

C. 157; *Cheatham v. Hawkins*, 76 N. C. 325; *Morse v. Riblet*, 22 Fed. Rep. 501; *Kreth v. Rogers* (N. C.), 7 S. E. Rep. 682; *Rosenberg v. Thompson* (Ky.), 8 S. W. Rep. 895.

⁶ *PHELPS v. MURRAY*, 4 Cent. L. J. 583, 2 Tenn. Ch. 746; *Blakeslee v. Bossman*, 6 Cent. L. J. 289; *Steinart v. Denster*, 23 Wis. 136; *Putnam v. Osgood*, 51 N. H. 192; *Coburn v. Pickering*, 3 N. H. 415; *Leopold v. Silverman*, 16 Pac. Rep. 580; *Griswold v. Sheldon*, 4 N. Y. 581; *Southard v. Benner*, 72 N. Y. 424; *Horton v. Williams*, 21 Minn. 187; *Joseph v. Levi*, 58 Miss. 845; *Addington v. Etheridge*, 12 Gratt. 486; *Simmons v. Jenkins*, 76 Ill. 479; *Dunning v. Mead*, 90 Ill. 379; *City Nat. Bank v. Goodrich*, 3 Colo. 139; *Catlin v. Currier*, 1 Sawyer, 7; *Weber v. Armstrong*, 70 Mo. 217; *Scott v. Alford*, 53 Tex. 82; *Wells v. Langbein*, 20 Fed. Rep. 183; *Orton v. Orton*, 7 Oreg. 478.

⁷ *Per Allen, J.*, in *Southard v. Benner*, 72 N. Y. 482. See also *Walt on Fraud*, Conv. § 350; *Gauss v. Doyle*, 46 Ark. 122; *In re Kahley*, 2 Biss. 383.

⁸ *Owens v. Hobbie*, 82 Ala. 466, 3 South. Rep. 145.

⁹ *Hitchler v. Citizens' Bank*, 63 Miss. 403; *Britton v. Oriswell*, 63 Miss. 394.

¹⁰ *Britton v. Oriswell*, 63 Miss. 394.

¹¹ *Bullene v. Barrett*, 87 Mo. 185; *Thompson v. Foerestel*, 10 Mo. App. 290; *Weber v. Armstrong*, 70 Mo. 217; *Hewson v. Tootle*, 72 Mo. 632. See also *Fiske v. Hershaw*, 45 Wis. 655, 8 Cent. L. J. 159; *Frost v. Warren*, 42 N. Y. 204; *Gardner v. McEwen*, 19 N. Y. 123.

¹² This is the classification made by Mr. Jones, after a careful review of the authorities: *Jones on Chattel Mortgages* (3d ed.), § 415.

Bench Division on Monday, from the well known case of *Stevens v. Woodward*, 50 Law J. Rep. Q. B. 231. Both these cases dealt with the not uncommon incident in modern domestic life of a tap being turned on upstairs to the injury of a neighbor underneath. In *Stevens v. Woodward* the source of the overflow was a solicitor's office, and its receptacle the books of a law publisher. The motive power was the finger and thumb of a solicitor's clerk, who, contrary to express injunctions, had washed his hands in his employer's room. The difference in *Ruddeman v. Smith* was that the offending tap was lawfully opened in a lavatory intended for the use of the clerk, who turned it on and forgot to turn it off. The Chief Justice held it unnecessary to decide the thorny question whether attention to personal cleanliness in a city clerk is within the scope of his employment, but held it enough that the act done was incidental to the employment. With both these propositions all will agree. To wash the hands is a necessary incident of the employment of a clerk in the murky atmosphere of the city. It is, as the Lord Chief Justice pointed out, according to the demands of the decencies of life, and the master who employs clerks and provides them with a lavatory, as he has the benefit of being served clean-handed, must submit to the liability for their carelessness in the process of ablution.—*The Law Journal*.

JUSTICE GRAY, by the way, is a splendid specimen of manhood. He looks precisely like one of those English clergyman that Anthony Trollope delighted to depict in his innumerable novels. He must be fully six feet four, weighs probably two hundred and fifty pounds, has a clear ruddy complexion, dark hair (what there is of it), blue eyes, no beard or mustache, and only spare whiskers, worn in the English style. Justice Gray has some peculiarities, both in dress and manner. He has been an almost constant resident of Washington since he took his seat upon the bench in 1825, but winter or summer, he has not been seen without an irreproachable white cravat. In the winter time he is given to wearing a very long overcoat of the sackcoat style, which comes almost to his heels, and the soles of his shoes are of enormous thickness. The justice is an inveterate pedestrian, and if the weather will permit, he walks from his house to the capitol, and generally alone. Although he is now sixty years old, and has been for twenty years upon the bench, either of his native State (Massachusetts) or of the supreme court, Justice Gray does not look a day over forty-five. With his excellent health, robust constitution and temperate habits, he no doubt has many years of active usefulness before him.—*Correspondence Albany Times*.

QUERIES ANSWERED.

QUERY NO. 17.

[To be found in Vol. 28, Cent. L. J., p. 344.]

C certainly takes subject to an incumbrance of \$10,000 and no more. There is then \$10,000 to be divided between A and B. In the absence of a hide bound statute, the proportion must be determined by the relative merits of their equities. If notice only be the test A must prevail. If negligence only be the test B must prevail. Other circumstances and relations necessarily existing and not stated in the query must exert a controlling influence. Question must be determined upon all the facts. J. K. D.

OTHER ANSWERS.

To the Editor of the Central Law Journal:

I am not satisfied with the answers to Query No. 17,

Vol. 28, page 344, as they appear in same volume, page 386. 1. Answers 1st and 2d disagree, and No. 1 cites an Ohio case, while No. 2 says an Ohio statute regulates it, and cites a case in the next earlier volume of reports to the one cited in answer No. 1. Which is wrong? I have not the reports. 2. A. D., in No. 3, appears to settle the question, and I have looked for several weeks for someone to show the lack of soundness in his conclusions. I cannot do so better than to give two answers to the original question: I. As between A and B, A would be entitled to the first \$10,000, as between A and C, A would be entitled to the second \$10,000, and so A would have to be paid in any event as between B and C, B would have the priority and would get the second \$10,000, so C would get nothing. II. As between A and C, C would be entitled to the first \$10,000, and as between B and C, C would be entitled to the second \$10,000, and would have to be paid in any event. As between A and B, A would have the priority, and would receive the remaining \$10,000 and B would get nothing. I will be much obliged to A D if he will show me wherein either of my answers is not as conclusive as his.

Respectfully yours,
W. H. W.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATORS — Appeal. — An administrator can appeal from an order of the probate court revoking his letters, but is not entitled to a stay of proceedings in the probate court, without giving bond therefor, notwithstanding Comp. Laws N. Mex. § 563.—*In re Henriquez*, N. Mex., 21 Pac. Rep. 80.

2. ADOPTION — Jurisdiction. — To give a decree of

the county court adopting a child any validity, such court must have acquired jurisdiction (1) over the parties seeking to adopt such child, (2) over the child to be adopted, and (3) over the parents of such child.—*Ferguson v. Jones*, Oreg., 20 Pac. Rep. 842.

3. ANIMALS—Trespassing Cattle.—In Colorado, the owner of crops cannot recover damages done thereto by trespassing cattle, unless such crops are at the time of the trespass inclosed by good and sufficient fences.—*Nuckolls v. Gaut*, Colo., 21 Pac. Rep. 41.

4. ATTACHMENT.—Under Comp. Laws N. M. § 1923, providing for attachment, it is not a sufficient ground for an attachment that a debtor is about to make an assignment of property, the effect of which will be to delay creditors, where the delay caused is not unreasonable, and the debtor is acting in good faith.—*Tortina v. Troricht*, N. Mex., 21 Pac. Rep. 68.

5. ATTACHMENT—Fraudulent Mortgage.—Where a debtor mortgages his personal property for the purpose of hindering and delaying his creditors, such act is sufficient to justify the issuance of an attachment against the debtor; and it is no defense for him to show that a short time before the attachment he caused such fraudulent mortgage to be released, where it is further shown that immediately upon such release, and upon suspicious circumstances, the mortgaged property was remortgaged to other parties.—*Buford & George Implement Co. v. McWhorter*, Kan., 21 Pac. Rep. 86.

6. ATTACHMENT—Federal Courts.—Under Rev. St. U. S. § 915, proceedings in an action in which an attachment has been levied will be stayed where insolvency proceedings against the debtor are instituted in the State courts, as otherwise the plaintiff would acquire an undue advantage over the State creditors, which is contrary to the intent of the statute.—*Neufeld v. Neufeld*, U. S. C. C. (Cal.), 37 Fed. Rep. 560.

7. ATTORNEY—Limitation.—The petition for the disbarment of an attorney alleged, as grounds, failure to maintain the respect due the court, defending an unjust cause, employing means of defense inconsistent with truth, and misleading the court by artifice and falsehood. Such charges are not barred by statute of limitations.—*In re Lowenthal*, Cal., 21 Pac. Rep. 7.

8. BAILMENT—Mixing Grain.—A warehouseman received wheat from farmers, and stored it in his warehouse, giving receipts for it. There was no agreement that the wheat should be mixed with other wheat, or that the warehouseman might sell, ship, or consume it. When it was stored, the warehouseman mixed it with wheat of his own, of the same grade and quality, and sold from the common mass, but never more than his own quantity, always reserving enough to return to the depositors their proper quantity: *Held*, the transaction with each depositor constituted a bailment, and not a sale. The title of the depositors to their wheat was not extinguished, or transferred to the warehouseman, by mixing it with other wheat belonging to him.—*Odell v. Leyda*, Ohio, 20 N. E. Rep. 474.

9. BANKS AND BANKING—Collections.—A draft on plaintiff bank, which had been fraudulently altered, was received by the E bank for collection only, and was indorsed and forwarded by it to defendant for collection for its account. The amount of the draft was credited by defendant to the E bank and was afterwards paid by plaintiff to defendant. All sums to the credit of the E bank at the time of payment were paid by defendant to the E Bank before the alteration was discovered: *Held*, that defendant was not liable to plaintiff for the amount thus erroneously paid to it.—*National Park Bank v. Seaboard Bank*, N. Y., 20 N. E. Rep. 632.

10. BANKS AND BANKING—Checks.—The plaintiff, a banking corporation, sent a number of checks to its correspondent, a banking firm at A, for collection; the checks being drawn upon the latter firm. Afterwards, but before the checks were received, the latter firm was dissolved by the death of one of its members. The surviving partner paid the checks by charging them to the accounts of the drawers, and gave credit for the amount thereof to the plaintiff on the books of the

firm: *Held*, that he had no such authority.—*First Nat Bank v. Payne*, Va., 9 S. E. Rep. 153.

11. BONDS—Construction.—Under Code Ala. 1896, § 278, an action upon the bond of a sheriff will lie in favor of one whose property the sheriff has seized under an attachment against another person.—*Albright v. Mills*, Ala., 5 South Rep. 591.

12. CARRIERS—Passengers.—In an action by a passenger on a street railway for injuries sustained from the negligent and sudden starting of a street-car, an instruction that in the transportation of passengers the defendant must exercise the utmost human foresight, skill, and care states the degree of care required of the defendant too broadly.—*Dougherty v. Missouri R. Co.*, Mo., 11 S. W. Rep. 251.

13. CARRIERS—Burden of Proof.—On a libel for damage to butterine during transportation, respondent has the burden of proving defective cooerage of the tubs containing it, or its nature or quality, and the action of the weather upon it, from which respondent alleges the damage resulted.—*Western Manuf'g Co. v. The Guiding Star*, U. S. C. C. (Ohio), 37 Fed. Rep. 641.

14. CARRIERS—Express Companies.—Where an express company made no inquiries of the sender as to the value of the article shipped, and it was lost by the company's negligence, the fact that the sender inserted in the printed form of receipt the name of the consignee and place of delivery did not estop him to recover the full value of the article, though its receipt contained a stipulation limiting the company's liability.—*Adams Exp. Co. v. Hoeing*, Ky., 11 S. W. Rep. 206.

15. CONTEMPT—Punishment.—One undergoing imprisonment for contempt is not "a prisoner convicted of an offense against the laws of the United States," within the meaning of the act of Congress, March 3, 1875, which allows to such a prisoner a deduction of five days in each calendar month during which no charge of misconduct has been sustained against him.—*In re Terry*, U. S. C. C. (Cal.), 37 Fed. Rep. 649.

16. CONTRACTS—Validity—Public Policy.—Where goods were about to be sold by an administrator by order of the court, to the highest and best bidder, and a bid had been made by T, a contract by which the defendant agreed to pay a sum of money to T if he would withdraw his bid, so that the defendant might purchase the goods at a less sum than that bid by T, is not enforceable.—*Goldman v. Oppenheim*, Ind., 20 N. E. Rep. 635.

17. CONTRACT—Condition Precedent.—Application of the rule that action on contract cannot be maintained before performance of a condition precedent unless condition has become impossible or its performance defeated by act of defendant.—*Sullivan v. Susing*, S. Car., 9 S. E. Rep. 156.

18. CORPORATIONS—Easements.—Under Gen. St. Colo. § 240, the right of way of a ditch company does not cease with the expiration of its charter, but, having previously been conveyed, its grantee may thereafter continue the use of the same.—*Bailey v. Platte & Denver Canal & Milling Co.*, Colo., 21 Pac. Rep. 35.

19. COUNTIES—Election.—Where a county board calls a special election in a township of the county, for the purpose of voting upon a proposition for the issuance of the bonds of such township in aid of the construction of a railroad, and gives notice of the election in a newspaper published in the county: *Held*, that the county was liable for the expenses of publishing the notice for the special election.—*Kearney County v. Stein*, Neb., 41 N. W. Rep. 1071.

20. COUNTIES—Commissioners.—The board of commissioners of a county having power to contract for the removal of county buildings to a new site, and for their reconstruction thereon, or to sell the old buildings and erect new ones upon the new site, the courts cannot interfere with or question their action in the absence of such an abuse of discretion as amounts to fraud, though they may have acted unwisely, and contrary to the wishes of tax payers.—*Crow v. Board of Commissioners*, Ind., 20 N. E. Rep. 642.

21. **COUNTIES—Indebtedness.** — The word "indebtedness," used in a statute creating a new county out of portions of others, and imposing on it proportionate liability for the existing indebtedness of the old counties, includes bonded indebtedness. — *Sierra County v. Dona Ana County*, N. Mex., 21 Pac. Rep. 83.

22. **COUNTIES — Officers.** — When the term of an elective county office, to which a person has been elected for the entire term, has commenced, and there is a vacancy in the office on account of the failure of the person elected to give bond and qualify as required by § 7, art. 8, of the constitution, the governor may fill the vacancy by appointment. — *Vacancies in Elective County Offices*, Fla., 5 South. Rep. 618.

23. **COUNTIES—Warrants.** — In order to defeat an action on county warrants, by invoking Const. Mo. art. 10, § 13, providing that "no county shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters," etc., it is not sufficient to show merely that during the years in which the warrants sued on were issued the expenditures exceeded the county revenues for those years, but it must be shown, in addition, that the limit had been reached before the indebtedness was incurred for which the warrants were issued. — *Geo. D. Barnard & Co. v. Knox County*, U. S. C. C. (Mo.), 37 Fed. Rep. 563.

24. **COUNTIES—Bond of Treasurer.** — Where a surety upon a county treasurer's bond appeared before the commissioners' court with the treasurer, and made application for release under Rev. St. Tex. art. 3483, and the treasurer proceeded immediately to file a new bond, the sureties upon the latter bond cannot complain because the statutory notice had not been served. — *Kempner v. Galveston County*, Tex., 11 S. W. Rep. 188.

25. **CRIMINAL LAW—Evidence.** — That another person, also under indictment for the same offense, has admitted that he was the guilty party, is not evidence in favor of the accused on trial. — *Kelly v. State*, Ga., 9 S. E. Rep. 171.

26. **CRIMINAL LAW — Plea.** — A plea that defendant has been held for trial for more than four terms after the indictment was found is unavailing where he was convicted during that time, and the conviction was reversed, as he was held till reversal for punishment, and not for trial. — *Smith v. Commonwealth*, Va., 9 S. E. Rep. 148.

27. **CRIMINAL LAW — Burglary.** — A cellar under a dwelling house, though entered only from the outside, is within the statute as to burglary. — *Mitchell v. Commonwealth*, Ky., 11 S. W. Rep. 209.

28. **CRIMINAL LAW—Intoxicating Liquors.** — The sale of liquors contrary to the provisions of the act of 1887, for the enforcement of the nineteenth, or local option, article of the constitution, is a misdemeanor, and a judgment of conviction thereof, rendered by a criminal court of record, is subject to be reviewed by the circuit court. — *State v. Butt*, Fla., 5 South. Rep. 597.

29. **CRIMINAL LAW—Larceny.** — Defendant's lessor sold him two calves, the title in them to remain in the lessor until they were paid for. A dispute arose as to the debt, and the lessor broke open defendant's corn-crib, and appropriated the corn, whereupon defendant, after consultation with an attorney, openly, and in the day-time, sold the calves: Held, that he was not guilty of larceny. — *Buchanan v. State*, Miss., 5 South. Rep. 617.

30. **CRIMINAL LAW — Forgery.** — Defendant is not guilty of forging tax receipts (alleged to have been forged by him) which receipts, if true, could not injure or defraud, either the State, county or other person. — *Cox v. State*, Miss., 5 South. Rep. 618.

31. **CRIMINAL LAW—Murder.** — Under the Montana statute defining murder in the first degree, a charge in an indictment that defendant feloniously, willfully, etc., assaulted E, and feloniously, willfully, and of his deliberately premeditated malice aforethought inflicted upon E a mortal injury or a mortal sickness of which E

died, is not defective as failing to charge an intent to kill. — *Territory v. Godas*, Mont., 21 Pac. Rep. 26.

32. **CRIMINAL LAW—Habeas Corpus.** — A writ of error does not lie in a suit of the State to review a judgment in habeas corpus proceedings discharging from imprisonment one who has been convicted of a crime, and it is immaterial whether the court rendering such judgment issued the writ of habeas corpus in the first instance, or whether it adjudicated the matter on certiorari to an inferior court. — *State v. Grottkau*, Wis., 41 N. W. Rep. 1063.

33. **CRIMINAL PROSECUTION — Limitations.** — In a criminal case, when the statute of limitations may be interposed, the prosecution may show on the trial that defendant comes within the exception to the statute, without an averment in the indictment of the facts relied upon to toll the statute. — *Blackman v. Commonwealth*, Penn., 17 Atl. Rep. 194.

34. **DEDICATION.** — The vital principle of a common-law dedication of land for public use is the intention, which must be unequivocally manifested, and clearly and satisfactorily appear. — *Village of White Bear v. Stewart*, Minn., 41 N. W. Rep. 1045.

35. **DEED.** — A deed to real property cannot be invalidated by parol evidence showing that there was no consideration for its execution, when it contains a recital that a consideration had been received by the grantor. — *Finlayson v. Finlayson*, Oreg., 21 Pac. Rep. 57.

36. **DEED—Description.** — The settled rule is that a deed will not be pronounced void for uncertainty of description, if by the aid of parol evidence of extrinsic facts the land intended to be conveyed can be located. — *Dorgan v. Weeks*, Ala., 5 South. Rep. 581.

37. **DISTRIBUTION.** — An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for, unless he gave a bond, with approved sureties, to pay the same. — *Alexander v. Alexander*, Neb., 41 N. W. Rep. 1065.

38. **DURESS—Levy of Void Tax.** — Where a tax assessment upon land is void, because the property has not been described in the assessment roll, the tax collector's levy and threat to sell to satisfy the tax do not constitute duress. — *Cooper v. Chamberlain*, Cal., 21 Pac. Rep. 14.

39. **EJECTMENT—Mortgage.** — Where the evidence in ejectment shows that the deed, absolute on its face, under which plaintiff claims, was in fact given to secure a debt, and is therefore merely a mortgage, he has failed to show either title or right of possession. — *Smith v. Smith*, Cal., 21 Pac. Rep. 4.

40. **EMINENT DOMAIN—Principal and Surety.** — Code Civil Proc. Cal. 1872, § 1254, relating to proceedings in eminent domain, authorizes the plaintiff to take possession, pending the proceedings upon the execution of a bond, etc.: Held, that it is not necessary to make a demand on the principal in order to maintain an action against the sureties on such bond. — *Coburn v. Brooks*, Cal., 21 Pac. Rep. 2.

41. **EQUITY.** — When a debtor's property is subject to be lawfully sold under judicial process, and it is sold in an illegal manner, the sale may be held void; yet if the debtor sue to recover the property, he can only succeed by offering to pay the purchase money which has gone to extinguish his debt. — *Galveston, H. & S. A. Ry. Co. v. Blakeney*, Tex., 11 S. W. Rep. 174.

42. **EQUITY—Mistake.** — Where the grantor in a deed seeks to have the description reformed so as to cover a smaller quantity of land, the evidence must show beyond reasonable controversy that the mistake alleged was mutual. — *Andrews v. Andrews*, Me., 17 Atl. Rep. 166.

43. **EVIDENCE—Production of Papers.** — Where the adverse party or his counsel has a letter with him in court, he may be called on to produce it, without previous notice, and, in the event of his refusing, the opposite party may give secondary evidence. — *Overlook v. Hall*, Me., 17 Atl. Rep. 169.

44. **EVIDENCE—Mortgage.**—The evidence of a subscribing witness to a mortgage, based on an examination of the record of such mortgage, and tending to prove that a copy of the instrument annexed to his interrogatories corresponds with the record, is not admissible as against the mortgagees, without first accounting for the original.—*Solomon v. Creech*, Ga., 9 S. E. Rep. 165.

45. **GARNISHMENT—Lien.**—Under Rev. St. Tex. arts. 181, 196, a claim for house rent which accrued in favor of a principal debtor from the garnishee between the service of the writ of garnishment and the date of the answer of the garnishee could not be assigned by the debtor as against the plaintiff.—*Gause v. Cone*, Tex., 11 S. W. Rep. 162.

46. **GUARDIAN AND WARD.**—Under Code Civil Proc. Cal. § 1747, relating to the appointment of a guardian for an infant, the appearance by petition of the mother of the minor, in whose care the minor was, and of all the relatives to whom notice would be requisite, by their written consent filed in the cause, is proof that they all had notice of what was in progress, and waived any more formal notice.—*Smith v. Biscailuz*, Cal., 21 Pac. Rep. 15.

47. **HIGHWAYS.**—By appealing from the award of damages in highway proceedings, the land-owner waives all question as to the regularity of their assessment by the supervisors.—*State v. Harland*, Wis., 41 N. W. Rep. 1060.

48. **HIGHWAYS—Dedication.**—Where the owner of land has dedicated it as a public street, and conveyed lots as bounded by it, he cannot afterwards exclude the public from using it, or demand compensation for the land, though there has been no formal acceptance by the authorities.—*Harrison County v. Seal*, Miss., 5 South. Rep. 622.

49. **HOMESTEAD—Exemption.**—Where the purchaser of a homestead pays the purchase price, and obtains a title bond and possession, such person, in order to defeat an alleged prior judgment lien against the property, may show, that at the date of his purchase the property was occupied by the grantor and his family as a homestead.—*Ellwell v. Hitchcock*, Kan., 21 Pac. Rep. 109.

50. **HUSBAND AND WIFE—Conveyances.**—The courts of Tennessee will enforce the liability of a married woman domiciled in Kentucky, on a note payable in that State, and executed by her there as surety for her husband, after she had been emancipated according to the laws of that State from all the disabilities of coverture, and clothed with all the powers of a *feme sole*, so far as the right to contract and to sue and to be sued was concerned.—*Roberson v. Queen*, Tenn., 11 S. W. Rep. 38.

51. **HUSBAND AND WIFE—Wife's Separate Estate.**—A husband, with the knowledge and consent of his wife, receives the proceeds of the sale of her realty, gives her no note or written obligation to repay it, mingles it with his means, uses it in his business for years, keeps no written account of such moneys, then becomes insolvent, and some eight or ten years after his receipt of the money purchases real estate in the name of his wife, and it is alleged by him and her that it was paid for with the money so received, and before such purchase a judgment is rendered against him for a debt. The lot is liable to the judgment.—*Kanawha Valley Bank v. Atkinson*, W. Va., 9 S. E. Rep. 175.

52. **HUSBAND AND WIFE—Community Property.**—Where a husband, unknown to the wife indorsed notes belonging to her and delivered them as collateral security: *Held*, that while property acquired by the wife during coverture is presumptively community estate, and a sale or mortgage thereof for valuable consideration by the husband to one ignorant of the wife's individual rights is valid, the pledgees being ignorant of the relationship, could not have given credit in reliance on that presumption and could not, therefore, be protected by it.—*Kempner v. Comer*, Tex., 11 S. W. Rep. 194.

53. **INJUNCTION—Trespass.**—Equity will enjoin the erection of a fence the effect of which would be to

entirely close the windows of plaintiff's house excluding both light and air and rendering the house unfit for habitation.—*Sankey v. St. Mary's Female Academy*, Mont., 21 Pac. Rep. 23.

54. **INSURANCE—Mutual Benefit Society.**—*Held*, that a change of plan on the part of a benefit insurance society was within the scope of defendant's powers and not a violation of the contract with plaintiff.—*Supreme Lodge v. Knight*, Ind., 30 N. E. Rep. 479.

55. **INTERSTATE COMMERCE ACT.**—The offense of "unjust discrimination," under § 2, of the interstate commerce act (24 U. S. St. at Large, p. 879), is not confined to discrimination by means of some device, as by a special rate, rebate, or drawback, but is committed by directly giving different rates to different persons.—*United States v. Tozer*, U. S. D. C. (Mo.), 37 Fed. Rep. 636.

56. **JOINT TENANCY—Adverse Possession.**—The doctrine that a purchase of an outstanding title by one joint tenant will be held to be for the benefit of his co-tenants, and not adverse to them, has no application to a case where the tenant buys the interest of his co-tenants at a public sale, and thereby obtains, or attempts and claims to obtain, their title.—*Peck v. Lockridge*, Mo., 11 S. W. Rep. 246.

57. **JUDGMENT.**—On a bill to review a judgment for error apparent on the record, no question can be made as to the correctness of an entry of default, unless the record shows that a motion to set aside the default was made and overruled, and an exception taken.—*Baker v. Ludlam*, Ind., 20 N. E. Rep. 648.

58. **JUDGMENT—Recitals.**—A recital, in the record of proceedings for the sale of a decedent's lands, that plaintiff, being a non-resident, was notified of the application for the sale, by publication in a newspaper published in the county, is conclusive on collateral inquiry unless falsified by the record itself.—*Goodwin v. Sims*, Ala., 5 South. Rep. 587.

59. **JUSTICES OF THE PEACE—Set-off.**—When a plea of set-off claiming a balance of more than \$200 is tendered in a justice's court, the justice should overrule the plea for want of jurisdiction, and proceed with the trial of plaintiff's demand.—*State v. Neumeyer*, N. J., 17 Atl. Rep. 154.

60. **JUSTICE OF THE PEACE—Jurisdiction.**—The charter of the city of Kansas provided that suits on tax-bills might be brought before the city recorder, "or any justice of the peace in said city, as in other civil cases." The city of Kansas had been, and was at the time of the suit on the tax bill in question, a part of Kaw township, and had no justices of the peace, except the justices elected for the township, who had their offices in the city: *Held*, that such justices were the justices contemplated by the charter.—*Harris v. Hunt*, Mo., 11 S. W. Rep. 236.

61. **LANDLORD AND TENANT—Landlord's Lien.**—A landlord has a lien upon every part of the crop raised upon the leased premises.—*Knowles v. Sell*, Kan., 21 Pac. Rep. 102.

62. **LANDLORD AND TENANT—Rent.**—Where a lessee becomes insane, and a committee is appointed, and his estate is insolvent, the landlord is entitled to the rent accruing on a sublease after, but not before, the time to which the rent on the original lease has been paid.—*Otis v. Conway*, N. Y., 20 N. E. Rep. 628.

63. **LANDLORD AND TENANT—Rent.**—An affidavit for a distress warrant to enforce a landlord's general lien for rent is amendable, under the act of October 5, 1887.—*Bryant v. Mercier*, Ga., 9 S. E. Rep. 166.

64. **LEASES—Reservation.**—A stipulation in a lease of a plantation for a year, with the right to continue two years longer, provided the rent is paid, that the title to the crops shall vest and remain in the landlord until he shall have been fully paid, is not void as to crops grown the last year, as being a sale of things not in esse.—*De Vaughn v. Howell*, Ga., 9 S. E. Rep. 173.

65. **LIBEL—Privileged Communication.**—It is libelous to falsely publish that a certain witness in a case, "whose idea of an oath appeared in yesterday's Times,

was arrested after his evidence was taken, on account of his criminal evidence." and that in default of bail, he was committed to jail, though no particular crime is charged.—*Godshalk v. Metzgar*, Penn., 17 Atl. Rep. 215.

66. LIENS—Priority. — The lien upon a mare prescribed for the benefit of the owner of a jack by Mansf. Dig. § 4408, will not take precedence of a prior recorded mortgage, executed subsequent to the passage of the statute.—*Easter v. Goyme*, Ark., 11 S. W. Rep. 212.

67. LIMITATION OF ACTIONS. — An account due a firm cannot on dissolution of the firm, and assignment of the account to one of its members, be included by him in his individual account against the same debtor, without the latter's consent, so as to avoid the bar of the statute of limitations as to it, under Gen. St. Colo. § 2167, providing that the cause of action in a mutual and open account current shall be deemed to have accrued at the time of the last item. — *King v. Post*, Colo., 21 Pac. Rep. 38.

68. LIMITATION OF ACTIONS. — The defendant, being indebted to plaintiff on accounts, agreed in writing "to waive any and all objections to said accounts which might be brought against them on account of the statute of limitations, and hereby renew the promise to pay whatever balance shall be against us." Held, that it was a new promise against which the statute would run.—*Trask v. Weeks*, Me., 17 Atl. Rep. 162.

69. LIMITATION OF ACTIONS. — The statute of limitations to an action by an heir to set aside a deed of his insane ancestor commences to run at the execution of the deed, and is a complete bar after the lapse of seven years, unless the action is brought within three years after the ancestor's death. — *Ellington v. Ellington*, N. Car., 9 S. E. Rep. 208.

70. MASTER AND SERVANT—Fellow-servant. — The conductor and engineer of a train are not fellow-servants of a trackman injured in collision. — *Northern Pac. R. R. v. O'Brien*, Wash. Ter., 21 Pac. Rep. 82.

71. MASTER AND SERVANT—Enticing Servant. — Under Code Ala. §§ 3757, 3758, making it an offense to entice servant, it is a defense to a prosecution under such statute that the defendant had, prior to the written contract entered into between the prosecuting witness and the laborer, verbally employed the latter for a period which had not expired, although the contract with the defendant was voidable under the statute of frauds, the parties to it electing to treat it as valid. — *Tartt v. State*, Ala., 5 South. Rep. 577.

72. MECHANIC'S LIEN. — Under Rev. St. Mo. § 8176, the statement must be fairly itemized, showing the materials used, the work done, and the price charged; and a statement filed by a principal contractor lumping the contract price on the one side and the credits on the other and referring to certain plans and specifications, is not sufficient. — *Rude v. Mitchell*, Mo., 11 S. W. Rep. 225.

73. MINES AND MINING. — The owner of a placer claim not being required by any law to designate in his application for a patent the particular use or character of his claim, the fact that he designated it in his location as a "placer mining or stone-quarry claim" does not limit him to the stone-quarry found within the claim, but he is entitled to all mineral deposits found therein.—*Freezer v. Sweeney*, Mont., 21 Pac. Rep. 20.

74. MORTGAGES. — Where one has a contract for a conveyance of land to him and procures another to complete the payments for him, and such other person does so and takes the deed in his own name for his advances, the transaction constitutes a mortgage between the parties. — *McPherson v. Hayward*, Me., 17 Atl. Rep. 164.

75. MORTGAGE—Foreclosure. — Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage ought, in pursuance of Rev. St. U. S. § 995, to be deposited with a designated depository of the United States, and the clerk is entitled to his commission thereon.—*Thomas v. Chicago & C. S. Ry. Co.*, U. S. C. C. (Mich.), 87 Fed. Rep. 548.

76. MORTGAGE—Assignment. — Held, under the facts that though there was no clause of defeasance in instrument in dispute and the possession of the property was delivered to the trustee, such instrument must be deemed a mortgage for the security of the creditors named in it, and not an assignment for the benefit of creditors, incurring to the benefit of all the creditors of the grantor.—*Hargardine v. Henderson*, Mo., 11 S. W. Rep. 218.

77. MUNICIPAL CORPORATIONS. — A city contracting for and authorizing the quarrying and disposal of stone from a ledge in a street, and below the grade thereof, for unauthorized purposes, becomes liable to the owner of the soil for the value of the stone as it lay in the ledge.—*Viliski v. City of Minneapolis*, Minn., 41 N. W. Rep. 1050.

78. MUNICIPAL CORPORATIONS—Ordinances. — A municipal ordinance, authorizing the depot marshal, or any police officer, to prescribe the place where omnibuses, hacks, and other vehicles shall stand at a railroad depot while waiting for passengers, and requiring drivers to obey the directions of the police officer with reference thereto, is valid. — *Veneman v. Jones*, Ind., 20 N. E. Rep. 644.

79. MUNICIPAL CORPORATIONS—Que Warranto. — An officer of a *de facto* municipality cannot be ousted, at the instance of a private relator in *quo warranto*, on the ground that such public corporation has no legal existence.—*State v. Vickers*, N. J., 17 Atl. Rep. 153.

80. NEGLIGENCE—Railroad Crossing. — Plaintiffs right to recover barred by his failure to stop, look and listen before crossing track, though company was negligent in failing to have the gates down or watchman present at passing of train. — *Greenwood v. Phil. W. & B. Ry. Co.*, Penn., 17 Atl. Rep. 188.

81. NEGOTIABLE INSTRUMENTS—Indorsement. — A negotiable promissory note payable to "order" must be transferred, by indorsement of the payee thereof, to an innocent holder for value, before maturity, in order to invest the holder with the legal title thereto, and deprive the maker from pleading his equities and defenses.—*Calvin v. Sterrit*, Kan., 21 Pac. Rep. 103.

82. NEGOTIABLE INSTRUMENT—Trustees. — When trustees of an estate under a will indorse a promissory note in their own names, adding thereto the words, "Trustees Estate of," without a stipulation that the trust estate alone should be responsible, they are personally liable upon the indorsement. — *Roger Williams Nat. Bank v. Groton Manufg Co.*, R. I., 17 Atl. Rep. 170.

83. NEGOTIABLE INSTRUMENT—Delivery. — The maker of a negotiable promissory note cannot interpose the defense against an innocent purchaser for value before maturity that the note was not delivered, when he allowed the payee to deposit it in a table drawer in an hotel, to be given to the landlord by his wife, to be held for both parties. — *McCormick v. Holmes*, Kan., 21 Pac. Rep. 108.

84. NEGOTIABLE INSTRUMENTS—Bill of Exchange. — The following instrument: "\$365.74. Moss Point, April 16, 1888. Received on board schooner Robert Delmas, from E. B. Smith, 2,244 barrels of charcoal, for which I promise to pay to the order of John J. Driscoll, at New Orleans, the sum of \$365.74. Louis Cromer, Master,"—is not a bill of exchange, and an action may be maintained thereon against the maker without presenting it in New Orleans for payment. — *Smith v. Cromer*, Miss., 5 South. Rep. 619.

85. NUISANCE—Findings. — Where the findings are contradictory a judgment for defendant cannot stand.—*Learned v. Castle*, Cal., 21 Pac. Rep. 11.

86. NUISANCE—Pollution of Water. — The construction and use of gas-works, the percolations from the refuse of which pollute and make the water in the wells of an adjoining land owner unfit for household purposes, and unfit for the use of stock, is a nuisance, and the party injured thereby is entitled to damages. — *Pensacola Gas Co. v. Pebley*, Fla., 5 South. Rep. 593.

87. NUISANCE—Municipal Corporations. — St. Paul Mun. Code art. 32, p. 41, does not confer upon the council the exclusive jurisdiction to determine what constitutes a nuisance, but only authorizes the abatement of that which is in fact a common nuisance. — *Hennessy v. City of St. Paul*, U. S. C. O. (Minn.), 37 Fed. Rep. 565.

88. PARTIALS—Publication—Decree. — Infants named as defendants to a bill for the sale of their ancestor's land to pay debts, against whom an order of publication is made upon an affidavit of their non residence, must show the falsity of such affidavit in direct proceedings to avoid the decree rendered in the cause, and cannot attack it collaterally. — *Lawson v. Moorman*, Va., 9 S. E. Rep. 150.

89. PARTNERSHIP. — If one who is a member of a copartnership, borrows money on his own account, the credit being given to him, the fact that he afterwards applies the money to the purposes of the firm will not render the latter liable therefor. — *National Bank v. Meader*, Minn., 41 N. W. Rep. 1043.

90. PARTNERSHIP—Exemption. — After dissolution of a firm (but not before it) a partner may, there being no fraud, claim exemption out of the firm property. — *Gowdy v. Werbe*, Ind., 19 N. E. Rep. 764.

91. PARTNERSHIP — Evidence. — In an action to charge defendant as a member of an alleged partnership, evidence that it was a matter of common notoriety that a certain business was carried on in the name of the alleged partnership is not admissible, in the absence of evidence that the debt sued for was contracted because of such notoriety. — *Tanner & Delaney Engine Co. v. Hall*, Ala., 5 South. Rep. 584.

92. PARTNERSHIP. — Plaintiff, a member of a firm, conveyed to his wife his entire interest in the partnership property, except claims due to it, with the consent of the defendant, the other partner: Held, that the partnership interest in the property as between themselves was destroyed, although business was carried on as before. — *Watson v. McKinnon*, Tex., 11 S. W. Rep. 197.

93. PLEADING—Contracts. — Where the law requires a contract to be in writing, an allegation that it was made will be held to imply that it was made in lawful form. — *Stillwell v. Hamm*, Mo., 11 S. W. Rep. 252.

94. PRESUMPTION — Marriage. — A marriage contracted by a woman after the absence of her husband for seven years, under such circumstances as raise the presumption of his death, is void, if he is in fact alive at the time, though she had good reason to believe and did believe, that he was dead. — *Thomas v. Thomas*, Penn., 17 Atl. Rep. 182.

95. PRINCIPAL AND AGENT—Ratification. — The facts held to show ratification by railroad company of conductor's act in employing physician to attend a man injured in accident. — *Terre Haute & I. Ry. Co. v. Stockwell*, Ind., 20 N. E. Rep. 650.

96. PRINCIPAL AND SURETY. — A creditor who, by the same contract, has personal security and a mortgage upon personal property, having, after maturity of the debt, received the mortgaged property, by contract with the principal debtor, in part payment, at more than its full value at the time he received it, may proceed against the surety as well as the principal for the balance of the debt. — *Marshall v. Dixon*, Ga., 9 S. E. Rep. 167.

97. PRINCIPAL AND SURETY. — One who is hired at a fixed compensation to become security on a bond given to procure the release of goods under seizure by a court of equity, is entitled to the stipulated compensation, if his liability attaches upon the bond, and the goods are released, although they may be immediately afterwards seized under other process. — *Blount v. Borne*, Ga., 9 S. E. Rep. 164.

98. PROCESS — Holiday. — A summons in action in this court will not be quashed, nor will its service be set aside, because it was issued, tested, and served by the sheriff on one of the days made legal holidays. — *Glenn v. Eddy*, N. J., 17 Atl. Rep. 145.

99. PUBLIC LANDS — Entries. — An entry upon inclosed and improved land occupied and claimed under a certificate from a railroad company, is not authorized by 23 U. S. St. at Large, 321, forbidding the fencing of public land, or preventing settlement thereon, but the person so entering is a naked trespasser. — *Laurendeau v. Fugelli*, Wash. Ter., 21 Pac. Rep. 29.

100. PUBLIC LANDS—Pre-emption. — Act Cong. June 9, 1890, providing that the affidavit in making final proof in pre-emption claims may be made before the clerk of the county court or of any court of record of county in the State or territory where the lands are situated, does not authorize the oath to be administered before the clerk of the probate court. — *United States v. Hall*, N. Mex., 21 Pac. Rep. 85.

101. PUBLIC LANDS—Water-course. — A mere entry upon public lands gives no vested rights against the government until final proof, and lands thus occupied are subject to the acquisition of prior water-rights under local customs and appropriations up to the time of final proof. — *Ellis v. Pomeroy*, Wash. Ter., 21 Pac. Rep. 27.

102. PUBLIC LANDS — Railroad Grants. — The word "attached," in 13 U. S. St. at Large, 492, (the Union Pacific land grant act,) granting land "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," means the filing of an entry in regular form by a settler. — *McIntyre v. Roeschlaub*, U. S. C. O. (Colo.), 37 Fed. Rep. 556.

103. QUIETING TITLE — Possession. — The general rule is that a party whose title to land is legal in its character must have possession of the land to entitle him to equitable relief against a cloud upon his title. Possession is not essential where the title is equitable. — *Sloan v. Sloan*, Fla., 5 South. Rep. 603.

104. RAILROAD COMPANIES—Signal-Injuries. — Failure of railroad employees to ring the bell or sound the whistle when approaching a railroad crossing, as required by statute, comes within the first clause of Rev. St. Mo. § 2121, imposing a penalty on a railroad company for a death resulting from negligence, unskillfulness, etc., of the servant while running locomotives, etc. — *Crumpley v. Hannibal & St. J. R. Co.*, Mo., 11 S. W. Rep. 244.

105. RAILROAD COMPANIES—Damages. — The doctrine that there can be no compensation for injury to property unaccompanied with negligence, arising from the operation as distinguished from the construction of a railroad lawfully occupying a street, when no property is taken from plaintiff, and no change made in the grade of the street in front of the premises, does not apply to a case in which the track is laid so close to the premises as to entirely cut off, or to render dangerous, all access to them. — *Pennsylvania S. V. R. Co. v. Walsh*, Penn., 17 Atl. Rep. 186.

106. RAILROAD COMPANIES—Fire. — Question of remote and probable cause applied to a fire alleged to have been started by a locomotive. — *Pielke v. C. M. & St. Paul Ry. Co.*, Dak., 41 N. W. Rep. 670.

107. RAILROAD COMPANIES — Accidents at Crossings. — The statutory diligence required touching the use of the bell or whistle, and touching checking of trains, on approaching public crossings, is exacted primarily for the benefit of persons crossing the track, and not for those walking along it, yet relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence to be considered by the jury. — *Central Railroad v. Ratford*, Ga., 9 S. E. Rep. 169.

108. RECOGNIZANCE — Surety. — The surety on a recognizance for appearance at a preliminary examination for crime is not discharged by the fact that the sheriff took the prisoner, at the latter's request, to another county, to enable him to obtain bondmen, as the surety must be held to have known of the irregularity when he signed the recognizance, which showed that the arrest was made in another county. — *Haney v. People*, Colo., 21 Pac. Rep. 33.

109. REMOVAL OF CAUSES—Criminal Actions.—Act Iowa, April 5, 1888, § 27, entitled "An act to regulate railroad corporations," being of a criminal nature, action under it is not removable under act Cong. March 3, 1887, § 2, which provides "that any suit of a civil nature, at law or in equity, may be removed."—*State v. Chicago B. & Q. R. Co.*, U. S. C. O. (Iowa), 37 Fed. Rep. 497.

110. REMOVAL OF CAUSES—Application.—Under the act of March 3, 1887, § 8, requiring the application for removal to be made at the time, or at any time before, the defendant is required to answer or plead, it is not too late to make the application after a motion to take the bill from the files and a demurrer to the bill have been disposed of.—*Tennessee v. Waller*, U. S. C. C. (Tenn.), 37 Fed. Rep. 545.

111. REPLEVIN—Bond.—In an action on a replevin bond, it cannot be set up that the judgment in the replevin suit was erroneous in deciding the question of ownership, when only that of possession was at issue.—*Binggenberg v. Hartman*, Ind., 20 N. E. Rep. 637.

112. SALE—Contract.—After the burning of a grain elevator, the warehouseman sold the "whole mass" of grain upon the premises, and which had been partially destroyed by the fire, with the condition that the purchasers should remove the same within thirty days. Contract constructed as a sale and purchase of an option to take away, all of the grain desired by the purchasers, but not as an absolute purchase, including the ashes and grain already destroyed. — *City of Duluth v. Duna*, Minn., 41 N. W. Rep. 1049.

113. SALE—Rescission.—Where the purchaser of a farming implement is entitled to rescind the contract, and for that purpose may return the article, he must return or offer to return within a reasonable time. — *Cookingham v. Dusa*, Kan., 21 Pac. Rep. 95.

114. SALE—Delivery to Carrier.—Under the provision of a contract for the sale of fruit, where the seller was to deliver the fruit on board the cars, consigned to the buyer, and send daily statements of weights, etc.: Held, that the title passed upon delivery to the carrier, and loss from shrinkage during transit must be borne by the buyer. — *Gates v. Carquize Packing Co.*, Cal., 21 Pac. Rep. 1.

115. SALE—Law of Peace.—The statutes of Georgia touching the inspection of fertilizers relate solely to such as are offered for sale or distribution in this State.—*Atlantic Phosphate Co. v. Ely*, Ga., 9 S. E. Rep. 170.

116. SET-OFF—Replevin.—A person who wrongfully takes and detains personal property of another cannot plead a set-off as a defense in an action of replevin brought by the owner for the recovery of such property.—*Kennett v. Fickel*, Kan., 21 Pac. Rep. 93.

117. SPECIFIC PERFORMANCE—Partnership.—A contract for the sale of lands made with a partnership firm, in the firm name, may be enforced in equity, and the deed will be decreed to be executed to the individual partners as tenants in common. — *Townshend v. Goodfellow*, Minn., 41 N. W. Rep. 1056.

118. SPECIFIC PERFORMANCE.—A party may waive a condition precedent to the performance of a contract after default; in which case he cannot insist upon the forfeiture provided for in the contract as the result of such non-performance.—*Izard v. Kimmel*, Neb., 41 N. W. Rep. 1068.

119. TAXATION—Interstate Commerce.—Act Pa. June 7, 1879, § 7, imposing a tax upon the receipts of railway and transportation companies, is in violation of Const. U. S. art. 1, § 8, providing that congress shall have power to regulate commerce between the States, so far as it levies a tax upon receipts derived from commerce between points within and points without the State, and between points without the State but passing through it, and it is immaterial that goods destined for points without the State were temporarily detained. — *Delaware & Hudson Canal Co. v. Commonwealth*, Penn., 17 Atl. Rep. 176.

120. TAXATION—Tax sale.—If no proof of publication of the notice of sale of real estate for delinquent

taxes is ever transmitted to the county treasurer by the printer making such publication, his fees therefor do not become a charge against the county, nor against the real estate.—*Jackson v. Challiss*, Kan., 21 Pac. Rep. 57.

121. TAXATION—Tax sale.—As a general rule, an action will not lie to set aside a tax-sale certificate, or restrain tax proceedings, with a prior payment or tender of all the legal taxes admitted to be due and payable.—*Franz v. Krebs*, Kan., 21 Pac. Rep. 92.

122. TRIAL—Argument of Counsel.—Judgment for injuries to a minor reversed because of objectionable remarks of counsel to the jury.—*Gulf C. & S. F. Ry. Co.*, Tex., 11 S. W. Rep. 185.

123. VENDOR AND VENDEE.—The parties to an absolute deed made a contemporaneous agreement acknowledging part payment, and stating that the balance should be paid when a sale to a third person should be effected, and out of the proceeds of such sale, and, if no sale should be made, the grantees should not be held for further payments: Held, that error in charging that the deed was presumptive evidence of a sale was not cured by adding that, if it was agreed that the transfer was only for convenience in effecting a sale to another, and that the grantees should be liable only for the moneys received from such sale.—*Shank v. Waggoner*, Mo., 11 S. W. Rep. 281.

124. WILL—Revocation.—An attested will, not written by testator, may be revoked by an olographic codicil, though the latter refers to the former, without which it cannot be understood, as the will does not by such reference become such a part of the codicil that the latter is not "entirely written, dated, and signed by the hand of the testator himself."—*In re Sohar's Estate*, Cal., 21 Pac. Rep. 8.

125. WILL—Presumption of Death.—The vital question was as to which of two parties provided by will died first where both were burned to death in the same fire.—*In re Ehle's Will*, Wis., 41 N. W. Rep. 627.

126. WILLS—Husband and Wife.—Under Gen. St. Ky. ch. 113, §§ 2, 4, providing that a married woman cannot make a will except for the disposition of her separate estate, a married woman has no power to dispose of her estate, though by a parol antenuptial agreement her husband consented that her property should be her separate estate. — *Hickman v. Brown*, Ky., 11 S. W. Rep. 139.

127. WILL—Foreign Probate.—A will of personal property which has been probated in another State, being the place of the testator's domicile, need not be probated in Texas, to make in evidence of the rights of one claiming under it.—*Hurst v. Mellinger*, Tex., 11 S. W. Rep. 181.

128. WILLS—Nature of Estate.—Construction of a will directing testator's realty to be divided between his wife "and all my children, share and share alike," the wife's portion to be hers for her life only, and on her death to "return to my surviving children or child, or their legal issue." In case testator should have no surviving child, or legal issue of such child, the wife's portion was devised to the testator's mother, brothers and sisters, or their children.—*Durant v. Nash*, S. Car., 9 S. E. Rep. 19.

129. WITNESS—Impeachment.—To impeach a witness by proving statements on another occasion inconsistent with or contradicting his statements on the trial, the statement must be material to the cause, not collateral.—*State v. Goodwin*, W. Va., 9 S. E. Rep. 86.

130. WITNESS—Transactions with Decedents.—Under Code Civil Proc. N. Y. § 829, a legatee is incompetent to testify as to the circumstances preceding, attending, and following the execution of the will, such as the mental and physical condition of testator, his acts, conversations, and conduct, from which sanity or the due execution of the will may be inferred, in a contest grounded on the alleged want of due execution and testamentary capacity. — *In re Eysaman's Will*, N. Y., 20 N. E. Rep. 618.

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CURRENT EVENTS.

UNDER the constitution of the United States, laws and treaties are of equal binding force as regards internal obligation. Neither has a higher validity than the other, and in case of conflict between a law and a treaty, the one which comes later in point of time must prevail. This is the generally accepted doctrine of constitutional law, as to the relative binding force of laws and treaties, and it is the doctrine which has just been affirmed by the United States Supreme Court in the case of *Chae Chang Ping*. There, the court upheld the validity of the Scott Chinese Exclusion Act, in spite of the fact that that act contravened express stipulations of the treaty of 1868 and the supplemental treaty of 1880, holding that congress has power to abrogate a treaty, and the undoubted right to exclude aliens whose presence is inimical to our interests. A question may, of course, arise as to the propriety of the government thus abrogating treaty provisions, but this question, the court says, is one for the consideration of the political departments of government, and not a matter for judicial cognizance. The petitioner in this case had left this country with a certificate, which, under a previous act and treaty, allowed him to return, and the contention was made that the Scott act thus destroyed vested rights. The court ruled however that the only rights which can become vested in this sense are such as are connected with and lie in property capable of sale or transfer, not such as are personal and untransferable in their character.

THE passage of the Weldon extradition act in the Canadian parliament is a matter of more than ordinary interest to the United States. Up to about half a generation ago the extradition regulations between this country and Great Britain were reasonably adequate. They covered the more important crimes. In recent years, however, offenses

growing out of breaches of trust, not included in the treaties with Great Britain, have become common and it is against malefactors of this category that the Canadian enactment is especially directed. For several years past the United States has been endeavoring to bring about a treaty with England whereby persons guilty of breaches of trust in either country may be secured if found in the domain of the other. All these attempts failed however, and now relief comes from the quarter, from which it was least expected but from which it was most sorely needed. The projectors of the Weldon act first sought to make it retroactive, so as to cover offenses already committed. But this feature of the bill failed, though it has recently been seriously contended that under its language the measure is in effect, retroactive.

A LAW of this sort made by a British province is something of an innovation. It involves no contract between this country and Canada, for the latter's relations with the Imperial government forbid her from entering into any such compact. The extradition of criminals becomes a matter of legal obligation only through treaty, but there is nothing to prevent a country for reasons of comity or otherwise from extraditing offenders. The power to surrender escaping criminals is part of the police power in every government, independent of treaties. The chief utility of extradition treaties is to secure full reciprocity and greater certainty. International jurists have been divided upon the question how far a State is obliged to deliver up criminals in the absence of a treaty. Many of the earlier publicists, with Grotius at their head, held that, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes, affecting the general peace and security of society and whose extradition is demanded by the government of the country within whose jurisdiction the crime has been committed. This was the view of our own great jurist, Chancellor Kent, who declared that it rested on the plainest principles of justice. The weight of the more modern authorities, however, seems to be against this doctrine. They hold that the duty is one of imperfect obligation, and that though it may be habitually practiced by some States it requires to

be confirmed and regulated by special convention, in order to give it the force of international law. This view seems to be borne out by the modern practice of civilized nations. The existence of the numerous treaties between particular countries, regulating the practice of extradition, seems to show that the duty is not regarded as one founded on principles of international law, irrespective of special compact.

NOTES OF RECENT DECISIONS.

THE question as to whether laches will bar the United States on a bill filed to redeem from a mortgage, property purchased by it at a sale under execution, was considered by the United States Supreme Court in *United States v. Insley*, 9 S. C. Rep. 485. It was held that, by analogy to former rulings to the effect that the United States are not bound by the statute of limitations, it could not be barred by laches, as it holds title to property for public and not for private purposes. The court says:

The decision of the circuit court, reported in 25 Fed. Rep. 804, proceeded upon the ground that, as the government in this case came into a court of equity, claiming the same rights as a private individual, and the case did not involve any question of governmental right or duty, the ordinary rules controlling courts of equity as to laches should be enforced; and that, as the bill was filed more than twelve years after the sheriff's deed had been made to Polly Palmer, and more than thirteen years after the sale on execution to the United States, the claim of the government was barred by its laches. This decision of the circuit court was made in December, 1886, prior to the decisions of this court in the cases of *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 S. C. Rep. 670; *U. S. v. Railway Co.*, 118 U. S. 120, 6 S. C. Rep. 1006; and *U. S. v. Beebe*, 127 U. S. 338, 8 S. C. Rep. 1083. These cases determine that the decree in the present case must be reversed. In *Van Brocklin v. State of Tennessee* 6 S. C. Rep. 674, this court said: "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts, and excises must be laid and collected, to pay the debts and provide for the common defense and general welfare of the United States." In the present case, the United States holds the title to the property in question, as it holds all other property, for public purposes, and not for private purposes. So holding the title and the right of possession under their deed, it holds in the same manner, and for public purposes, the incidental right of redemption. In this view, the doctrine often laid down, and again enforced in *U. S. v. Railway Co.*, *supra*, applies to this case. It was there said: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the

public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless congress has clearly manifested its intention that they should be so bound. *Lindsey v. Miller*, 6 Pet. 686; *U. S. v. Knight*, 14 Pet. 301, 315; *Gibson v. Chouteau*, 13 Wall. 92; *U. S. v. Thompson*, 98 U. S. 486; *Fink v. O'Neill*, 106 U. S. 272, 281," 1 S. C. Rep. 325. This doctrine is applicable with equal force, not only to the question of a statute of limitations in a suit at law, but also to the question of laches in a suit in equity. In *U. S. v. Beebe*, *supra*, it was said: "The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest, is established past all controversy or doubt." These views entirely cover the present case. It was suggested in the decision of the court below, as a ground for applying to the United States the doctrine of laches, that the government was not made a party to the foreclosure suit because it could not have been made such party except at its own will, and that it would be a hardship to the other parties to this suit to allow the government to lie by for so many years, and then come into a court of equity to assert the rights sought to be maintained in this suit. It is a sufficient answer to this view to say that the principle we have announced has long been understood to be the rule applicable to the government, and that it rests with congress, and not with the courts, to modify or change the rule.

As to whether words spoken by husband to wife constitute a publication within the meaning of the law of slander, the Supreme Court of California, in *Sesler v. Montgomery*, 21 Pac. Rep. 185, seems to have reversed itself on rehearing. They held in the original decision, 19 Pac. Rep. 686, that such a communication from husband to wife, not in the presence of any other person, is a publication. On rehearing they conclude that it does not constitute a publication, saying:

There is no doubt of the general common law rule that the civil existence of the wife is merged in that of her husband. Blackstone says that "by marriage the husband and wife are one person in law," and that "the legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband." Volume 1, p. 442. Upon this principle of the legal union of husbands and wives most of their rights, duties, and disabilities depended. And upon this ground it has been always held that no prosecution for conspiracy can be maintained against a husband and wife only; because the crime of conspiracy cannot be committed by one person alone, and a husband and wife are but one person in law. *Hawk. P. C.* p. 448, § 8; 2 Russ. Crimes, 690; *People v. Richards*, 67 Cal. 412. It is said that this rule was a legal fiction, and that in the course of modern legislation and judicial decisions it has been exploded. But it is no more a fiction than any other general principle of law, and we have seen no authentic account of the explosion. There always were some exceptions to the rule, from the earliest history of the common law, and modern legislation and decision have

merely created additional exceptions. The general rule still obtains, save where an exception has been legally established, and we have been referred to no decision establishing an exception as to the point involved in the case at bar. Indeed, the only case in point cited at all is from an inferior court of New York, *Trumbull v. Gibbons*, 3 City H. Rec. 97, in which it was directly held that the delivery of a defamatory manuscript by a husband to a wife was not a publication. And every sound consideration of public policy, every just regard for the integrity and inviolability of the marriage relation—the most confidential relation known to the law—should restrain a court from establishing the exception upon which the judgment in the case at bar rests. When husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, "thinking aloud." There is no intention that the conversation shall be repeated to others, and no presumption that it will be. It would be strange, indeed, if a husband or wife could not safely say anything to the other about their neighbors or acquaintances which he or she would not feel warranted in saying to the world. Such a rule would destroy all opportunity for confidential conference, advice, or suggestion. And see *Scheneck v. Scheneck*, 20 N. J. L. 208.

A QUESTION of interstate commerce came before the Supreme Court of Minnesota in *State v. Chicago, St. P., M. & O. Ry. Co.*, 41 N. W. Rep. 1047. There it was held that the railroad and warehouse commission of the State has no authority to fix rates for carriage between two points within that State over a route extending across a neighboring State. The court says:

By section 8, art. 1, Const. U. S., congress is empowered "to regulate commerce with foreign nations, and among the several States." The transportation of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word "commerce," as here used. *Gibbons v. Ogden*, 9 Wheat. 1; *Case of State Freight Tax*, 15 Wall. 232; *Lord v. Steamship Co.*, 102 U. S. 541; *Railway Co. v. Illinois*, 118 U. S. 557; *Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Fargo v. Michigan*, 121 U. S. 230; *Carton v. Railroad Co.*, 59 Iowa, 481. Since the decision in *Railway Co. v. Illinois*, 118 U. S. 557, it must be regarded as settled, whatever doubts may have been previously entertained, that the regulation, as by prescribing rates, of such transportation as is to be deemed interstate as distinguished from wholly domestic carriage is exclusively given to congress. The only question upon which there can be any doubt is whether the transportation to which this order of the commission relates is to be deemed commerce or transportation between different States, within the meaning of the constitutional provision above quoted, or as being in its nature merely domestic commerce or transportation, to be governed wholly by our State laws, and over which congress has no control. The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato, a large part of which—indeed, the greater part of which—lies beyond the boundaries of our State, and within the territory of another sovereignty. These rates are for the con-

tinuous carriage of freight over the entire route, including the transit of 148 miles through the State of Wisconsin. The order is as applicable to that part of the line as to that which is within our own State, and can only be sustained upon the theory that the railroad and warehouse commission of the State of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the State of Wisconsin, provided only that the carrier receives the property within this State, and is to carry it through the foreign State to a destination within our own borders. In view of the above decisions of the Supreme Court of the United States, that the transportation of freight by a common carrier, apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of "commerce," to which the constitution applies, it is not a matter of controlling importance that the consignor and consignee, or place of shipment and destination, be within the same State, if the transportation is through a foreign State. * * * The question under consideration has not come before the Supreme Court of the United States in the form here presented; but it seems to us that that court has so determined the construction and effect of the commerce clause in the constitution that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the meaning of the constitution, and that the authority of congress is exclusive as respects the regulation of rates for interstate commerce. *Lord v. Steamship Co.*, 102 U. S. 541; *Sterberger v. Railroad Co.*, 7 S. E. Rep. 836. * * * The interstate commerce commission has recently ruled upon the question here presented, holding that commerce between points in the same State, but which, in being carried from one place to the other, passes through another State, is interstate commerce, subject to congressional regulation. *Cotton Exchange v. Railway Co.*, *Interst. Comm. R.* 375. We are aware that the Supreme Court of Pennsylvania has held to the contrary. *Com. v. Railroad Co.*, 7 Atl. Rep. 179. If those cases were wholly analogous to that before us, that court has not regarded the decision of the court of last resort in such cases, in *Lord v. Steamship Co.*, *supra*, as having the effect which we think must be accorded to it.

As to the practice in equity in the adoption of the findings of a jury on questions of fact, the Supreme Court of Illinois, in *Guild v. Hull*, 20 N. E. Rep. 665, says:

In chancery cases, except in cases where the submission to a jury is required by law or the rules of chancery practice, the chancellor is the judge of the weight of the evidence and of the ultimate facts established by it. If he submits controverted questions of fact to a jury, as he may do, the verdict or finding of the jury is advisory merely. He may adopt the verdict, or set the same aside and resubmit the question to a jury, or he may disregard it and enter such a decree as in his judgment equity demands. He may enter his decree after setting the verdict aside or without setting it aside. *Sibert v. McAvoy*, 15 Ill. 108; *Williams v. Bishop*, *Id.* 553; *Milk v. Moore*, 39 Ill. 588; *Sharkey v. Miller*, 69 Ill. 560; *Meeker v. Meeker*, 75 Ill. 260; *Smith v. Newton*, 84 Ill. 14; *Calvert v. Carpenter*, 96 Ill. 63; *Russell v. Fanning*, 2 Ill. App. 682. It appears that

the chancellor in this case made no independent finding, but rendered his decree in pursuance of the finding of the jury, "and not otherwise." The decree is *pro forma*, and *pro forma* only. This precludes the idea or presumption that the court acted upon its own judgment as to the truth of the allegation upon which the deed and bill of sale were set aside. Parties litigant are entitled to the judgment of the chancellor, and his consideration of the evidence, notwithstanding the verdict of the jury. As the decree is based on the verdict of the jury alone, and not upon any independent judgment of the circuit court, it must follow that, if the finding of the jury was the result of, or was influenced by, the admission of improper evidence, or by improper instructions given by the court, the decree should be reversed. The condition is somewhat anomalous, but the effect must necessarily be the same as though the decree was based upon improper evidence or a misconception of the law applicable. In such case there can be no presumption that the chancellor acted upon proper evidence only, and rejected that which was incompetent. It therefore becomes necessary to examine whether the court below erred in the admission of evidence or in its rulings. Nor is this position rendered untenable by the fact that this court may pass upon the evidence submitted under the issues presented by the pleadings and determine the fact at issue, and enter such decree, or direct the entry thereof by the circuit court, as it shall find from the evidence pertains to equity and good conscience.

A nice question as to the construction of a will and power of sale arose in *Harmon v. Smith*, decided by the United States Circuit Court of Minnesota (not yet reported). There a testator gave all the rest and residue of his real and personal estate to his executor, with full power to sell and convey any or all of said estate, and convert the same into money for the use and benefit of his sister, who is made sole legatee, and also directs him to pay over the avails to her. Shortly after and before any sale the sister died. Thereafter the executor sells under the power to defendants, and plaintiffs, as representatives of the sister, file this bill to set aside such sale. The court holds:

That it is clear the testator intended that his whole real and personal estate should become united in one common fund for the purpose of distribution to the sole object of his bounty. The executor took only the legal title, subject to the trust, and in the death of the legatee the estate vested in her representatives. The trust ceased to be active and was then determined, and the estate belonged to the complainants. The legal estate remained in the trustee so long as the execution of the trust required it, and no longer. *Young v. Bradley*, 101 U. S. 787. No ulterior purpose for maintaining the trust is evinced. No sale was authorized, except to convert the estate into money for the benefit of Mrs. Heath, legatee, and when the executor undertook to sell after her death the sale was utterly void.

A case almost its counterpart is *Fidler v. Lash*, 17 Atl. Rep. 240, decided by the Su-

preme Court of Pennsylvania. A similar conclusion was reached that the power of sale was exercisable only during the life-time of the beneficiary, the court stating that "no principle is better settled than that when the object for which a power has been created has been accomplished, or has become impossible or unattainable, the power itself ceases to exist, *Wilkinson v. Buist*, 16 Atl. Rep. 856; *Ely v. Dix*, 9 N. E. Rep. 62.

THE right of a State to impose license tax on peddlers came before the Supreme Court of West Virginia in *State v. Richards*, 9 S. E. Rep. 245. It was there held that the statute which reads: "Nor shall any agent traveling with one or more horses sell any lighting-rod, sewing-machine, or organ or other musical instrument, without a State license therefor," is not unconstitutional, as applied to such agents selling sewing-machines manufactured outside of this State. The court distinguish between such a statute and the statutes taxing "drummers" declared unconstitutional by the United States Supreme Court. They say:

The counsel for defendant cites and relies on the case of *Robbins v. Taxing Dist.*, 120 U. S. 486, 7 S. C. Rep. 592, holding that a statute of Tennessee, that "all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods by sample," should be required to pay taxes for the privilege, was void as contrary to the United States constitution as to persons soliciting the sale of goods on behalf of individuals or firms doing business in another State. It must be admitted that this case and the case of *Asher v. Texas*, 128 U. S. 129, 9 S. C. Rep. 1, are in advance of former decisions of the same court in restricting taxation on callings by the State, if not in conflict with them, as seems to be admitted by Justice Bradley in the latter case. But they were cases of persons selling by sample or soliciting orders for persons residing or doing business in other States, taxing the mere act of so soliciting, when the property had not arrived in the State. Here the party was in the State, perhaps a part of its population, travelling with the machines in his possession, inside the state, obtained from the store-house of the company at Parkersburg, in this State. * * * Justice Bradley, as I think, appears from the above extracts from his opinion has in mind and hand the case of drummers selling by sample for principals in other States, who solicit orders for the sale of property not yet in the State. As the attorney-general argues, I think "*Robbins v. Taxing Dist.* merely deals with a tax on a drummer selling by sample, and not with a man carrying goods with him for delivery as he sells, as in our case." I do not understand that high and able tribunal, the Supreme Court of the United States, to have gone to the extent claimed by the defense in this case, or to have denied the power to impose the license taxes where they do not directly affect interstate commerce, or the right t

tax salesmen having their goods in the State, and selling them, simply because, in instances, such goods are manufactured in or sold by owners residing in other States. No one will be more ready than I to accord to the constitution and laws of the United States their pre-eminence where I can see the conflict of State law with it; but I do not realize it in this case, nor do I construe the case of *Robbins v. Taxing Dist.* as operating to invalidate the statute of the State in question.

An interesting question as to the priority of a chattel mortgage over a lien was decided by the Supreme Court of Tennessee in *McGhee v. Edwards*, 11 S. W. Rep. 316. There it was held that a recorded chattel mortgage on a horse is superior to a subsequent lien of a livery stable keeper acquired under the statute, where the horse is placed in the stable after the making of the mortgage without the knowledge of the mortgagee, though the stable keeper had no notice in fact of the mortgage. The court says:

Mr. Jones, in his late work on Liens, with the adjudged cases on both sides of the question before him, says, (section 691:): "A chattel mortgage upon a horse is superior to a subsequent lien of a stable keeper, where the horse is placed in the stable by the mortgagor, after the making of the mortgage, without the knowledge or consent of the mortgagee;" citing therefor *Jackson v. Kasseall*, 30 Hun. 281; *Bissell v. Pearce*, 28 N. Y. 252; *Charles v. Neigelsen*, 15 Ill. App. 17; *Sargent v. Usher*, 55 N. H. 287; *Bank v. Lowe*, (Neb.) 38 N. W. Rep. 482. The learned author adds: "It is not to be supposed that a statute giving a lien for the keeping of animals was intended to violate fundamental rights of property by enabling the possessor to create a lien without the consent of the mortgagee, when the person in possession could confer no rights as against the mortgagee by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien as against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at the time, and not a lien as against the mortgagee, between whom and the keeper of the animals there is no privity of contract. The mortgagor, though in possession, is in no sense the mortgagee's agent; nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien without his knowledge or consent, as security for a liability of the mortgagor, unless such a construction clearly appears from the language of the statute to be unavoidable." As stated in the outset, authorities are to be found holding a contrary view. See *Case v. Allen*, 21 Kan. 217-220; *Smith v. Stevens*, 36 Minn. 303, 31 N. W. Rep. 55,—which were cases where an agister's lien was held superior to an older registered mortgage. But their reasoning does not commend them to us sufficiently to shake our convictions that the other view is the sounder and better.

STIPULATIONS FOR ATTORNEY'S FEES IN PROMISSORY NOTES.

Three objections have been urged against a stipulation in a promissory note for the payment of "such additional sum as the court might adjudge reasonable as attorney's fees," in case suit or action should be instituted to collect said note or any portion thereof. These objections are as follows:

1st: It has been claimed that such stipulation was usurious;

2d: That it rendered the note non-negotiable; and

3d: That it was contrary to public policy, without consideration and void.

First: The claim that such a stipulation renders the transaction usurious is without foundation in law or fact. The contract is to pay damages for the non-payment of the note at maturity, in the event the holder thereof shall be compelled to bring an action to collect the amount due, and the amount of damage must be ascertained and determined by the court, and is to be such sum as the court may adjudge reasonable "as attorney's fees" in the action. This damage is not paid to the creditor directly. It is true that he indirectly receives the benefit of it, but it is paid to the attorney, and the creditor only receives the rate of interest contracted to be paid by the debtor. If there was no agreement by the debtor for the payment of an attorney's fee and the creditor was compelled to sue, the debtor, it is true, would pay the contract rate of interest, but the creditor would not receive that amount. He would receive the amount due him, less the amount he would be required to pay his attorney for collecting the same. Thus, if the note be for \$1,000.00 and interest at the rate of ten per cent. per annum from its date until paid, and be collected by an attorney at the end of the first year and the attorney charges a commission of ten per cent. on the amount collected, the debtor pays \$1,100.00, but the creditor only receives \$990.00. Therefore the creditor has not only failed to receive any interest for the money loaned, but has also, in order that he might not lose the whole amount, been compelled to pay out \$10.00 of the principal sum. He is, therefore, \$10.00 worse off than he was before he loaned the money, while, if he could have recovered a

reasonable attorney's fee, he would have received the interest to which he was justly entitled.

The borrower, by complying promptly with the terms of his contract and paying the amount due in accordance with his agreement, can always avoid the payment of such damages, and it is his sole fault if the lender be compelled to sue and enforce payment by legal means. He is the only one to blame for the breach of the contract and, if the lender is damaged thereby, he should in equity pay the damage sustained.

In *Smith v. Silvers*,¹ the court say: "A stipulation whereby the debtor agrees to be liable for reasonable attorney's fees in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it."

And in *Parham v. Pulliam*,² the court say: "The contract of the debtor to pay the attorney's commission, in case of suit upon default of payment of the debt for the prescribed time, adds nothing to the amount of interest to be paid to the creditor. If the debtor pays the ten per cent. interest stipulated, and also pays the attorney's commissions, the creditor has received no more than the ten per cent. interest. If he does not pay the attorney's commissions the creditor receives to that extent less than the ten per cent. interest."

In *Huling v. Drexel*,³ the court say: "The contract here has nothing in it oppressive to the borrower; it is advantageous to the borrower and lender when merely intended to enforce a punctual performance of the contract; nor is there the slightest pretense to say that it is intended as a cover to usury. A failure on the part of the borrower puts nothing in the pocket of the lender; on the contrary the probability is that he will not be reimbursed the expenses which he may incur. With such stipulations, which are frequently made, persons may borrow money at a less rate of interest, as punctuality is always taken into consideration in fixing the terms of a loan." To the same effect are the cases cited below.⁴

¹ 82 Ind. 321.

² 5 Coldwell (Tenn.), 407.

³ 7 Watts, 126.

⁴ *Clawson v. Munson*, 55 Ill. 394; *McGill v. Griffin*,

As early as 1846 the Supreme Court of Indiana held: "As to the objection of usury in the mortgage, it is sufficient to answer that, so far as regards the ten per cent., that was the lawful rate of interest when the contract was made; and, so far as regards the five per cent. damages contingent upon the sale of the premises under the power given in the mortgage, it was entirely optional with the mortgagor whether he would pay them or not. They were in the nature of a penalty for the want of punctuality in paying the debt when due. This saves the contract from the taint of usury.⁵ Besides, the five per cent. seems to have been intended as a compensation for the trouble of selling the mortgaged premises on default of the mortgagor in paying the debt. This, we think, is a reasonable stipulation to allow compensation for extra and incidental trouble and expense, and does not, in our opinion, render the contract usurious."^{6 7}

The same reasoning applies with equal effect to the attorney's fee stipulation in a promissory note; but the Supreme Court of Ohio, in the case of the *State of Ohio v. Taylor*, say:⁸ "It must be admitted, if this agreement can be enforced, the statutes of Ohio regulating the rate of interest, whether upon loans by the fund commissioners or in other cases, are at once virtually repealed. The statute passed on March 28, 1837, provides that the fund commissioners, in a certain event, may loan the money to individuals at a rate of interest not exceeding seven per cent. Seven per cent. is the maximum of interest the commissioners are authorized to contract for or receive for the forbearance of their loans. They are prohibited from receiving more, in fact, in express terms—that is, as interest. It is said, however, that the five per centum in this case is, by the agreement of the parties, to be added to the seven per cent., not as interest, but as costs, agreed upon as such, for collection by the parties.

32 Iowa, 445; *McIntyre v. Cagely*, 37 *Id.* 676; *McAllister's Appeal*, 69 Pa. St. 204; *Miner v. Paris Exchange Bank*, 53 Tex. 559; *Wilson S. M. Co. v. Moreno*, 6 Sawyer, 35; *Gaar v. Louisville Banking Co.*, 11 Bush, 189; *Imler v. Imler*, 94 Pa. St. 372; *Weatherby v. Smith*, 30 Iowa, 131; *Siegel v. Drumm*, 21 La. Ann. 8.

⁵ *Wells v. Girling*, Brod. & B. 447.

⁶ *Baynes v. Fry*, 15 Ves. 120.

⁷ *Gambrell v. Rose*, 8 Blackf. 140, 44 Am. Dec. 760.

⁸ 10 Ohio, 378. See also *Dow v. Updyke*, 7 N. W. Rep. 857, 11 Neb. 95.

Now it seems to be of little consequence in this case what this five per cent. may be called, but the inquiry is, what is the thing itself? However it may be designated, it is very clear to us it is a mere shift or device, by which twelve per cent. is retained as interest upon this loan, and in this view of the case cannot be enforced."

The Supreme Court of Oregon, after reviewing the foregoing authorities, said: "And the only question involving any serious difficulty, it seems to us, is whether such engagements are opposed to the policy of the statute against usury. If the effect of enforcing them would be to give the lender a larger compensation for the loan and use of his money than such statute allows, then they should be held usurious and void. But while the lender has no lawful right to contract with the borrower for a rate of interest exceeding the limit imposed by the statute, he is not debarred from requiring as a condition of making the loan that he shall be secured in such a way as will enable him to receive the principal of the loan and the amount of lawful interest stipulated for, without further loss or expense occasioned by the default of the borrower." ⁹

It would seem, therefore, that the great weight of authority holds such stipulations to be free from the taint of usury.

Second. It is claimed that such stipulations destroy the negotiability of a promissory note; and in *Woods v. North*,¹⁰ the Supreme Court of Pennsylvania say: "Interests and costs of protest after non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not alter its negotiability, neither does a clause waiving exemption, for that in no way touches the implicity and certainty of the paper. But a collateral agreement as here, depending, too, as it does upon its reasonableness, to be determined by the verdict of a jury, is entirely different. It may well be characterized like an agreement to confess a judgment was by Chief Justice Gibson, as luggage, which negotiable paper, riding, as it does, on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the

wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contention and litigation result."

It seems to me that a stipulation in a promissory note for the payment of a reasonable attorney's fee is the very class of luggage which would enable the holder to negotiate it the more easily. One would purchase more readily and pay more for a promissory note, which held the maker liable for the costs of collection, than for one the cost of collecting of which he would himself be compelled to pay.

In *First National Bank of Trenton v. Gay*,¹¹ the note sued on contained a stipulation for the payment of attorney's fees, and had been transferred to the plaintiff, but the court held: "For the reason that the instrument in suit is not precise as to the amount to be paid, we do not regard it as a promissory note. And no little stringency is exhibited by the cases in respect to this point. It is said that the sum must be stated definitely, and must not be connected with any indefinite or uncertain sum, and that the rule *Id certum est*, etc., is not allowed to supply any lack in this particular." And the instrument was held not to be negotiable.

I understand a promissory note to be a legal promise in writing for the payment within a certain time of a certain sum of money, in which the maker and payee are designated with sufficient certainty.¹²

The note last above referred to, with the exception of the stipulation as to the attorney's fee, read as follows:

"\$650.00. TRENTON, Mo., May 13, 1874.

Ninety days after date we promise to pay to the order of Robert L. Gillilan, six hundred and fifty dollars, with interest after maturity at the rate of ten per cent. per annum, at the First National Bank of Trenton, Mo.," and was signed, "Nathan Gillilan. Samuel Gay."

Thus far we have a "legal promise for the certain payment of a certain sum of money." This constituted the note, and no stipulation added thereto that the makers would pay an additional sum as a penalty, or as liquidated damages, in the event of the happening of some contingency after its maturity, could, by any possibility, change or alter the legal

⁹ *Peyser v. Cole*, 11 Oreg. 89.

¹⁰ 21 Am. Rep. 214, note.

¹¹ 63 Mo. 33, 21 Am. Rep. 430.

¹² 1 Parson's on Bills and Notes, 23.

effect thereof. The promise was to pay a certain sum to a certain person at a certain time and place, and there was then the further agreement that, in the event this promise was broken and the holder of the note thereby compelled to institute legal proceedings for the recovery of the amount due, the promisor would pay the expense incurred; but there was an unconditional promise to pay a certain sum at all events.

Again, in *Jones v. Radatz*,¹³ the court say: "The suggestion in some of the cases,¹⁴ that a stipulation to pay attorney's fees in case of suit relates merely to the remedy, is not sound; for the payee, if he recover on that part of the promise, must recover, not because he is obliged to bring suit, but because it is part of the contract and obligation of the maker, on which the suit is brought, that he will pay them upon the specified contingency. Those cases, and *Gaar v. Louisville Banking Co.*,¹⁵ appear to advance the proposition that a note may be negotiable if the amount with which it may be discharged at maturity, or recoverable upon it in an action, be entirely indefinite and uncertain. We think the certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and that any provision which, before that time, removes such certainty, prevents the instrument being negotiable at all. The stipulation in this instrument for the payment of reasonable attorney's fees introduced into the obligation an element of uncertainty, which prevented the instrument being a negotiable note."¹⁶

On the other hand, it is held that such a stipulation does not render the note non-negotiable. Thus, in *Trader v. Chichester*,¹⁷ the court say: "Thus far we have proceeded upon authority. But on principle the stipulation for an attorney's fee ought not to effect the negotiability of a note. The principal and interest is the sum due upon the note

at maturity, and by the payment thereof, it will be fully satisfied. And it is only in case of default of such payment, and after the note is overdue, and lost its negotiable character, that the penalty or attorney's fee can be claimed or collected at all. In fact, the stipulation, although contained in the note, is, strictly and properly speaking, no part of it, but is a distinct contract, collateral thereto, as much as if it was written on a separate piece of paper."

In *Stoneman v. Pyle*,¹⁸ the court say: "But as the note was payable at a bank in this State, it is governed by the law merchant, and the holder thereof is entitled to all the rights of a holder of commercial paper, unless the clause in the note stipulating for the payment of attorney's fees, in case suit should be commenced thereon, takes it out of that class of paper. It is earnestly urged by counsel for appellee, that the provision above indicated makes the amount of the note uncertain, and therefore that it does not come within the legal requirements of commercial paper. It may be conceded that a note, in order to be placed upon the footing of bills of exchange, must be for a sum certain; for in no other way can the maker know precisely what he is bound to pay, or the holder what he is entitled to demand. But the note in question, if paid at maturity, or after maturity, but before suit is brought thereon, is for a sum certain. On the maturity of the note the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. In the commercial world commercial paper is expected to be paid promptly at maturity. The stipulation for the payment of attorney's fees could have no force except upon a violation of his contract by the defendant. Had the defendant kept his contract and paid the note at maturity, or afterwards, but before suit, he would have been required to pay no attorney's fees, nor would there have been any difficulty as to the extent of his obligation."¹⁹

¹³ 27 Minn. 240.

¹⁴ *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kas. 433.

¹⁵ 11 Bush, 180.

¹⁶ See also, to the same effect, the cases cited in the note below: *Morgan v. Edwards*, 11 N. W. Rep. 21, 33 Wis. 599; *Garretson v. Purdy*, 14 N. W. Rep. 100; *First Nat. Bank v. Larsen*, 19 N. W. Rep. 67, 60 Wis. 206; *Johnston v. Speer*, 92 Pa. St. 297, 37 Am. Rep. 675; *Maryland Fertilizing and Manufacturing Co. v. Newman*, 60 Md. 584, 40 Am. Rep. 750; *Altman v. Rittershafer* (Mich.), 38 N. W. Rep. 74; *Altman v. Fowler* (Mich.), 37 N. W. Rep. 708.

¹⁷ 41 Ark. 242, 48 Am. Rep. 38.

¹⁸ 35 Ind. 103, 9 Am. Rep. 637.

¹⁹ *Smock v. Ripley*, 62 Ind. 81; *Brown v. Barber*, 59 Id. 533; *Garven v. Pontius*, 66 Id. 192; *Tuley v. McClung*, 67 Id. 10; *Hubbard v. Harrison*, 38 Id. 333; *Stroup v. Gear*, 48 Id. 100; *Wyant v. Pattorf*, 37 Id. 513; *Smith v. Muncie Nat. Bank*, 29 Id. 258; *McGill v. Griffin*, 32 Id. 445; *Sperry v. Horr*, 32 Iowa, 184; *Nickerson v. Sheldon*, 33 Ill. 372; *Dietrich v. Bayley*, 23 La. Ann. 767; *Seaton v. Scovill*, 18 Kas. 435; *Gaar v.*

Those cases, also, which hold that the agreement to pay a reasonable attorney's fee is contrary to public policy and therefore void, hold substantially that such provision does not affect the negotiability of the note.²⁰

Third. It has been claimed that such stipulation is contrary to public policy, without consideration and void.

In *Bullock v. Taylor*,²¹ Cooley, J., speaking for the court says: "A stipulation for such a penalty we think must be held void. It is opposed to the policy of our laws concerning attorney's fees and it is susceptible of being made the instrument of the most grievous wrong and oppression. * * * The provision in these notes is as much void as it would have been had it called for the sum imposed by its true name of penalty or forfeiture. There is no consideration whatever that can support it."

The foregoing opinion applied, however, to notes where the stipulation was to pay a specified sum as attorney's fees. Where the agreement is to pay such sum as the court may adjudge reasonable, the amount to be recovered will be determined by the evidence in the case, just as any question of damage or loss must be determined; and, in such case, the stipulation is not "susceptible of being made the instrument of the most grievous wrong and oppression," but the court will see that no unfair advantage is taken nor wrong perpetrated in adjudicating the sum to be recovered.

In a case somewhat similar to the Michigan case above referred to, where the attorney's fee stipulated for was twenty per cent. of the amount due on the note, the Supreme Court of Oregon said: "Objection is made by the appellants to the allowing of \$200.00 as attorney's fees in this suit for foreclosing the mortgage. That allowance was based on a provision in the mortgage providing for counsel fees of twenty per cent. on the amount due in case of a suit, whether judgment should be recovered or not. In *Peyser v. Cole*,²² this court considered the question

Louisville Banking Co., 11 Bush, 180; *Witerspoon v. Musselman*, 14 Bush, 214, 29 Am. Rep. 204; *Howenstein v. Barnes*, 5 Dillon, 484; *Bank of British North America v. Ellis*, 6 Sawyer, 96; *Heard v. Dubuque Co. Bank*, 8 Neb. 10; *Dow v. Updyke*, 11 *Id.*, 95.

²⁰ *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Myer v. Hart*, 40 Mich. 517.

²¹ *Supra*.

²² 11 Oreg. 39.

of attorney's fees arising on contracts providing for reasonable attorney's fees and sustained their legality; but we do not feel disposed to extend the doctrine there announced beyond the precise question then before the court. But the question there considered does not exclude the one at bar. We are, therefore, at liberty to consider it, uninfluenced by any thing that was said in that case."²³

And, after quoting from the Supreme Court of Michigan,²⁴ the Oregon court then say: "Counsel for the respondents suggested upon the argument that if the court deemed the amount specified in the mortgage as attorney's fees to be unjust or unreasonable, that the same might be reduced to such sum as we might think, under all the circumstances, would be proper. This, in effect, is asking the court to make a contract for the parties that they have not made themselves, and which we do not consider we are authorized to do. We must either enforce this contract as it appears, as to this item, or decline to enforce it. * * * *Peyser v. Cole*, *supra*, has gone as far on the subject of allowing attorney's fees as is consistent with our views of the best considered cases." This holding was affirmed by the same court in *Kimball v. Moir*.²⁵

On the other hand, in *Weatherly v. Smith*,²⁶ where the contract was to pay a reasonable attorney's fee, the court say: "The contract to pay a reasonable attorney's fee, not being usurious, upon what principle should it be disallowed? Why cannot a party by his contract solemnly entered into for the sale of land, or for the loan of money, legally bind the other party to pay him a sum that will indemnify him against actual expenses which he may have to pay out to collect his debt, and which could be avoided by prompt payment by the debtor? We can see no good reason why this may not be done."

And I have no hesitation in saying that no court has ever given, or can ever give, any good reason for disallowing a reasonable attorney's fee, in the event of suit brought to

²³ *Balfour v. Davis*, 14 Oreg. 47.

²⁴ *Myer v. Hart*, *supra*.

²⁵ 15 Oreg. 427. The cases of *Burns v. Scoggins*, 9 Sawyer, 73, and *Daily v. Maitland*, 88 Pa. St. 884, hold a contrary doctrine.

²⁶ 30 Iowa, 181, 6 Am. Rep. 663.

collect a note, where such fee is stipulated for by the parties. The law frequently awards damages for the breach of a contract, when the parties have not contracted to pay damages for such breach, why, then, should it refuse to adjudge such damages when it has been expressly stipulated that they should be paid?

The Supreme Court of Pennsylvania, in *Daly v. Maitland*,²⁷ say: "It is undoubtedly true that the parties to a contract may lawfully agree that the damages in case of a breach shall be liquidated at a certain amount. Equity will not relieve against such a contract, fairly entered into, unless it is evidently a penalty."

In *Wilson S. M. Co. v. Moreno*,²⁸ Deady, J., says: "An agreement by a debtor to pay a reasonable attorney's fee in case his creditor is compelled to incur the expense of an action to collect the debt is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure to perform his contract to pay his debt. In justice and fairness it stands on as high a ground as the right to recover damages for the non-performance of any contract—such as to deliver grain or goods at a certain time and place." These views are fully sustained by the authorities cited below.²⁹

D. R. N. BLACKBURN.

²⁷ 88 Pa. St. 384, 32 Am. Rep. 457.

²⁸ 6 Sawyer, 35, 38.

²⁹ *Johnson Harvester Co. v. Clark*, 30 Minn. 308; *Bank of British North America v. Ellis*, 6 Sawyer, 96, where it is said: "A stipulation in a negotiable instrument for an attorney's fee, which, in effect, provides for the payment of certain expenses of collection in case the same is not paid without suit, so far gives security and currency to such instrument, and is, therefore, to be regarded with favor as being a just and convenient means of promoting the general object and utility of the same;" and it was there held that an indorser was liable to a subsequent holder for a reasonable attorney's fee for collecting the note. *Howenstein v. Barnes*, 8 Reporter, 326, 9 Cent. L. J. 48; *Robinson v. Loomis*, 1 P. F. Smith, 78; *McAllister's Appeal*, 9 Id. 204; *Mahoning Co. Bank's Appeal*, 8 Casey, 158; *Stoneman v. Pyle*, 35 Ind. 104; *Smith v. Silvers*, 32 Id. 321; *Tuley v. McClung*, 67 Id. 10; *Billingsley v. Dean*, 11 Id. 351; *Churchman v. Martin*, 54 Id. 387; *Clawson v. Munson*, 55 Ill. 394; *McIntyre v. Cagley*, 37 Iowa, 676; *Davidson v. Vorse*, 52 Id. 384; *Nelson v. Everett*, 29 Id. 184; *First Nat. Bank v. Breese*, 39 Id. 640; *Siegel v. Drumm*, 21 La. Ann. 8; *Dietrich v. Bayley*, 23 Id. 767; *Nickerson v. Sheldon*, 33 Ill. 372; *Salem Farmers' Nat. Bank v. Rasmusser*, 1 Dak. Ter. 60; *Heard v. Bank*, 8 Neb. 10; *Kemp v. Claw*, 8 Id. 24; *Schmidt & Friday's Appeal*, 1 Norris, 524; *Miner v. Paris Exchange Bank*, 53 Tex. 561; *Cox v. Smith*, 1 Nev. 161; *McLane v. Abrams*, 2 Id. 199;

Thalen v. Duffy, 7 Kas. 405; *Sharp v. Baker*, 11 Id. 381; *Whitmore v. Reynolds*, 46 Cal. 380; *Bowie v. Hall* (Md.), 16 Atl. Rep. 64.

CONTRACTS—ILLEGALITY—ATTORNEY AND CLIENT.

BOWMAN V. PHILLIPS.

Supreme Court of Kansas, April 5, 1889.

A contract was entered into between certain attorneys and other parties, whereby for a monthly compensation, payable monthly for the period of one year, said attorneys agreed to defend said parties, and all others who joined their association, in all suits which might be brought against them for violation of the prohibitory liquor laws. Such monthly compensation was paid for nine months, and suit was brought for the failure to pay the same during the last three months. *Held*, that the contract was against public policy and void, and the parties would be left as the law found them.

VALENTINE, J., delivered the opinion of the court:

This action was commenced by C. S. Bowman and Charles Bucher, partners as Bowman & Bucher, and J. W. Ady, against W. H. Phillips, James L. Serviss, G. W. Rogers, and George E. Clark to recover from the defendants the sum of \$240, alleged to be due for professional services rendered by the plaintiffs as attorneys and counselors at law. The case was tried before the court without a jury, and judgment was rendered in favor of the defendants and against the plaintiffs for costs, and the plaintiffs, as plaintiffs in error, bring the case to this court for review. It appears that on May 5, 1883, a society existed at Newton Kan., composed of the defendants and others, known as the "Saloon and Druggists' Protective Association of Newton, Kansas." The members of the association were principally saloon-keepers, and were engaged in selling intoxicating liquors in violation of the prohibitory liquor law, and the principal object of the association was to frustrate the law to the extent of evading all punishment for its violation. The plaintiffs in this case had full knowledge of all these things. On that day the plaintiffs and the defendants, with a few others, entered into the following written contract to-wit:

"NEWTON, KANSAS, May 5, 1883.

"We, the undersigned, business men of the city of Newton, agree to pay Mess. Bowman & Bucher and J. W. Ady the sum of eighty dollars per month on the 1st day of each month for the period of one year, from May 1, 1883, eighty dollars to be paid on the execution hereof. Said payments to be made in consideration of the services herein agreed to be rendered.

"We, the undersigned, attorneys at law, agree to defend all cases that may be brought against Geo. E. Clark, Jas. Serviss, W. H. Phillips, J. E.

Marti, J. H. Gray, J. H. Pappe, O. S. Bassett, E. Wetzell, and any others, who may become members of the Saloon and Druggists' Protective Association of Newton, Kansas, or any person in business with either of them, as clerk, partner, or otherwise, for a violation of the prohibitory liquor laws of the State of Kansas, and to accept as full compensation for our services the sums hereinbefore stipulated to be paid. This is not to include the necessary expenses or outlays on our part, should such be necessary, but only fees for professional services. Executed in duplicate.

[Signed]

"JAS. L. SERVISS. BOWMAN & BUCHER.

"W. H. PHILLIPS. J. W. ADY.

"J. H. PAPPE. GEO. E. CLARK.

"J. E. MARTI. G. W. ROGERS.

"L. H. CRAFTS.

"Sept. 1st."

Afterwards, and within one year thereafter, various criminal prosecutions were instituted and conducted against the several members of the aforesaid "Saloon and Druggists' Protective Association," for violation of the prohibitory liquor law, and the plaintiffs in this action, as attorneys and counselors at law, defended them. Also, during that year, and for the services of the plaintiffs for the first nine months thereof, the members of said association paid to the plaintiffs the sum of \$720, leaving, as the plaintiffs claim, still due to them on the aforesaid contract and for their services for the last three months of the aforesaid year, the sum of \$240, for which sum they brought this action. It is stated in the briefs of counsel that the court below decided this case upon the theory that the aforesaid contract was in violation of public policy, and therefore void, while the plaintiffs claim that the contract is not in violation of public policy, nor void for any other reason; and they further claim that, even if the contract is void, still they alleged enough in their petition, and proved enough on the trial, to enable them to recover in the action as upon an implied contract for the actual services which they in fact performed. They certainly proved that the services which they actually performed were worth more than \$960, which is all that they claim for the entire year's work.

We think the contract is against public policy, and void. Of course, attorneys at law may be employed to defend persons charged with crime, where the alleged offenses are charged to have been committed prior to the employment. An attorney's services may also be engaged for future transactions, where no wrong is intended or contemplated; and in all cases good faith and innocence will be presumed until the contrary appears. Also, where a contract is not in violation of public policy, nor in any manner tainted with immorality or illegality, and services are performed or benefits conferred under it, but the contract, is void because of some want of power in one or both the parties to make it, or void be-

cause of some irregularity in its execution, a contract will be implied, and a promise assumed, that the party benefited shall pay for all benefits which he has actually received under the void contract. Or, if no contract is expressly made, but services are nevertheless performed, or benefits actually conferred with the knowledge and consent of the other party, and not as a gratuity, which services or benefits are in and of themselves innocent and proper, a contract and promise will be implied to pay for all the benefits actually received. But none of these cases is the present case. In the present case it was future wrongs and violations of law that were contemplated when this contract was executed, and it was future wrongs and violations of law that were to furnish the foundation for the plaintiffs' services, and the foundation for their compensation, and, except for these contemplated future wrongs and violations of law, the contract would never have been made. This contract was tainted at its inception with these future intended and contemplated violations of law. Of course, the plaintiffs, when they entered into the contract, did not intend to perform services different from services which may rightfully and legally be performed under a contract made for similar services after the violations of the law have actually occurred, and the plaintiffs, in rendering their services under this contract, did not render any services except such as they might have legally and rightfully rendered under a contract made after the violations of the law had actually taken place. But these things are not the things which render the contract in this case objectionable. The wrong on the part of the plaintiffs consisted simply in entering into a contract to defend persons for criminal offenses which were, in contemplation of all the parties, to be committed in the future. This was a virtual encouragement of the defendants to violate the law, and surely the defendants expected by future violations of the law, to furnish plaintiffs a sufficient amount of work to make the plaintiffs earn the agreed compensation; and in all probability the defendants also expected to realize a sufficient amount of profits out of their illegal and interdicted traffic to pay the plaintiffs, and have something left. It was evidently considered by the parties as a mere sharing of the profits. The evidence tends to show that the defendants employed the plaintiffs in advance, because they believed that by so doing they could better evade the prohibitory liquor law, and could obtain the services of the plaintiffs at a cheaper rate, provided they continued to carry on their illegal traffic. If the plaintiffs had refused to enter into such a contract, possibly the defendants would have closed their illegal business at once. What operated upon the minds of the plaintiffs to enter into this contract, in advance of the commission of the contemplated offenses, is not shown, but it is open to the supposition that they may have believed that, if they did not enter into this contract, the defendants would close their illegal

business, or, at least, would not commit so many violations of law, and thereby would render the plaintiff's services and their compensation correspondingly lighter. The defendants, by this contract, agreed to pay the plaintiffs \$80 per month, and they did in fact pay them that amount for the first nine months of their employment, and failed to pay them only for the last three months. It must also be remembered that the plaintiffs in this action are attorneys and counselors at law. They belong to a class of persons who are authorized and licensed under the laws of Kansas to assist the courts in the administration of justice, and in enforcing the laws. Now, is it proper for such persons to say to persons who are contemplating the commission of crime: "If you commit the crime, we will defend you, and are ready now to enter into a contract for that purpose?" Attorneys at law, above all others, should refrain from doing anything which might seem to encourage a violation of the laws. We know of no authorities directly and precisely in point as to the questions involved in this case, but we cite the following as giving support to the views herein expressed: *Treat v. Jones*, 28 Conn. 334; *Arrington v. Sneed*, 18 Tex. 135; *Hayes v. Hayes*, 8 La. Ann. 468; 3 Amer. & Eng. Encyclop. Law, 869, 875, 886, and cases there cited; 7 *Walt, Act. & Def. c. 31*; *Greenh. Pub. Pol.* pts. 11, 13. As above stated, we think the contract in question in this case is void for the reason that it contravenes public policy, and we also think that the plaintiffs cannot recover for their services which they actually performed under the contract, and this for the same reason. As between the original parties, and all persons *in pari delicto*, the courts will not enforce illegal contracts, nor any supposed rights founded upon them, but will leave the parties, and those *in pari delicto*, just where they find them, and leave each in the possession of just what he has obtained. So much of the contract, or its fruits, as has already been executed, performed, or vested, the courts will permit to stand, but whatever remains to be executed or performed, or to become vested, the courts will not enforce. In the present case, the plaintiffs will retain all the money which they have received under the void contract without the defendants having any action to recover it back, and the defendants will retain all the benefits resulting from the services of the plaintiffs which have already been rendered under the void contract, without the plaintiffs having any action to recover for the value of such services. Indeed, except for the contract there might never have been any necessity for the performance of any such services, for without the encouragement given by the contract to the defendants they might never have violated any of the laws of Kansas. We think the decision of the court below is correct, and its judgment will be affirmed. All the justices concurring.

NOTE.—As the court says in the principal case there seem to be no cases which are exactly like that case,

though two of the cases cited refer to services rendered by attorneys. To induce a party to engage in a riot, an attorney promised to defend him against the expected prosecution. The court held, that the attorney could not maintain a suit for the value of his services, since the contract originated in his own illegal instigation to the commission of a crime, which without that instigation might never have been committed, and so no occasion for the plaintiff's services would have arisen.¹ So a contract, the consideration of which was such advice to a party as was calculated to enable, if not to induce, him to elude the process of the law, and such advice to the officer intrusted with the execution of process as was calculated to induce him to violate his duty, cannot be sustained.² But the general principles applying to such contracts are well settled. Contracts, which tend to obstruct or impede the administration of justice, are null and void.³ In reference to such contracts the courts leave the parties as they find them, when they are *in pari delicto*;⁴ but a recovery is often allowed when the parties are not *in pari delicto*, the party seeking assistance being the victim of duress, fraud or superior influence.⁵

It was formerly held, that A could not sue on a contract with B, if he knew that B intended to avail himself of the proceeds or result of such contract to do an illegal act. This rule was frequently asserted in the case of the sale of goods. It is now held, that A can recover on such contract, unless he participates in such illegal enterprise.⁶ It is sometimes said there must be complicity in the performance of the illegal act,⁷ or a combination to effect such illegal purpose.⁸ Where, however, the contract is so connected with the illegal transaction or purchase as to be inseparable from it, the contract cannot be enforced.⁹ A and B carried cotton between the lines of the two armies during the late war, which was contrary to law. They employed C to haul it. C was not allowed to maintain a suit for his services.¹⁰ A could not recover from B for his services in assisting B in managing a lottery, lotteries being prohibited.¹¹ A printed a copyrighted book for B, knowing that B intended to violate the copyright law, which forbid anyone but the author from printing a copyrighted book. A was not allowed to recover against B for his services.¹² A carpenter was denied compensation for his services in building a nine-pin alley for a public house keeper, the law forbidding the keeping of such alleys.¹³

In order, however, to make a contract unlawful as against public policy or law, it must be manifestly and directly so. It is not sufficient, that the contract is connected with some violation of the law, however re-

¹ *Treat v. Jones*, 28 Conn. 334.

² *Arrington v. Sneed*, 18 Tex. 135.

³ *Herman v. Zeuchner*, 21 Cent. L. J. 887; 2 *Addison on Contracts* (ed. of 1888), 1141; *Collins v. Blaptern*, 2 Wils. 349.

⁴ 2 *Addison on Contracts* (ed. 1888), 1172; 2 *Wharton on Contracts*, §§ 836, 852, 840.

⁵ 1 *Wharton on Contracts*, § 853.

⁶ *Gaylord v. Soragen*, 32 Vt. 110; *Green v. Collins*, 8 Cliff. 494; *Bishop v. Honey*, 34 Tex. 245.

⁷ *Hill v. Spear*, 50 N. H. 253; *Whitlock v. Workman*, 15 Iowa, 351; *Kottwitz v. Alexander*, 34 Tex. 699.

⁸ *Tatum v. Kelley*, 25 Ark. 209; *Aiken v. Blaisdell*, 41 Vt. 655; *Lewis v. Alexander*, 51 Tex. 578; 1 *Wharton on Contracts*, § 843; *Adams v. Couillard*, 102 Mass. 167.

⁹ *Tatum v. Kelly*, *supra*.

¹⁰ *Williams v. Gay*, 21 La. Ann. 110.

¹¹ *Davis v. Caldwell*, 2 Rob. (La.) 271.

¹² *Nichols v. Ruggles*, 3 Day (Conn.) 145.

¹³ *Spurgeon v. McElwain*, 6 Ohio, 442.

motely or indirectly.¹⁴ It is held, that where a party contracts to furnish an article, which has only an unlawful use, he is presumed to know thereof, and he cannot enforce his contract. When the article has a lawful use, he is not presumed to know that it will be used unlawfully, and may enforce his contract.¹⁵ The same rule has been applied according to the legality or illegality of the ordinary use of such article.¹⁶

The contract in question is apparently an innocent one. It is a contract to act for parties in suits that may arise against them under laws which are novel, imposing new provisions of questionable constitutionality. We do not see why, in good faith, such contracts cannot be made. It is a common practice to engage lawyers in advance to attend suits that may be brought against parties, and for convenience and economy several persons unite in such contract of employment. In this case, the court has, by parol testimony or common reputation, "annexed incidents" to this contract. It is implied in the opinion that there can be no such thing as a legal sale of liquors by a druggist or a saloon keeper, that all defenses in suits under their prohibitory liquor laws must be made merely to evade deserved punishment, and that there is no room to question the legality of any of the provisions of those laws. In such case, under the prior decision, there being no occasion for such legal services but an unlawful one, the contract in suit may be held to be void. The idea, that this contract was considered "a mere sharing of the profits," seems to be far-fetched. There are other statements which are assumptions or presumptions, and hardly strengthen the argument. Unfortunately for the weight of this decision, all questions relating to prohibitory liquor laws have, in Kansas, assumed a political tinge.

S. S. MERRILL.

¹⁴ Brunswick v. Vallean, 50 Iowa, 190.

¹⁵ Spurgeon v. McElwain, 6 Ohio, 442.

¹⁶ Bier v. Dozier, 24 Gratt. (Va.) 1.

JETSAM AND FLOTSAM.

A CHILD BRINGS SUIT FOR INJURIES SUFFERED BEFORE ITS BIRTH.—A novel suit has been brought in the Philadelphia common pleas court. It is probable that the records might be searched in vain for a case like it. It is no less than a suit by an infant in arms against a street railway company to recover damages for injuries received before it was born.

The mother of the child was a passenger and received spinal injuries from the jolt of the car, which had come into collision with a wagon. About six months after the accident the child was born. Since birth the child has been afflicted with epilepsy, and it is the opinion of two physicians of high standing that the disease is traceable to the injury which the mother received. It is for this reason that suit has been brought on behalf of the child. Whether such a suit can be maintained is a highly interesting question, and the decision of the court will be looked for with interest by lawyers. The law is clear that an inheritance will attach to an unborn child, and that such child, after birth, can bring suit for the possession of the inheritance, but whether such child can bring suit for any other purpose is the novel point to be decided, and is one upon which the law books seem to be silent.

UNCONSTITUTIONAL EMBARGO.—The Indiana legislature at its last session passed an act forbidding the piping of natural gas to points outside the State. The reason given was that it was not certain how long

the supply would last, and that Indiana ought to have the benefit of it while it still held out. It was much as if Pennsylvania should forbid the exportation of anthracite, or Michigan salt or iron ore. It was understood at the time the law was passed that its constitutionality would soon be tested, and it has been. A company having begun piping gas into Ohio, suits were brought to stop it. The State circuit court held the act was unconstitutional since it was in conflict with the power to regulate commerce between the States which had been conferred on congress. The case will go at once to the State supreme court, which will doubtless affirm the decision.

A NICE DISTINCTION.—Not long ago an English court decided, and justly, without doubt, that after a convict has served his term and been discharged—and the same principle would apply to a pardon—it is a libel to write of him as "a felon." In Missouri it has now been held that a charge that plaintiff has been "tried for conspiracy and libel, and convicted," is justified, if literally true, though plaintiff, after a conviction and before the publication, had succeeded in having one case against him dismissed, and had taken an appeal in the other: *Boogher v. Knapp*, Mo. 11 S. W. Rep. 45.

CAPITAL PUNISHMENT.—The Michigan house of representatives has passed the capital punishment bill. It requires in case of convictions for murder that every jurymen must sign a written verdict recommending the death penalty before it can be imposed, and even then the trial judge may exercise his discretion and make the sentence life imprisonment. The execution must be by hanging or by a shock of electricity.

DIVORCE STATISTICS.—In the matter of divorces Illinois is reported by Commissioner Wright to lead all the other States. During twenty years it has never had less than 1,000 granted appeals for divorce. It now averages over 2,000 cases per year. Indiana and Ohio stand next on the list, followed closely by Missouri and Michigan. New York shows but about 15,000 cases in twenty years to 25,000 for Indiana. The showing is not dependent on any special line of immigrants, for Michigan, Ohio and New York are emphatically settled by New Englanders, while Indiana and Missouri and Illinois are not. But the puzzle is that the Illinois divorce laws are not as lax as in many other States. Chicago's phenomenal wickedness is probably accountable for the statistics of the State.

A new Maine statute includes in the order of "tramps," whoever goes about from town to town asking for food or shelter, or begging or subsisting upon charity. It was put in force a week ago, and the first case was a strong illustration of its injustice. Two able bodied men were returning to their homes in Massachusetts after spending their winter chopping in the forest. Unfortunately their wages had been exhausted, and on their appearance at the Biddeford police station to ask for shelter, they were arrested and subjected to a penalty of sixty days' imprisonment of ten hours a day at hard labor—this is the inflexible punishment of the letter of the law.—*New Haven Journal*.

OBITUARY

The death, on Sunday May 19, in New York, of Peter Carpenter Baker, the head of the well known law publishing firm of Baker, Voorhis & Co., was painfully sudden and unexpected, and removes one, who for over a quarter of a century has been prominent among law book publishers. Though not young in years, his

strong physique and rugged appearance indicated unexpended vitality and gave promise of many years of activity and usefulness. Mr. Baker was a man of eminent business ability, and of spotless integrity. Genial in disposition and kind of heart, he made friends of all with whom he came in contact. We knew him well and we feel that we but echo the sentiment of all publishers and authors in expressing genuine admiration for the man, and deep regret at his death.

RECENT PUBLICATIONS.

A SUMMARY OF THE COMMERCIAL LAW OF THE UNITED STATES, WITH BUSINESS FORMS AND PRACTICAL SUGGESTIONS. Designed for the uses of Merchants, Bankers, Manufacturers, Farmers, Mechanics, Factors, Brokers and other agents; Clerks, Conveyancers, Commissioners, Notaries and Justices of the Peace; Shippers, Carriers, and Insurance, Telegraph and Telephone Companies, and men of business of all classes in all the States and Territories. Also, adapted to use as a Text Book in Commercial and other schools and colleges, by Lee Knowlton Mihills, L.L. B., of the Akron (Ohio) Bar, and late Professor of Law in Buchtel College. Des Moines, Iowa: Mills Publishing Company. 1889.

A well-established prejudice against books of this kind exists in the minds of a large proportion of the profession. Whether the significant sneer at the "every man his own lawyer" style of legal literature is grounded upon sufficient reason, or is prompted simply by a mercenary desire on the part of practitioners to deter the public, as far as possible, from acting as their own lawyers, we do not undertake to say, but the fact of the prejudice does, undoubtedly, exist. Therefore, so far as the legal fraternity is concerned, we venture the prediction that this volume will hardly meet with a cordial reception, notwithstanding the author's disclaimer of purpose, in his preface, to make everybody his own lawyer. Nor are we decrying the merits of the work in the assertion that few lawyers will find within its pages much of real positive value. It consists of a grouping together of the elementary principles pertaining to the law of Contracts, Agency, Partnership Corporations, Negotiable Instruments, Sales, Mortgages, Liens, Carriers, Deeds, Leases, Insurance, Shipping, Exemptions, Limitations, Wills, etc., with forms such as are in common and general use, and the statutes governing Copyrights, United States Postal Regulations, Internal Revenue, Duties upon Imports and the Interstate Commerce Law. The author cites no authorities whatever. From this statement it will readily be seen that it contains but little with which the average practitioner is not, or at least, should not be, familiar. This does not, however, apply to the forms or the compendium of statutes, which at times may afford the practitioner a means of ready reference.

The author in his preface says that the book is designed for the use of Merchants, Bankers, Farmers, Mechanics and business men generally. To such we can understand that the book, if properly used, will give value. There are many questions arising from day to day in the life of a business man upon which it may not be necessary or convenient to take the advice of a lawyer, and at such times a book of this kind will be found useful, though the danger is in an absolute reliance upon statements of general principles for the settlement of special cases. The author is an old and valued friend of this JOURNAL, to which he has contributed many interesting papers, and we feel sure that this book will be found accurate and carefully prepared as far as it goes.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXVI. Practice. St. Louis, Mo.: The Gilbert Book Company. 1889.

We have so often written in favorable terms of this series of reports, and the profession generally are so fully acquainted with their merits, that it was our intention not to notice this volume further than by acknowledging its receipt in "Books Received." But the subject of which this volume treats "Practice," is so important and of such interest that it seems best to call attention to it. The practitioner in the United States courts will find herein a complete compendium of the law pertaining to that branch of practice, including Admiralty, Equity and Removal of Causes.

QUERIES AND ANSWERS.

[Subscribers are invited to send short answers to the following.]

QUERY NO. 20.

A statute provides that, "if the inheritance came to the intestate by gift, devise or descent from the paternal line, it shall go to the paternal grandfather and grandmother as joint tenants, etc. A father had his life insured in favor of his only child. At his death, his wife being dead, the child received the proceeds of the policy. At her death, she being unmarried and childless, would such "proceeds" descend to her paternal grandparents, or would it be controlled by another statute, viz.: "If the estate come to the intestate otherwise than by gift, devise or descent, it shall be divided into two equal parts, one of which shall go to the paternal, and the other to the maternal kindred." Suppose the insurance policy was drawn payable to the mother on the child's death, would the "inheritance" go to the maternal line, under a section providing that, "If the inheritance come to the intestate by gift, devise or descent from the maternal line, it shall go to the maternal line?"

W. W. T.

QUERY NO. 21.

A and B enter into a party-wall agreement, by the terms of which A is permitted to place his wall six inches on the land of B, who covenants for himself, his heirs and assigns, that when he or they make use of the wall they will pay to A, his heirs and assigns, one-half of the value of said wall. A sells to C and B sells to D, with parol notice of the existence of party-wall agreement, which is at the time unrecorded. D appropriates part of the wall, and, on refusal to pay for same on demand of C, C sues B and D. Is this a personal contract enforceable against B, or is it one which runs with the land so as to bind D only?

A. J.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMIRALTY—Jurisdiction. — A court of admiralty has no jurisdiction of a libel *in rem* against vessels navigating a river, for damage negligently caused by them to a swing-bridge resting on a pier, constructed on the bed of the river.—*City of Milwaukee v. The Curtis*, U. S. D. C. (Wis.), 37 Fed. Rep. 706.

2. ADMIRALTY—Jurisdiction—Damages. — The admiralty courts cannot take cognizance of a libel for damages for death caused by negligence on the high seas, in the absence of an act of congress giving a right of action therefor, though the vessel proceeded against is a foreign one.—*The Alaska*, U. S. S. C., 9 S. C. Rep. 461.

3. ANIMAL—Vicious Horse. — In action for injuries sustained by plaintiff in assisting defendant with vicious horse, the plaintiff must not only prove viciousness of horse, and representation of defendant that horse was gentle but must also show knowledge of defendant as to viciousness.—*Finney v. Curtis*, Cal., 21 Pac. Rep. 120.

4. APPEAL. — An action at law, or a final order in any special proceeding therein, can be reviewed only on error; but an action in equity, or any special proceeding therein in the nature of a final order, may be reviewed on appeal.—*Morse v. Engle*, Neb., 41 N. W. Rep. 1098.

5. APPEAL—Bond—Supersedeas. — Under Rev. St. Mo. § 3713, the order of the court approving the bond and allowing the appeal is a determination that the amount of the bond is sufficient, and operates as a *supersedeas*, regardless of the actual amount of the bond.—*State v. Dillon*, Mo., 11 S. W. Rep. 255.

6. ARBITRATION AND AWARD — Misconduct. — An award is properly set aside where one of the arbitrators remained at the house of the successful party several nights, partaking of his hospitality, while engaged in the arbitration, and another of them dined at a hotel at such party's expense. — *Robinson v. Shanks*, Ind., 20 N. E. Rep. 713.

7. ARBITRATION — Incomplete Award. — An award

which is not complete as to all the matters included in the submission is void altogether, and is not admissible even as an account stated.— *Hamilton v. Hart*, Penn., 17 Atl. Rep. 226.

8. ASSIGNMENT FOR THE BENEFIT OF CREDITORS. — A voluntary assignment for the benefit of creditors, executed in another State, and valid there, will be enforced as against creditors of the assignor resident in such State subsequently attaching property of the debtor in this State. — *Woodward v. Brooks*, Ill., 20 N. E. Rep. 685.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS. — A debtor conveyed his stock of goods, accounts, etc., to his creditor by an absolute bill of sale, containing no reservation or words of trust. The creditor accepted the property in satisfaction of his debt, which was less than its value, but he also absolutely assumed and agreed to pay certain other creditors' claims, the whole amount exceeding the value of the stock and other property included in the conveyance: *Held*, a valid sale, and not an assignment.—*Powell v. Kelly*, Ga., 9 S. E. Rep. 278.

10. ATTACHMENT — Dissolution. — On a hearing to dissolve an attachment, when the party against whom the attachment has issued files an affidavit denying the grounds upon which the writ issued and the party who procured the attachment refuses to offer evidence to sustain it, it is error not to sustain motion to dissolve.—*Mitchell v. Carney*, Kan., 21 Pac. Rep. 153.

11. ATTACHMENT — Lien. — The mere issuing of an attachment, and placing it in the hands of a sheriff, gives no lien, and an attachment subsequently issued, but first levied, holds the property as against it. — *May v. Buckhannon River Lumber Co.*, Md., 17 Atl. Rep. 274.

12. ATTACHMENT—Indemnity Bond. — Sureties on an indemnifying bond are not liable for injury to goods attached resulting from the negligence or misconduct of the sheriff in keeping them.—*Smokey v. Peters & Calhoun Co.*, Miss., 5 South. Rep. 632.

13. ATTACHMENT — Discharge. — Where there is another action pending between the same parties for the same cause, in which an order of attachment has been issued, and the property of the defendant levied upon, such pending action and attachment proceedings are sufficient grounds for a district judge to discharge an attachment issued in a subsequent action, brought by the same plaintiff against the same defendant upon the same cause of action. — *Smith Frazer Boot & Shoe Co. v. Dorse*, Kan., 21 Pac. Rep. 167.

14. ATTORNEY AND CLIENT — Privileged Communications. — Communications made by testator to his attorney, who drew the notes and deeds of trust securing them, made at the time they were drawn in the presence of defendant and the person from whom he bought the land to pay for which the money was borrowed, are not privileged.—*Hughes v. Boone*, N. Car., 9 S. E. Rep. 286.

15. BANKS AND BANKING—Depositor. — A depositor of a certain bank instructed it to charge to his accounts a note upon which he was surety, and which was payable to the bank. The note was not so charged, but it was agreed that the bank should at any time thereafter have the right to make such entry, and that the note should be held by the bank to be collected for the benefit of the depositor: *Held*, that such agreement gave to the bank a right which it would not otherwise have had, and that the depositor became the owner of the note.—*Harrison v. Harrison*, Ind., 20 N. E. Rep. 746.

16. BOND—Constable. — Under Rev. St. Ind. § 722, providing that chattels mortgaged may be levied on and sold, and that the purchaser shall be entitled to possession on complying with the terms of the mortgage, a constable is liable on his bond for turning over mortgaged property to a purchaser at an execution sale before the latter has complied with the conditions of the mortgage.—*McDaniel v. State*, Ind., 20 N. E. Rep. 739.

17. CARRIERS — Injuries to Stock. — A race-horse shipped by plaintiff over the defendant's road was in-

jured in a wreck: *Held*, that an agreement made by the general freight agent of the defendant, who went to the place of the wreck by the authority of the defendant to look after injured property, by which the defendant was to take the injured horse, and pay to plaintiff a certain sum in settlement of his claim for damages, was within the authority of the agent, and was founded on a sufficient consideration. — *Chicago & E. I. R. Co. v. Katzenbach, Ind.*, 20 N. E. Rep. 709.

18. CARRIERS—Goods—Baggage. — Where an emigrant carries trunks and other ordinary baggage, and at the same time turns over other boxes of goods to the carrier for transportation, paying freight for the weight in excess of her baggage allowance, and the general character of the shipment is known to the carrier, it cannot be conclusively presumed that the entire shipment is baggage, so as to make applicable the rule that there can be no recovery in case of loss except for such articles contained in the boxes as would properly be designated as necessary baggage. — *Hamburg-American Packet Co. v. Gattman, Ill.*, 20 N. E. Rep. 662.

19. CONFLICT OF LAWS — Option Contract. — Contracts for the future delivery of cotton, made by a commission merchant in New Orleans, to be performed there, for his principal, residing in the State of Mississippi, are governed by the laws of the State of Louisiana, and, if valid in that State, will be enforced by the circuit court of the United States in the State of Mississippi. — *Lehman v. Feld*, U. S. C. C. (Miss.), 37 Fed. Rep. 852.

20. CONSTITUTIONAL LAW—Office and Officer. — Const. Mich. art. 12, § 7, which provides that the legislature shall provide by law for the removal of county officers commits to the legislature the whole subject of removal, and the determination of the existence of cause for removal may be vested by it in other departments of the State government than the judicial, though it involves the exercise of judicial powers. — *People v. Stuart, Mich.*, 41 N. W. Rep. 1091.

21. CONTRACT — Breach of Marriage Promise. — In an action for breach of marriage promise, an instruction that if certain facts are true plaintiff may recover is not reversible error for omitting from view the defense of limitation, where another instruction clearly states that, if the limitation has expired before the bringing of the action, plaintiff cannot recover. — *Schreder v. Michel, Mo.*, 11 S. W. Rep. 314.

22. CONTRACTS—Illegality. — In suit on note given for losses sustained in option dealing: *Held*, that where there was no intention of the parties to purchase and receive the grain, and no intention of the sellers to deliver the same, no recovery could be had on the contract. — *Sprague v. Warren, Neb.*, 41 N. W. Rep. 1113.

23. CORPORATIONS—Stockholders. — Assuming that the insolvency law includes and applies to corporations, a release of a debt due from a corporation by its creditor, and a judgment of a court thereon discharging the debtor pursuant to the provisions of said insolvency law, releases and discharges the stockholders in said corporation from the personal liability imposed by § 8, art. 10, of the constitution of the State. — *Mohr v. Minn. Elevator Co., Minn.*, 41 N. W. Rep. 1074.

24. CORPORATIONS—Officers — Misappropriation. — An appropriation by the directors of a corporation of its funds as compensation to its president for services rendered at a time when there was no by-law or resolution authorizing payment for the services is unauthorized, and the corporation, by its receiver, may recover the funds so appropriated. — *Ellis v. Ward, Ill.*, 20 N. E. Rep. 671.

25. CORPORATIONS—Associations. — Mere voluntary associations are incapable of taking and holding real property in their society name, but it may be held for their use and benefit through the intervention of a trustee, who may be a natural or artificial person. — *Liggett v. Ladd, Oreg.*, 21 Pac. Rep. 133.

26. CORPORATIONS. — Where one corporation seeks judicial redress against another corporation, on the

ground that the other has refused to give a service, or to perform a duty which it owes, the complaining corporation, to succeed, must show, affirmatively, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law. — *Delaware, L. & W. R. Co. v. Central, etc. Co., N. J.*, 17 Atl. Rep. 146.

27. COUNTIES—Courts. — The rule that a court of record can act only through its orders made of record does not require, where the court has large administrative and executive powers, with authority to appoint agents, that all the acts of the agents should appear of record. — *Bullitt County v. Washer*, U. S. S. O., 9 S. C. Rep. 499.

28. COURTS—Special Judge. — Under Rev. St. Mo. §§ 1107, 1111, the special judge upon taking the oath becomes the judge of the court for all the purposes of the particular case even though before it is tried a regular judge is on the bench. — *Noffziger v. Reed, Mo.*, 11 S. W. Rep. 315.

29. COURTS—Jurisdiction. — A railroad company, whose road extends from Atlanta, Ga., through South Carolina to Charlotte, N. C., the office of its division superintendent being in Atlanta, may be sued in the Georgia courts by a citizen of Georgia, for personal injuries received while traveling on its road in South Carolina, especially where it appears that the train on which the accident happened was being operated under the superintendent's control. — *Hills v. Richmond & D. R. Co., U. S. C. C., Ga.*, 37 Fed. Rep. 660.

30. COVENANT. — Measure of Damages under the facts for breach of covenant of warranty. — *Danfort v. Smith, Kan.*, 21 Pac. Rep. 168.

31. CRIMINAL LAW—Burglary. — In an indictment for burglary it is necessary that the name of the owner of the building broken into should be given, and for this purpose the person in the visible occupancy and control of the premises at the time of the burglary may be set out as the owner, whether he be the owner of the title, or a tenant. — *Winslow v. State, Neb.*, 41 N. W. Rep. 1116.

32. CRIMINAL LAW—Homicide—Sanity. — An instruction that "insanity, when once shown to exist in an individual, is presumed to continue until the contrary is shown by the evidence," is not erroneous because omitting the words "beyond a reasonable doubt," where there is a following instruction that "evidence rebutting the presumption of sanity need not, to entitle defendant to acquittal, predominate in his favor." — *Grubb v. State, Ind.*, 20 N. E. Rep. 725.

33. CRIMINAL LAW—Misdemeanor. — The complaint referred to in Laws 1885, relating to procedure before justices in misdemeanors, is the party who makes to a justice of the peace, on his oath or affirmation, a complaint charging a person with the commission of a misdemeanor. — *In re Winne, Kan.*, 21 Pac. Rep. 176.

34. CRIMINAL LAW—Murder. — Instruction in criminal case that the jury render such a verdict as they believe is fair, just, and right, is erroneous, as they must be satisfied beyond reasonable doubt. — *Territory v. Kay, Ariz.*, 21 Pac. Rep. 152.

35. CRIMINAL LAW—Gaming. — The dealer of a game of stud poker is an accomplice with those who bet money or value at such game. — *State v. Light, Oreg.*, 21 Pac. Rep. 132.

36. CRIMINAL LAW—Perjury. — Statements sworn to on application to commute homestead entry to cash entry are not required by law and perjury cannot be predicated on them. — *United States v. Howard*, U. S. D. C. (Ala.), 37 Fed. Rep. 666.

37. CRIMINAL LAW—Murder. — An instruction that "evidence of casual statements or admissions by a party, made in casual conversation and to disinterested persons, are regarded by law as the weakest kind of evidence that can be produced, owing to the liability of the witness to misunderstand or forget," etc., is properly refused. — *State v. Glahn, Mo.*, 11 S. W. Rep. 260.

38. CRIMINAL LAW — Larceny. — One who has the

bare custody of property as the employee or servant of the owner, is guilty of larceny, if he fraudulently appropriates such property to his own use. — *Crocheron v. State*, Ala., 5 South. Rep. 649.

39. CRIMINAL LAW—District Attorney. — The district attorney is the legal advisor of the grand jury, and may be present at, and assist them in, their examination of cases, provided he does not take part in their deliberations as to their conclusions and findings. — *State v. Aleck*, La., 5 South. Rep. 639.

40. DEDICATION. — Evidence sufficient to constitute a dedication of land to public use. — *Pierce v. Roberts*, Conn., 17 Atl. Rep. 278.

41. DEED — Constructive Notice. — Where the description of land in a deed is insufficient to pass the title because of omissions therein, made through the mistake of the parties thereto, and, subsequent to the record thereof, the same land is conveyed to a third party, who has no actual notice of the prior deed, the record is not constructive notice to the latter of the equitable rights of the former purchaser. — *Bailey v. Galpin*, Minn., 41 N. W. Rep. 1064.

42. DEED—Construction. — A deed of conveyance to a husband and wife residing in Barbour county, then in Virginia, for a tract of land situated in said county, did not confer upon the husband title to the undivided moiety of said land, but said husband and wife took by entireties. — *Farmers' Bank v. Corder*, W. Va., 9 S. E. Rep. 220.

43. DEED—Escrow. — Where a deed is delivered by the grantor to a third person, to be held in escrow, until the grantee shall have paid a specified debt, and the deed is delivered before the debt is fully paid, but it is subsequently paid: *Held*, the delivery will be operative, and the deed valid, at least from the time the debt is fully paid. — *Connell v. Connell*, W. Va., 9 S. E. Rep. 252.

44. DIVORCE—Alimony. — The statutes of Oregon, which prohibit a divorced party from contracting marriage with a third person until the expiration of the period allowed to take an appeal from the decree granting the divorce, which is six months, makes the marriage between plaintiff and defendant a nullity, and precludes the recovery of alimony. — *Wilkie v. Wilkie*, Kan., 21 Pac. Rep. 178.

45. ELECTIONS—County Attorney. — A county attorney is a county officer and the county court of the proper county has original jurisdiction in a proceeding to contest the election of said attorney, and the supreme court has not original jurisdiction. — *Bell v. Templin*, Neb., 41 N. W. Rep. 1093.

46. EMINENT DOMAIN — Street. — Defendant constructed its railroad upon a public street for which no grade had been established, but which would evidently require grading in the near future. The track was laid two or three feet above the natural level of the street, practically cutting off access from the street to plaintiffs abutting lots: *Held*, that plaintiff was entitled at least to nominal damages, and to such actual damages as he may suffer by the diminution of rental value, but he could not recover for a depreciation in the total value of the inheritance, as it cannot be presumed, in view of the condition of the street, that a permanent nuisance was intended. — *Smith v. Kansas City, St. J. & C. B. Ry. Co.*, Mo., 11 S. W. Rep. 259.

47. EQUITY—Injunction—City Council. — A court of equity has no jurisdiction to restrain the council of a city from proceeding to investigate charges preferred against trustees of the water works in the mode provided by the by-laws and ordinances of the city. — *Muhler v. Hedekin*, Ind., 20 N. E. Rep. 700.

48. EQUITY—Bill of Review. — A bill of review for newly-discovered evidence will not lie where the evidence is simply confirmatory or cumulative. It must be decisive in its character. — *Davis Sewing-Machine Co. v. Dumbar*, W. Va., 9 S. E. Rep. 237.

49. EQUITY. — A doubtful or partial remedy at law does not exclude the injured party from relief in equity.

A suit may be maintained in a court of equity by or in the name of the sheriff, under § 15, ch. 141, Code 1887, where there is a conflict between two or more execution creditors in respect to the same fund or property, and such suit will avoid a multiplicity of suits. — *Nease v. Etina Ins. Co.*, W. Va., 9 S. E. Rep. 233.

50. EQUITY—Void Tax-deed. — Though a tax deed be void for illegality in the proceedings, equity will give relief on bill to remove a cloud from title, particularly where the illegality does not appear wholly on the face of records. — *Lyon v. Alvey*, U. S. S. C., 9 S. C. Rep. 490.

51. EVIDENCE — Parol. — Parol evidence held admissible to explain ambiguity in contract for legal services. — *Louisville, N. A. & C. R. R. Co. v. Reynolds*, Ind., 20 N. E. Rep. 711.

52. EVIDENCE—Admissions. — In an action for personal injuries, defendant having shown that plaintiff had made statements contrary to his testimony, which statements showed that the accident was due to his own carelessness, plaintiff cannot show that he had made other statements consistent with his testimony. — *Logansport Turnpike Co. v. Heil*, Ind., 20 N. E. Rep. 708.

53. EVIDENCE—Production of Books. — A court will not before the trial of an action, at the instance of a party thereto, require a disinterested person to produce his private books for inspection, though they contain accounts the examination of which is important to the preparation of the case for trial. — *Marion Nat. Bank v. Abell's Adm.*, Ky., 11 S. W. Rep. 300.

54. EXECUTION — Fraudulent Representations. — Suit for deceit and fraudulent representations in the purchase of goods on credit is not a suit in tort and a judgment by default therein was not a judgment for a tort within meaning of statute authorizing body execution. — *People v. Healy*, Ill., 20 N. E. Rep. 692.

55. EXECUTION. — Defendant assumed to levy on plaintiff's goods in its office, telling the agent in charge that they were "just the same as theirs, or in their hands," but he "could use it just the same." The agent, at defendant's request, receipted for the property. Notices of sale were not posted, and the property was not removed: *Held*, that a levy was made. — *Chicago & W. M. Ry. Co. v. Reid*, Mich., 41 N. W. Rep. 1088.

56. EXECUTORS AND ADMINISTRATORS — Sale. — An administrator may sell a lease of real estate for a term of twenty-five years, held by his intestate as personal property, under a proper order from the county court, without obtaining a license therefor from the district court as in case of the sale of real estate for the payment of debts. — *Mulloy v. Kyle*, Nob., 41 N. W. Rep. 1117.

57. EXEMPTION—Conveyance of Exempt Property. — Where land has been duly set apart to a judgment debtor as exempt, he may thereafter convey it as he chooses, free from any lien of the judgment or right of the judgment creditor. — *Ray v. Yarnell*, Ind., 20 N. E. Rep. 708.

58. FRAUDS—Statute of. — A parol contract that is not to be performed within a year from the making thereof, and not relating to land, is not enforceable or taken out of the operation of the statute of frauds by a part performance, as that equitable doctrine applies only to contracts relating to land. — *Osborne v. Kimball*, Kan., 21 Pac. Rep. 163.

59. FRAUD—Estoppel. — Application to the facts of the doctrine that, if a representation has been procured by fraud, there will be no estoppel upon the party making it though he made it with the intent that it should be acted upon. — *German Sav. Inst. v. Jacoby*, Mo., 11 S. W. Rep. 206.

60. FRAUDULENT CONVEYANCE. — The retention of possession by the grantor of land is *prima facie* evidence that the conveyance was fraudulent. — *Cooper v. Davison*, Ala., 5 South. Rep. 650.

61. GUARDIAN AND WARD — Accounting. — While a tutor is liable for the revenues yielded by the property of his wards, under his control and administration, and which he has collected, he is entitled to be credited, in

statement with them, with all disbursements for insurance, repairs, taxes, board and lodging, etc., made by him in his official capacity. — *Mahony v. Mahony*, La., 5 South. Rep. 643.

62. HIGHWAYS—Establishment. — Under § 46, of ch. 78, Compiled statutes, the order of the county board declaring a section line to be a public highway, and ordering it to be opened by survey of the county surveyor, is an establishment of a public highway on such line, which can only be vacated by pursuing the course designated in said chapter. — *McNair v. State*, Neb., 41 N. W. Rep. 1099.

63. HOMESTEAD. — Under the California statute requiring the declaration of a homestead to contain a description of the premises, and "an estimate of their actual cash value," a declaration stating that the property claimed "does not exceed in value the sum of \$5,000" is sufficient. — *Southwick v. Davis*, Cal., 21 Pac. Rep. 121.

64. HOMESTEAD — Abandonment. — Evidence held sufficient to show an intention to abandon the homestead. — *Kaufman v. Fore*, Tex., 11 S. W. Rep. 278.

65. HOMESTEAD. — The right of homestead and exemption is the creature of the legislature, and can be limited according to the legislative will in any respect and at any time; and the law in force at the time of the death of husband and wife, and not the law in force at the time the homestead was created, controls as to the rights of the survivor. — *Tyrrell v. Baldwin*, Cal., 21 Pac. Rep. 116.

66. HUSBAND AND WIFE. — Where a parol gift of land is made to a married woman by her father, and she and her husband take possession, the husband acquires no interest, except as tenant by curtesy in case he survive her. — *Tomlin v. Franks*, Ky., 11 S. W. Rep. 296.

67. HUSBAND AND WIFE — Power of Attorney. — A married woman may appoint her husband by power of attorney as her agent to convey the inchoate interest which she holds in his real estate. — *Munger v. Baldridge*, Kan., 21 Pac. Rep. 159.

68. HUSBAND AND WIFE. — A wife living with her husband on land, and claiming the land as her separate estate, under a right derived from a person other than her husband, prior to commencement of the action, cannot be turned out of possession by a writ of possession in an action of ejectment against her husband to which she was not a party. — *Bushong v. Rector*, W. Va., 9 S. E. Rep. 225.

69. HUSBAND AND WIFE— Adverse Possession. — It is the law of Missouri that the adverse possession for the statutory period which will defeat the husband's sole right of possession of his wife's land will likewise defeat an action of ejectment therefor brought by the husband and wife jointly. — *Deguire v. St. Joseph Lead Co.*, U. S. C. O. (Mo.), 37 Fed. Rep. 683.

70. INSURANCE—Principal and Agent. — An agent of a mutual insurance company, authorized to issue policies of insurance, and consummate the contract, binds the company by any act, agreement, waiver, or representation within the ordinary scope and limit of insurance business, which is not known by the assured to be outside the authority granted to the agent. — *National Mut. Fire Ins. Co. v. Barnes*, Kan., 21 Pac. Rep. 165.

71. INSURANCE— Assignment of Policy. — Where a fire insurance company issues a policy with power to assign it, the assignee is not affected by any conditions not shown in the policy of which he had no notice, although they were known to his assignor. — *Miller v. Hillsborough Mut. Fire Assn.*, N. J., 17 Atl. Rep. 293.

72. INTEREST — Coasts. — A complaint alleged that defendant wrongfully converted certain property to plaintiff's damage in a given sum, and alleged also that that sum was the value of the property, and demanded judgment for that sum, with interest from the date of conversion. Under Rev. St. Mont. §§ 1236, 1237: *Held*, that the interest was unauthorized from the day of the

conversion, but could be recovered only from the date of the judgment for damages. — *Palmer v. Murray*, Mont., 21 Pac. Rep. 126.

73. INTOXICATING LIQUORS— Civil Damage. — Under the Michigan civil damage law, a wife has a right of action where her husband and another both became intoxicated, and the husband's leg was broken in a scuffle, causing loss and injury to the wife. — *Thomas v. Densby*, Mich., 41 N. W. Rep. 1083.

74. INTOXICATING LIQUORS— Ordinance. — By Rev. St. Ind. 1881, § 5314, the county commissioners are only authorized to grant licenses to male inhabitants of the State: *Held*, that a male inhabitant of the State, prosecuted for a violation of such ordinance, could not complain that an unjust discrimination was made against women and non-residents. — *Wagner v. Town of Garrett*, Ind., 20 N. E. Rep. 706.

75. INTOXICATING LIQUORS — Gift to Minor. — One who furnishes liquor to a minor at the instance of a third person, who is to pay for the liquor and give it to the minor, is guilty of giving liquor to a minor under Rev. St. Ind. 1881, § 2094, making such gift a misdemeanor. — *Topper v. State*, Ind., 20 N. E. Rep. 699.

76. JUDGMENT—Divorce. — In an action for divorce, where service was had by publication only, the publication of a notice requiring the defendant to answer on or before the second Monday after completed service, instead of the third as provided by Code, would not prevent the court from acquiring jurisdiction, and a decree rendered in such case would, perhaps, not be open to collateral attack, but would be subject to be set aside on motion. — *Wilkins v. Wilkins*, Neb., 41 N. W. Rep. 1101.

77. JURY—Right to Jury Trial. — In Indiana, whenever the cause of action is one that can only be enforced by invoking the equitable powers of the court, then the right of trial by jury does not maintain, but if the cause of action does not depend on the equity jurisdiction of the court, a jury may be demanded. — *Martin v. Martin*, Ind., 20 N. E. Rep. 763.

78. LANDLORD AND TENANT—Notice to Quit. — Where in an action by a landlord to recover possession after the expiration of the term, it appears that the tenancy was by a written lease for a period of one year, there is no error in admitting in evidence a written notice to quit, though the notice was not served in the manner required by statute. — *Snideman v. Snideman*, Ind., 20 N. E. Rep. 723.

79. LIBEL AND SLANDER. — In an action for libel by charging plaintiff with fraudulently appropriating money of an insurance society of which he was an officer, defendant may show the society's business methods, as tending to show that it was possible for plaintiff to appropriate the funds. — *Mosier v. Stoll*, Ind., 20 N. E. Rep. 752.

80. LIMITATION OF ACTIONS. — *Held*, that the claim upon which suit was predicated was barred by the statute of limitations, and if the plaintiff relied upon any of the statutory or other exceptions to take said claim out of the operation of statute it should have been set forth in a replication to plea. — *Laidley v. Smith's Ex.*, W. Va., 9 S. E. Rep. 209.

81. MARITIME LIENS—Seamen. — Sailors who ship at New York for a voyage via Mobile to South America and return, are entitled, upon the seizure of the vessel under process at Mobile, only to wages then due, it appearing that they can obtain other similar employment at equal or better wages, and there being no proof of any special damage or of return expenses to their homes. — *The Augustine Kobbe*, U. S. D. O. (Ala.), 37 Fed. Rep. 696.

82. MASTER AND SERVANT—Contract. — The prevention of filing liens for services rendered in grading the railway was a sufficient consideration between employees of such subcontractor in grading the railway road-bed and the contractor, who had agreed to save the railway company harmless from such liens. — *Carville v. Dauchy*, Neb., 41 N. W. Rep. 1119.

83. MASTER AND SERVANT—Negligence. — Evidence reviewed and held to sustain verdict for plaintiff injured in defective elevator of defendant.— *Oberfelder v. Doran*, Neb., 41 N. W. Rep. 1094.

84. MASTER AND SERVANT — Negligence. — Where deceased was injured crossing tracks in defendants yard, going to his work: *Held*, that if the failure of the company to provide a safe passway was negligence, the deceased, by remaining at the works, with full knowledge of the danger, and by attempting to cross, voluntarily assumed the risk. — *Lord v. Pueblo Smelting Co.*, Colo., 21 Pac. Rep. 148.

85. MASTER AND SERVANT. — In an action for injury to plaintiff through escape of gas from a receiver: *Held*, that plaintiff was not acting under the orders of his employer, but on his own responsibility, knowing the danger, and could not recover damages for his injuries. — *Taylor v. Baldwin*, Cal., 21 Pac. Rep. 124.

86. MASTER AND SERVANT. — Plaintiff, a brakeman on defendant's train, was injured in an accident caused by a bull on the track: *Held*, that even if plaintiff knew that the engine was without a cow-catcher, and the fences along the track were defective, the question of his recovery was for the jury.— *Mages v. North Pacific C. R. Co.*, Cal., 21 Pac. Rep. 114.

87. MECHANIC'S LIENS. — Constructing of Mansf. Dig. Ark §§ 4403, 4404, subjects to mechanics' liens as amended by act March 17, 1885, requiring the owner to retain for ten days one-third of the cost.— *Bashan v. Toors*, Ark., 11 S. W. Rep. 280.

88. MECHANICS' LIENS — Subcontractors. — Under Mansf. Dig. Ark. § 4422, relating to mechanics' liens, one who works for the contractor is a subcontractor. — *Buckley v. Taylor*, Ark., 11 S. W. Rep. 281.

89. MINES AND MINING—Taxation.—*Held*, that Sess. Laws, 1887, § 1, subjects all mining property to taxation, but divides it into two classes,—mines or claims producing an annual output exceeding \$1,000, and all other mining property, without reference to value, and there is no such unreasonableness in the division made by the act as will justify judicial interference. — *People v. Henderson*, Colo., 21 Pac. Rep. 145.

90. MINES AND MINING—Quieting Title. — Under the practice act of Utah Territory a complaint in an action to quiet title to a mining claim, which states that plaintiff is in possession and that defendant claims an interest or an estate therein adverse to him, is sufficient to require the nature and character of the defendant's adverse claim to be set up, inquired into, and judicially determined.—*Parley's Park Silver Min. Co. v. Kerr*, U. S. S. C., 9 S. C. Rep. 511.

91. MORTGAGES—Foreclosure.—Under Rev. St. Ind. § 4392, relating to sale of land under mortgage foreclosure, the auditor is bound to a strict observance of the statute, and a sale of a portion of a tract taken out of the central and south-easterly part, instead of the north-westerly corner, is void. — *Haynes v. Cox*, Ind., 20 N. E. Rep. 758.

92. MUNICIPAL CORPORATIONS—Public Improvements. — It is error to charge a jury sworn to assess the benefits to be derived by the owner of property by the construction of a proposed sidewalk that they shall exclude from their consideration the present use to which the premises are put, but should determine whether their market value for any legitimate purpose for which they may be used will be increased by the improvement. — *Kankakee Stone & Lime Co. v. City of Kankakee*, Ill., 20 N. E. Rep. 670.

93. MUNICIPAL CORPORATIONS — Exclusive Franchise.—Although a company had erected gas-works in a city by the authority of the city, and had complied with all the requirements of the common council, there was nothing in the statute which precluded the city from building its own gas-works.— *Hamilton Gas Light Co. v. City of Hamilton*, U. S. C. C. (Ohio), 37 Fed. Rep. 832.

94. MUNICIPAL CORPORATIONS—Public Improvements.—Act Mo. March 28, 1881, authorizing a sewerage system in cities of a certain size, was not unconstitu-

tional, because the cost of the construction of a sewer was authorized to be apportioned against the property fronting on the improvement in proportion to the frontage of each lot.—*Rutherford v. Hamilton*, Mo., 11 S. W. Rep. 249.

95. MUNICIPAL CORPORATIONS—Public Improvements. — In a proceeding by the city to condemn property for the purpose of widening and extending a public highway, it appearing that the proposed street is for public use, the question as to whether there is any present public necessity for it cannot be determined.—*City of Kansas v. Baird*, Mo., 11 S. W. Rep. 243.

96. MUNICIPAL CORPORATIONS — Defective Sidewalks. — Under the charter of St. Louis (2 Rev. St. Mo. p. 1623) where the plaintiff was injured by falling on a sidewalk at a place where ice and snow had been allowed to accumulate, it was not necessary to join as a party defendant with the city a certain corporation in front of whose premises such snow and ice had accumulated, although there was an ordinance requiring all persons to keep the sidewalks in front of their premises free from such accumulations.—*Norton v. City of St. Louis*, Mo., 11 S. W. Rep. 242.

97. NEGLIGENCE—Railroad Company. — Defendant held not liable for negligence where child walking on track was run over by portion of a train which became uncoupled. — *Galeston H. & S. A. Ry. Co. v. Chambers*, Tex., 11 S. W. Rep. 279.

98. NEGLIGENCE. — Defendant held liable for injuries to plaintiff an engineer who while standing on the main track was run over by a hand car and his right to recover was not defeated by the fact that at the time he was violating a rule of the railroad company, forbidding engineers to permit firemen to operate the engine, except when they are themselves present upon them.—*Barry v. Hannibal & St. J. Ry. Co.*, Mo., 11 S. W. Rep. 308.

99. NEGLIGENCE—Railroad Crossing. — Defendant held guilty of negligence where deceased was injured crossing railroad tracks in defective condition. — *Telfer v. St. J. & D. M. Ry. Co.*, Mo., 11 S. W. Rep. 810.

100. NEGOTIABLE INSTRUMENTS. — A complaint in an action on a note, which alleges that the note has been accidentally destroyed by fire, and sets out a copy of it, need not allege that the destruction of the note occurred without plaintiff's fault.—*Cunningham v. Hoff*, Ind., 20 N. E. Rep. 758.

101. NEGOTIABLE INSTRUMENTS — Indorsement. — One who obtains possession of a note after indorsing it is restored to his original position, and cannot, nor can subsequent purchasers from him with notice of the fact, hold intermediate indorsers, who could look to him again.—*Adams v. McKaskill*, N. Car., 9 S. E. Rep. 284.

102. NEGOTIABLE INSTRUMENTS—Validity. — Under Gen. St. Ky. ch. 32, § 13, where a note signed by defendant and one M, was made payable to the order of M, and the latter signed his name on the back of the note, and delivered it to the plaintiff, that the defendant became liable to the plaintiff.—*Jenkins v. Bass*, Ky., 11 S. W. Rep. 293.

103. NEW TRIAL — Mandamus. — If a judgment is rendered against defendant for default of appearance, in an action commenced by attachment and personal service, for a greater sum than the amount of plaintiff's claim, as stated in the affidavit filed to obtain the attachment, the circuit court will be required by *mandamus* to grant a new trial, unless the plaintiff consents to remit the judgment down to the amount mentioned in the affidavit.—*Rose v. Palmer*, Mich., 41 N. W. Rep. 1080.

104. NEW TRIAL—Remittitur. — The exaction, as a condition of refusing a new trial, that the prevailing party shall remit a portion of the verdict awarded, does not in any sense impair the constitutional right of trial by jury, and an order of the circuit court of the United States requiring a party to remit a portion of the verdict awarded as a condition for refusing a new trial is not subject to review by the supreme court. — *Arkansas Valley Co. v. Mann*, U. S. S. C., 9 S. C. Rep. 458.

105. PRINCIPAL AND AGENT—Sale.— Defendant held

liable for goods ordered of plaintiff by one assuming to act as agent of defendant, with knowledge of the latter. — *Cooper v. Mulder*, Mich., 41 N. W. Rep. 1064.

106. PRINCIPAL AND AGENT — Contracts. — Where plaintiffs' agent sells defendant plaintiffs' goods, to be paid for in services to be rendered by defendant to the agent, plaintiffs, by suing in *assumpsit*, for the price after having been informed of the terms of the sale, ratify all those terms, including the manner of payment. — *Shoninger v. Peabody*, Conn., 17 Atl. Rep. 178.

107. PUBLIC LANDS — Patents. — In ejectment, plaintiff claiming under a patent from the State, and defendant contending that the patent was void, and asking that plaintiff be required to convey to defendant, the validity of the patent need not be considered, as if it is valid defendant has no rights, and if invalid a conveyance to defendant would give no title. — *Peabody v. Prince*, Cal., 21 Pac. Rep. 123.

108. PUBLIC LANDS — Occupancy. — Where unsurveyed public land is occupied by a settler with the intention to pre-empt it, but who dies before the survey is made, he has no vested interest which can pass to his heirs. Rev. St. U. S. § 2269, has no application to such a case. — *Buxton v. Traver*, U. S. S. C., 9 S. C. Rep. 509.

109. RAILROAD COMPANIES — Stock killing. — Respecting the liability of railroad companies in stock-killing cases and as to what is negligence in such cases. — *Memphis & C. R. Co. v. Scott*, Tenn., 11 S. W. Rep. 317.

110. RAILROAD COMPANIES — Negligence. — In an action against a railroad company for negligently and unlawfully leaving a car standing on the highway, at which plaintiff's horse became frightened, and caused her personal injuries, it is unnecessary to explain in the complaint how the horse came to be frightened, or to allege that there was anything unusual about the car calculated to produce such a fright. — *Pittsburgh, C. & St. L. R. Co. v. Kitley*, Ind., 20 N. E. Rep. 727.

111. RAILROAD COMPANIES — Negligence. — A complaint for injuries, caused by plaintiff's horse taking fright at defendant's cars, is not bad on demurrer for failure to state that the car was permitted to remain on the highway an unreasonable time. — *Cleveland, C. C. & I. Ry. Co. v. Wynant*, Ind., 20 N. E. Rep. 730.

112. RAILROAD COMPANIES — Lease and Consolidation. — None of the various statutes of the State of Oregon, either expressly or by implication, authorize a railroad corporation to lease its road and franchises, or to take similar leases from other railroad corporations; and such a lease is *ultra vires* and void. — *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, U. S. S. C., 9 S. C. Rep. 406.

113. RAILROAD COMPANIES — Injuries to Stock. — Cattle belonging to plaintiff got on the track of the defendant railroad company within a few yards of a rapidly moving train, and were run over and killed. The engineer did not see the cattle until they were so close that he could not stop the train in time to save them, though after he saw them he did everything that was possible to avoid the collision: *Held*, that the defendant was not liable, although the engineer might have seen the cattle near the track for several hundred yards ahead. — *New Orleans & N. E. R. Co. v. Bourgeois*, Miss., 5 South. Rep. 623.

114. SALE — Stoppage in Transitu. — The fact that at the time of a sale of goods the vendee was insolvent will not defeat the right of stoppage *in transitu* of the vendor, if the latter was not aware of such insolvency. — *Farrell v. Richmond & D. R. Co.*, N. Car., 9 S. E. Rep. 302.

115. SALE — Conditional. — Defendant bought a soda fountain from plaintiff, giving him notes (payable one each month, stipulating that the title to the fountain did not pass till all the notes were paid. Defendant's store burned after he had received possession of the fountain and paid several of the notes, and the fountain was destroyed: *Held*, that he was none the less liable on the unpaid notes. — *Burnley v. Tufts*, Miss., 5 South. Rep. 627.

116. SPECIFIC PERFORMANCE. — This court will not undertake to compel the specific performance of an agreement to take care of and provide for the complainant in case of her "general debility or sickness." — *Mowers v. Fogg*, N. J., 17 Atl. Rep. 298.

117. STATUTES — Validity. — The "validity" of a statute as used in act Cong. March 3, 1885, regulating appeals from supreme court of the District of Columbia refers to the power of congress to pass the act at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power. — *Battimore & P. R. Co. v. Hopkins*, U. S. S. C., 9 S. C. Rep. 503.

118. STATUTES — Construction — "Town." — In a prosecution for keeping a private boarding-house in Mississippi City without paying tax, the question whether Mississippi City was a "town," or not, within the meaning of the statute, was a question of fact for the jury. — *Murphy v. State*, Miss., 5 South. Rep. 626.

119. TAXATION — Injunction. — Where property, by collusion between the assessors and the owners, is intentionally assessed far below its true value, equity will relieve the owner of other property in the same city, fairly assessed, from such portion of the taxes thereon as is imposed by reason of the fraudulent undervaluation of the property first mentioned. — *Walsh v. King*, Mich., 41 N. W. Rep. 1069.

120. TAXATION — Judgment. — The presumptions following ordinary judgment of courts of general jurisdiction follow the judgments rendered in tax proceedings. — *McGregor v. Morrow*, Kan., 21 Pac. Rep. 157.

121. TENANCY IN COMMON — Lien. — Where one tenant in common pays off a lien against the joint property, he is entitled to contribution from the other tenants to the extent of their respective interests, and a court of equity will enforce upon the interests of the other tenants an equitable lien of the same character as that which has been removed. — *Moon v. Jennings*, Ind., 20 N. E. Rep. 748.

122. TRUSTS — Trustee — Advances. — A trustee of land is not prevented from taking title in his own name, at the request of his *cestui que trust*, as security for money advanced on the latter's contract of purchase; and he may enforce his equitable lien for such advances. — *Stewart v. Fellows*, Ill., 20 N. E. Rep. 657.

123. TRUSTS — Constructive. — Defendant conveyed to M, with covenant of warranty, etc., a one sixth interest in certain mineral land. At that time defendant had no title, but the owners of the legal title had orally agreed to convey to him a one third interest. Subsequently defendant, for the avowed purpose of defeating his deed to M, induced the owners of the legal title to convey the one-third interest to defendant's wife: *Held*, that the transaction must be regarded in equity as if the owners had conveyed to defendant and he to his wife, she holding in trust for M, and his heirs one-half of the interest conveyed to her. — *Moore v. Crawford*, U. S. S. C., 9 S. C. Rep. 447.

124. VENDOR AND VENDEE. — Under a judgment dissolving the sale of an immovable as an effect of the dissolving condition, express or implied, for non-payment of the price, the evicted vendee owes rents and revenues to the owner who has evicted him for the whole time of his possession, and not from the date of the suit for dissolution only. — *McKenzie v. Bacon*, La., 5 South. Rep. 640.

125. WAREHOUSEMEN — Estoppel. — Defendants, who were warehousemen, gave a receipt for 140 barrels of flour, "to be delivered only on return of this certificate, properly indorsed." The owners of the flour indorsed the receipt to plaintiff, to secure a loan: *Held*, that defendants were estopped to deny that they received the flour on the terms specified in the receipts. — *Babcock v. People's Sav. Bank*, Ind., 20 N. E. Rep. 782.

The Central Law Journal.

ST. LOUIS, JUNE 7, 1889.

CURRENT EVENTS.

THE Supreme Court of Louisiana holds, in the case of Greeley v. City of New Orleans, after a vigorous discussion of the authorities, that "mandate is a consensual and imperfect synallagmatic contract. Gratuitousness does not appertain to its essence, but to its nature." Whether, in the utterance of this opinion, the justice, who delivered it, suffered any serious displacement of the *maxilla*, or any temporary paralysis of the muscles of the face, we do not know, but we are sure that the ordinary common law practitioner has only a vague idea of what, this dogma of Troulong, one of the expounders of the civil law, means. There are many features of the civil law which might well be engrafted into the common law, and it is undeniably true that the former in many respects is more satisfactory, because more simple, in its applications, but we hope, in the event of an amalgamation or substitution, to be spared the distressing phraseology with which the civil law comes clothed.

It seems that the Massachusetts legislature, like the Indiana one, are at loggerheads with the judges of the supreme court. The constitution of that State requires the judges to give their opinion to the legislature, if requested, "upon important questions of law and upon solemn occasions." The legislature passed a compulsory education bill. They then asked the judges as to its proper construction, and, in particular, several questions bearing on the right of parents to provide private instruction, stating that these questions were propounded, with a view to further legislation. The judges replied in brief, that the questions concern matter of private right, and as their construction, should they give one, in this manner, would doubtless be enforced by the administrative officers, a citizen affected might justly complain, that his rights had been determined without allowing

him a hearing. The *New York Register* gravely remarks that this is a situation for the satire of a Bentham, that the legislative hen having laid an egg, desires to be informed by somebody whether it be an egg really and if so, what kind of an egg. This delicate situation in which the legislature cannot find out the meaning of their own words, and in that embarrassment are not able to say afresh what they do mean, but want to know first what the courts are going to do about it, and in which the courts hardly think it fair to let the people know what they will do about it, lest it should prejudice the question, leaves the people in a happy condition under the conclusive presumption that every man (not in the legislature or on the bench) knows the law.

THE decision of the United States Supreme Court, in the Friedlander case, reported in full on page 503 of this issue, wherein they hold, that a railroad carrier is not liable for goods never actually in its possession, because one of its agents, having authority to sign bill of lading, when goods are received, has issued such a bill by collusion with another person in the absence of any goods at all, may be good law, and sustained by the weight of authority, but it does not strike us as either reasonable or logical. The general rule, as cited by the court, is that a master is answerable for every wrong of the servant as is committed within the scope of his employment. It was certainly within the scope of the servant's employment here to issue bills of lading, and to assert that his act was not within the course of the service because "bills of lading could only be issued for merchandise delivered," seems most fallacious. The decision is certainly contrary to the rule established in New York and Kansas, where corporations, as well as individuals, are held estopped, by the act of their agent, in such a fraud, a doctrine reaffirmed in 1887, in the case of *Bank of Batavia v. New York, etc. R. Co.*, 106 N. Y. 195. The rule of the New York court seems far more inclined to promote justice and fair dealing, and it leaves the responsibility on the shoulders of those, whose care and attention alone can secure the prevention of such frauds. If the carrier cannot prevent them, no one can.

A DECISION embodying the same general rule as that laid down in the Iowa railroad commissioners case, has just been rendered by the Supreme Court of Florida, in a case where the State brought suit against the Pensacola & Atlantic Railroad Company to recover penalties for the refusal of the road to adopt rates fixed by the commissioners, but which the company declared were too low to enable it to earn enough revenue to pay its operating expenses. The court decided in favor of the company, holding that the reduction by a board of railroad commissioners, of the rates of a railroad to a point too low to permit it to earn operating expenses is a deprivation of property, without due process of law, and without just compensation and is confiscation and in conflict with the State and federal constitution. This decision is apparently in conflict with that of Judge Brewer, who refused to enjoin the Iowa railroad commissioners from enforcing their schedule of charges for local traffic. But it will be remembered that Judge Brewer held, that although the commissioners have an undoubted right to make rates for interstate traffic, the reasonableness of the rate is something which cannot be proved by anything but actual experience, and that if the rates were unremunerative, the companies can then take action against the commissioners.

The general position taken in these decisions is undoubtedly sound. It is clearly in harmony with the doctrine announced by Chief Justice Waite as early as 1886 that the power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the State cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation.

NOTES OF RECENT DECISIONS.

A SINGULAR phase of the question as to the right of a carrier to eject a passenger came before the United States circuit court in *Paddock v. Atchison, etc. R. Co.*, 37 Fed. Rep. 841, a case similar to that of *Connelly v. Crescent City R. Co.*, 28 Cent. L. J. 256.

Here it appeared that a passenger on a railroad train was ejected by reason of the belief that he had the small pox, though in fact, as it afterwards appeared, he had simply the measles. Judge Brewer in charging the jury says:

If a passenger breaks out with eruptions, which the best medical advice that can be and is obtained is unable to disclose whether they proceed from small pox; and if, from any prior conduct of the plaintiff, or from any statement he had made, there is a well grounded, clear and honest belief that small pox was developing itself, then the officers of the company are justified in removing him from the train, although afterwards it may turn out that they were mistaken. I do not mean to say, of course, that any mere guess or surmise or suspicion that it may be small pox would justify such action; but when the advice of the best physicians at hand is obtained, and the past history of the plaintiff, as disclosed by himself, or as known to the officers of the company, creates a well grounded, a clear and honest belief that that which is breaking out on the passenger is a case of small pox, then they are justified in acting upon that conviction as though it were small pox. They are under no obligation to wait until the disease has gone so far that the lives and the health of all the other passengers become endangered. Of course, in the exercise of this right and the discharge of this duty for the protection of the health and safety of the other passengers, they may not act wantonly, or recklessly, or with disregard to the safety or comfort of the passenger removed. Take another illustration: Suppose a man becomes boisterous from drunkenness, becomes quarrelsome, so as to endanger the lives of passengers. It would be a very extreme case that would justify the conductor in putting him off the train out on the prairie, and far from the conveniences of a town or village. But when the train reaches a city or a stopping place where he could be taken care of, the duty of the railroad company is completed when it puts such drunken and quarrelsome passenger off the train. It is not its duty to go beyond that, for its business is only that of a common carrier, and it is not under any other obligation. And so, in this case, if you should find all these things—if you should find that the plaintiff was forcibly removed, and that he was removed because these was, as indicated, a well grounded belief that he was breaking out with the small pox; and if there was no other reasonable way of protecting the other passengers from danger, then its duty was to put him off at some place where he could find accommodations, or where there was reasonable ground to believe he could find accommodations. It could not stop out on the prairie and put him off where there was only a hamlet or a single house, where he could not possibly obtain medical attendance, but it could put him off where there was every reasonable ground to believe that he could procure medical attendance and ample accommodations; and, if it there removed him without unnecessary force it has discharged its full measure of duty.

THE liability of a municipal corporation for negligence does not extend to the case of one confined in a city prison for disturbing the peace who sustains injuries by reason of the bad condition of the prison or the negli-

gence of the officer in charge, according to the Supreme Court of Kansas, in *La Clef v. City of Concordia*, 21 Pac. Rep. 272. The court says:

It has already been held in this State that counties are not liable for injuries of this kind (*Pfefferle v. Board*, 39 Kan. 432, 18 Pac. Rep. 506), and this seems to be the doctrine universally held elsewhere. *Wehn v. Gage Co.*, 5 Neb. 494; *Crowell v. Sonoma Co.*, 25 Cal. 313; *Miller v. Iron Co.*, 29 Mo. 122; *Waltham v. Kemper*, 55 Ill. 346; *Brabham v. Supervisors*, 54 Miss. 363; *Winbigler v. Los Angeles*, 45 Cal. 36; but it is urged that a different rule prevails in respect to cities and other public corporations, and that they are not such political divisions of a State as to entitle them to immunity from damages for injuries such as complained of. It is not claimed that there is any statute making it the duty of a city of the third class, to which class the defendant belongs, to keep and maintain comfortable and safe city prisons, and no charter has been shown requiring this duty of the defendant. Where such duties are imposed by law upon municipal corporations, they then become liable when the duty enjoined relates to some act in the doing of which the city has some special interest apart from the public generally. *Sawyer v. Corse*, 17 Grat. 230; *Merrifield v. Worcester*, 110 Mass. 216; *Emery v. Lowell*, 104 Mass. 13. But, where such duties relate to acts which in their nature are for the benefit of the public as well as the citizens of the city, then no responsibility follows that can be enforced by private action. *Pfefferle v. Board*, 39 Kan. 432, 18 Pac. Rep. 506; *Gould v. Topeka*, 32 Kan. 485, 4 Pac. Rep. 822; *Wellington v. Gregson*, 31 Kan. 99, 1 Pac. Rep. 253; *Bigelow v. Randolph*, 14 Gray, 541; *Hill v. Boston*, 122 Mass. 344; *Eastman v. Meredith*, 36 N. H. 284; *Hamilton Co. v. Mighels*, 7 Ohio St. 109; *Board v. Strader*, 18 N. J. Law, 121; *Finch v. Board*, 30 Ohio St. 37; *Flori v. St. Louis*, 69 Mo. 341; *College v. Cleveland*, 12 Ohio St. 375. The distinction between an act done by a city in a public capacity and as a part of the political subdivisions of a State, and an act done for its private advantage, and relating to things in which the State at large has no interest, is clearly defined and is well recognized. See *Society v. Philadelphia*, 31 Pa. St. 183; *Maxmilian v. Mayor, etc.*, 62 N. Y. 160; *Bailey v. Mayor, etc.*, 3 Hill, 531; In *Hill v. Boston* it was said: "The examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, peculiarly or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecutions in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby." This seems to be the current of authority everywhere: that a city, while acting as a political part of the State in suppressing crime and immorality, and in the preservation of peace and good order, is not liable for its acts, although negligently committed by the city or its agents.

As to the effect of a violation, by a *particeps criminis*, of an agreement to testify in

behalf of the State, the Court of Appeals of Texas, in *Neely v. State*, 11 S. W. Rep. 376 say:

Having violated his agreement to testify in behalf of the State, the defendant was not entitled to exemption from prosecution by virtue of said agreement. It is well settled that where a *particeps criminis*, for the purpose of securing exemption from prosecution, agrees to testify in behalf of the State against his accomplices in crime, and violates such agreement by refusing to testify in good faith, fairly and fully, to facts within his knowledge, he cannot claim the benefit of such agreement, and may be prosecuted and convicted regardless thereof. 1 Bish. Crim. Proc. § 1164; 1 Greenl. Ev. § 379; Rosc. Crim. Ev. §§ 132, 133; Whart. Crim. Ev. §§ 443, 656; *Holmes v. State*, 20 Tex. App. 517. And the common-law authorities above cited further lay it down that in such case the confession made by the defendant under such agreement may be used in evidence against him. See, also, *Com. v. Knapp*, 10 Pick. 477, which holds the same doctrine. But this court has held, and, we think, correctly, that even in such case the confession is not admissible unless it was voluntarily and freely made, uninfluenced by persuasion or compulsion, not induced by any promise creating hope of benefit, or any threats creating fear of punishment. A promise, such as will render the confession inadmissible, must be positive, and made or sanctioned by a person in authority, and must be of such character as would be likely to influence the party to speak truthfully. And a confession induced by the mere fear of legal punishment is not thereby rendered inadmissible. *Willson*, Crim. St. § 2472. In this case it is evident that the confession was induced by the hope of thereby securing immunity from prosecution and punishment for the theft of which defendant was accused. It was made upon the positive promise of the district attorney that if the defendant would testify to the matters stated in the confession he would not be prosecuted. Defendant's subsequent bad faith in refusing to so testify could not *per se* render said confession admissible evidence against him. It was not a voluntary confession, within the meaning of the law, and, not being voluntary, was inadmissible, upon the ground that he had violated his agreement to testify. *Womack v. State*, 16 Tex. App. 178.

As to the admissibility of parol evidence to explain latent ambiguity in a will, the Supreme Court of Indiana, in *Dougherty v. Rogers*, 20 N. E. Rep. 779, hold that parol evidence of surrounding circumstances and testator's declarations is admissible in an action by an administrator on notes executed to testator by a legatee to show that the clause giving defendant his legacy, reading: "I will, devise, and bequeath to P. R., the young man I raised, in addition to what I have already given him, the further sum of five hundred dollars," referred to the sums represented by the notes as the amount "already given." The court (*Berkshire, J.*, dissenting) says:

It has been said, with what we conceive to be commendable accuracy, that "the points of inquiry under

a will may, for general purposes, be classed under three heads: (1) The person intended; (2) the thing intended; and (3) the intention of the testator with respect to each of them." Wig. Wills, 263. It may often happen that persons or things, or the intention of the testator respecting them, may seem to be sufficiently defined by the terms of the will, and yet, when the language employed, and the facts to which it refers, are brought in contact with each other, the language and facts are so inharmonious as to leave the intention of the testator obscure. Thus, an ambiguity arises, not upon the face of the will itself, but from facts therein referred to, which are extrinsic to the instrument. This, according to the maxim of Lord Bacon, constitutes the very essence of a latent ambiguity, which he defines to be "that which seemeth certain and without ambiguity, for anything that appeareth on the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." *Hawkins v. Garland's Admr.*, 78 Va. 149. "An ambiguity which arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe," is a latent ambiguity. 1 Amer. & Eng. Cyclop. 530, and note. Whenever, therefore, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce or develop a latent ambiguity not apparent upon the face of the will itself, since the ambiguity is disclosed by the introduction of extrinsic facts, and the court may inquire into any other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator in his will may be arrived at. *Skinner v. Harrison Tp.*, 116 Ind. 139; *Black v. Richards*, 95 Ind. 184; *Cruse v. Cunningham*, 79 Ind. 402; *Atkinson's Lessee v. Cummins*, 9 How. 479; *Patch v. White*, 117 U. S. 210; *Chambers v. Watson*, 60 Iowa, 339; *Powell v. Biddle*, 2 Dall. 70; *Connolly v. Pardon*, 1 Paige Ch. 291; *Pickering v. Pickering*, 50 N. H. 349; *Tilton v. Society*, 60 N. H. 377; *Hinckley v. Thatcher*, 139 Mass. 477; *Morgan v. Burrows*, 45 Wis. 211; *Miller v. Travers*, 8 Bing. 244; *Hiscocks v. Hiscocks*, 5 M. & W. 362; Wig. Wills, 142. It is therefore a fundamental error to assume that a latent ambiguity such as will justify the admission of evidence of extrinsic facts can only arise out of some obscurity in the terms employed in the will. The purpose for which extrinsic evidence may be legitimately admitted is not to add to or vary, or, ordinarily, to explain, the literal meaning of the terms of the will, nor to give effect to what may be supposed to have been the unexpressed intention of the testator, but to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances. *Sugar Co. v. Whittin*, 69 N. Y. 328. This brings us to a point where the general principles above stated may be applied to the case under consideration. Looking at the will, it is at once apparent that the object of the testator's bounty, so far as the subjects here involved are concerned, is the young man he had raised; that primarily the subject of disposition was the further sum of \$500; and that the intention of the testator respecting the object and subject was that the young man he had raised should receive a legacy of \$500 in addition to what he had theretofore given him. In effect, the testator declares by his will that at some time prior to

the date of its execution he had given Philo Rogers money or property, to which his purpose was to add the further sum of \$500 as a legacy. The implication that he had theretofore given the legatee a sum of money is as plain and irresistible as is the declaration that a further sum was to be added to that already given. As is, in effect, said in *Parker v. Tootal*, 11 H. L. Cas. 143, implication may arise from a form of expression which necessarily implies something else, or from a form of gift which cannot be rendered effectual without implying something else. The present, in our opinion, affords an apt example of such a case.

An interesting question as to the operation of the statute of frauds arose in *Seddon v. Rosenbaum*, 9 S. E. Rep. 326, decided by the Court of Appeals of Virginia. There it was held that a contract to sell certain stock at the end of three years, with an option to the purchaser to call it at any time, may be performed within a year, and is therefore not within the statute prohibiting an action on an agreement "not to be performed within a year," unless it be in writing, etc. The court says:

But it is insisted in this case by the defendant in error that while the plaintiff could call the stock within the year, by the terms of the agreement the defendant could not, and that upon the option of the plaintiff the agreement might be performed within the year, but this the defendant could not do, and that the agreement, so far as it was mutual, was beyond the year, and came under the statute. The accepted doctrine in England upon the decided cases seems to be that the words in the statute "not to be performed" mean not to be performed "on either side,"—that is, that an agreement does not come within the statute, provided that all that is to be done by one of the parties is to be done within a year; that is, that on that side the contract is executed. This was first hinted at in *Bracegirdle v. Heald*, 1 Barn. & Ald. 722, and then distinctly ruled in *Donellan v. Read*, 3 Barn. & Adol. 899; *Littledale, J.*, saying as to the contract not being to be performed within a year: "We think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case." In that case there was no time fixed for the performance by one party, but he performed within the year; the other party, by the terms of the agreement, was not to perform except at the expiration of several years; he to pay an additional annual rent for the remainder of the lease, of which several years were unexpired. This was established as the prevailing doctrine in England by the later case of *Cherry v. Heming*, 4 Exch. 631. * * * * * This ruling has been approved and followed in many American cases, though not uniformly so. *Holbrook v. Armstrong*, 1 Fair. 81; *Rake v. Pope*, 7 Ala. 161; *Johnson v. Watson*, 1 Kelly, 348. This doctrine is thus stated by Mr. Smith, (Smith, Cont. 113:) "When, however, all that is to be done by one party, as the consideration for what is to be done by the other, actually is done by the one within the year, the statute does not prevent that party suing the other for the non-performance of his part of the contract. When

one has had the full benefit of the contract the law will not permit the other to withhold the consideration," citing numerous cases, both English and American. If, by its terms, or by reasonable construction, a contract not in writing can be fully performed within a year, although it can be done only by the occurrence of some improbable event, as the death of a person referred to, it is not within the statute; so if it can be performed on one side within the year. *Blanding v. Sargent*, 33 N. H. 239; *Wiggins v. Keizer*, 6 Ind. 252; *Soggins v. Heard*, 31 Miss. 426; *Suggert v. Cason*, 26 Mo. 221; *Burney v. Ball*, 24 Ga. 505; *Sherman v. Champlain Co.*, 81 Vt. 162; *Wilson v. Ray*, 18 Ind. 1; *Hill v. Jamieson*, 16 Ind. 125. See, also, *Paris v. Strong*, 51 Ind. 339; *Withers v. Richardson*, 5 T. B. Mon. 94. In the Supreme Court of the United States, Mr. Justice Miller said upon this subject (*Walker v. Johnson*, 96 U. S. 424): "In order to bring a parol contract within the statute, it must appear affirmatively that the contract was not to be performed within the year." In *McPherson v. Cox*, 96 U. S. 404, it was said in the same court that the statute applies only to contracts which, by their terms, are not to be performed within that time. To the same end are *White v. Hauchett*, 21 Wis. 415; *Blakeney v. Goode*, 80 Ohio St. 330; *Thomas v. Hammond*, 47 Tex. 42; *Somerby v. Buntin*, 118 Mass. 279, and *Jordan v. Miller*, 75 Va. 450; 1 Benj. Sales, 132. In the case of *Packet Co. v. Sickles*, 5 Wall. 580, relied on by the defendant in error, the court held that the contract, being by its terms extended beyond a year—to-wit, 12 years—that it was within the statute, notwithstanding the proviso, if the bond should last so long; that is, that the possibility of defeasance within the year does not make it the less a contract to be performed beyond the year. And to the same effect are many other cases cited. *Birch v. Earl of Liverpool*, 9 Barn. & C. 392; *Dobson v. Espie*, 2 Hurl. & N. 81. This has been often held, and the reason is that the contract, being one to be performed by its terms beyond the year, comes within the statute, although it may be defeated within the year; a possible defeasance not affecting time when by its terms it may be performed. We are dealing with the statute that provides "any agreement that is not to be performed within a year," not any agreement that is not to be defeated within a year, and we think the distinction is clearly defined in reason as well as by the cases.

On the subject of seduction, the Supreme Court of Oregon in *Patterson v. Hayden*, 21 Pac. Rep. 129, held that a woman may be unchaste, and then reform and lead a virtuous life, and if she is then seduced her seduction ought to be visited with such damages as a jury would think, under all the circumstances, the defendant ought to pay; but to justify a recovery there must be a reformation. The female must have honestly abandoned and ceased her lewd conduct for a sufficient length of time before the act complained of, to induce the jury as reasonable men to believe the reformation was real and not feigned. The word "seduction," when applied to the conduct of a man towards a woman, means the use of some influence, artifice, promise,

or means on his part by which he induces the woman to surrender her chastity and virtue to his embraces. Therefore, criminal indulgence with a woman who was at the time leading a lewd and lascivious life does not constitute seduction. The court says:

But the question which presents the greatest difficulty is what is meant by the word "seduction" in this section. Lexicographers are not agreed as to its meaning. Webster defines the word seduce, to draw aside from the path of rectitude and duty in a manner; to entice to evil; to lead astray; to tempt and lead to iniquity; to corrupt; to deprave; to induce to surrender chastity. And the word "seduction" thus: The act of seducing or of enticing from the path of duty; specifically, the act or crime of persuading a female to surrender her chastity. Burrell's Law Dictionary thus defines it: The debauching of a woman; the offense of inducing a woman to consent to unlawful intercourse, omitting altogether the elements of chastity. Under Webster's definition the female must have been persuaded to surrender her chastity; under Burrell's, only to consent to unlawful intercourse. Courts have been more inclined to follow Webster's definition than those given by the legal lexicographers. *Croghan v. State*, 22 Wis. 424; *Parker v. Monteth*, 7 Oreg. 277; *Breon v. Henkle*, 14 Oreg. 494; *Bell v. Rinker*, 29 Ind. 267. * * * So far these extracts, I think, tend to show that, in construing the statute under consideration, to constitute seduction something more is necessary than sexual intercourse, induced by persuasions, urgent importunities, etc., followed by pregnancy; but just where the dividing line is to be drawn seems difficult to determine. If the word "chaste," in this connection, is used in the sense of never having submitted to illicit sexual intercourse, the requirement is greater than the law exacts, because it has been frequently determined that a woman may be seduced who had previously at some period of her life been unchaste. *Baird v. Boehner*, 33 N. W. Rep. 694; *Smith v. Milburn*, 17 Iowa, 30; *Love v. Masoner*, 6 Baxt. 24. But these authorities leave the main question untouched, which counsel for appellant seek to present on this appeal, and that is, what is the legal effect of lewd practices and habits of the female alleged to have been seduced, at and immediately before such alleged seduction? Do they only mitigate the damages, and corroborate the defendant's denial of the seduction, or do they go further, and defeat the plaintiff's right of recovery entirely, if the jury are satisfied that the female alleged to have been seduced was in the habit of seeking opportunities for criminal indulgence, not only with the defendant, but with various other persons, about the time of such alleged seduction? In other words, can a woman who engages in criminal indulgence with her male acquaintances, as opportunities present themselves, and who will make opportunities for that purpose, be said to be seduced, within the true intent and meaning of the statute? Unless these questions can be answered in the affirmative, it is not perceived that she was "seduced." To hold otherwise would be to break down all distinctions between the virtuous and vicious, and to place the common bawd on the same plane with the virtuous woman, whose life was pure and whose confidence had been betrayed by the heartless libertine.

FOREIGN DIVORCES.

Although marriage is commonly only spoken of as a contract and by our statutes declared to be a "civil contract," it has features antagonistic to our ideas of an ordinary contract. "It is more than a contract, is indissoluble by the parties, subsists though one of them becomes incapable by act of God, it is of greater moment to the State than to them, it is the parent and not the child of society."¹

While the term contract may be correct, while it remains executory, as soon as the marriage relation is established by the prescribed ceremony it becomes a *status*, clothing the parties with relations, entirely new as to each other and the world. It is this new relationship with all its accompanying rights and obligations which we call the *status* and which death or divorce can alone destroy.

This modern view of the marriage relation, as contradistinguished from the contract idea as in large measure still held in foreign countries and as held in New York until the case of *Kinnier v. Kinnier*, 45 N. Y. 535, decided in 1871—has had a decided influence upon the subject of divorce and especially of foreign divorce.

It is a generally conceded principle of law in the United States that marriage is controlled by the *lex loci contractus*, and that this is true whatever may be the actual domicile of the parties at the time. In other words, whatever may have been the requirements of the laws of the domicile of the contracting parties as to age, capacity, consent, etc., if the requirements of the laws of the State where the marriage was celebrated were complied with, the marriage itself will be valid in the State of domicile.

It has accordingly been held that parties, domiciled in New York might go to New Jersey there marry and return to New York, and the marriage be held valid. Adjudications of this kind in most of the States have given rise to the principle that "a marriage valid where made is valid everywhere," except, of course, it be incestuous, polygamous or against public morals. The converse of this seems to follow necessarily viz., a marriage void where made is void everywhere, barring mere informalities or irregularities.

¹ 26 Alb. L. J. 448.

It is also well established that while the contracting parties may retain the benefits of the inviolability of the *status* upon removing to a foreign jurisdiction, the *status* undergoes a change, inasmuch as the statutory requirements which characterize the *status* in one State cannot be transferred to another State, even upon a *bona fide* change of domicile to the latter. For upon such a change the *status* of the new domicile upon removal, *ipso facto*, attaches and that of the old is lost; were this not so, there would arise an endless confusion of conflicting marital rights and obligations, wholly inconsistent with public policy and the comity of States.

With this preface as to the *status* of marriage, it will now be proper to consider in what manner and to what extent the decree of a foreign court can dissolve it; the tribunals of the different States being considered in this connection foreign to one another.

The plan to be followed necessitates the treatment of the following points:

1. A consideration of the requisites for giving the court jurisdiction in both domestic and foreign divorces.
2. The form and nature of the action, including notice by publication.
3. The effect of a foreign judgment of divorce upon the *status* of parties, plaintiff and defendant.
4. The validity of the judgment in other States.

And first as to the requisites. As legislative divorces have been generally abolished, original jurisdiction has been given to the circuit courts. Before such courts, therefore, it is necessary to bring the application for divorce in the first instance, and to render its decree valid it must have jurisdiction of the subject-matter and the parties. This subject-matter of the suit in an action for divorce must not be confused with the grounds upon which it is to be granted, for while the former must be within the court's jurisdiction, the latter may have arisen or the offenses have been committed in any jurisdiction. Under this principle a Wisconsin court can render a valid decree of divorce for causes occurring wholly in England or Illinois.²

After the same nature is the doctrine that, "the domicile of the parties at time of the offense committed is of no consequence, the

² 2 Bishop M. & D., § 171.

jurisdiction depending on their domicile when the proceeding is instituted and the judgment is rendered," and this obtains in all States except Pennsylvania, New Hampshire, and Louisiana.³

Nor is it material to the question of jurisdiction in what country or under what system of divorce laws the marriage was celebrated, the *lex fori* governing the court. This, however, is only the American rule, the English rule asserting the incapacity of any foreign court to dissolve an English marriage. But the tendency is to a more liberal view at present.⁴

As in other actions the domicile of the parties within the jurisdiction is a prime requisite, so is it in actions for divorce, but with this marked qualification that the domicile of the moving party is alone required, both need not be within the jurisdiction, and this power of the court where the applicant resides is not dependent upon the residence of the defendant in the same State or jurisdiction, but exists even though the defendant never resided in the State.

The nature of such a domicile as is required to give jurisdiction needs explanation.

It is generally conceded that the husband has the right, without the consent of the wife, to establish his domicile anywhere, and it is the legal duty of the wife to follow, non-compliance on her part amounting to desertion, and this is true even though both be living separate under articles of separation or by mutual consent.⁵

This domicile of the husband for the purpose of giving jurisdiction must be *bona fide*, he cannot leave the matrimonial domicile, for instance, go to another State, with no intention of becoming a citizen, but for the purpose of obtaining an *ex parte* divorce, for this would, when shown, be a fraud upon the court, rendering its decree void *ab initio*.

If such decrees were allowed to stand, marriage would become a farce, subject to the caprice of either of the parties.

But the wife may, under certain circumstances, acquire a separate domicile for the purposes of a divorce.⁶ This right on her part is one founded in justice and common sense, for, were this not so, it is easy to con-

ceive of a worthless and cruel husband, by willfully changing his domicile, depriving his wife of all remedy by way of a divorce.

That a husband can commit adultery in Wisconsin and flee to Illinois and thereby deprive his wife of her right of action, on the theory that her domicile, following that of her husband, was in Illinois and that therefore she could not sue in a Wisconsin court, is to allow reverence for a dogma to overpower our sense of justice. It was long before this enlightened doctrine obtained in the United States and received its first recognition in the Supreme Court of the United States, in the case of *Cheever v. Wilson*, 9 Wall. 108, and was not fully accepted in the courts of New York until the case of *Hunt v. Hunt*,⁷ decided in 1878.

The circumstances under which the wife can thus secure her separate domicile must be such that she is not the spouse guilty of the matrimonial wrong; or, as stated by Bishop: "A wife cannot obtain an independent domicile by her own wrong. Hence, in proceedings against her for divorce, though she may have separated from her husband, and he living in a different State, her domicile is presumed to be the same as his."⁸ But it is evident that were the husband the wronging party, a contrary rule must prevail. "The wife's legal duty is to follow her husband's domicile ceases only in consequence of conduct of the husband, of such a nature, as owing to it the law would by divorce absolve her from the duty."

As was well said in the leading case of *Harding v. Alden*:⁹ "Unless the wife could acquire a separate domicile for the sake of getting a divorce, it would require that the wife, abandoned and dishonored, should seek the new domicile of the guilty husband, *animo manendi*, before she could claim the benefit of the law to be relieved from his control."

II. *The form and Nature of the Action, Including Notice by Publication.* — Under the contract idea of the marriage relation, the action for divorce partook of all the incidents of any action for the breach of contract, and as divorce was the remedy for such a breach, the action was considered as one purely in *personam*, i. e., the action instead of being

³ 2 Bishop M. & D., §§ 178, 179.

⁴ *Harvey v. Farnie*, 8 L. R. App. Cas. 43.

⁵ *Warrender v. Warrender*, 2 C. & F. 488.

⁶ *Craven v. Craven*, 27 Wis. 418.

⁷ 72 N. Y. 217, 242.

⁸ 2 Bishop M. & D., § 128.

⁹ 9 Greenl. (Me.) 151.

directed against the relation was directed against the person, and it therefore followed as a natural consequence that no action could be maintained unless the party defendant were in court, on the maxim that every person should have his day in court, in order to be bound. So long as this view of the action obtained in the courts, it is evident that the propositions above advanced, concerning the presence of but one party, could not be maintained. Latterly, however, since the acceptance of the idea that marriage is a *status*, an action for divorce, so far as the main question is concerned, viz., the termination of the relation of husband and wife, is now considered by the leading courts as an action wholly *in rem*. Such an action as the term indicates is no longer directed against the person, but against his *status*, the *status* being the res under adjudication.

It is a principle of interstate law, that each State has the right to judge of the *status* of its own citizens, and that no State can exercise any direct jurisdiction outside of its own borders. But when an applicant for a divorce comes into court, he brings his *status* with him, and thus gives the court jurisdiction of the subject-matter, which jurisdiction could in nowise be strengthened by the presence of the defendant, so far as the subject-matter is concerned.

"As in other actions *in rem* the inanimate object must be secured as being the only way to get jurisdiction over it, so in divorce the judgment does not act on the material man, but upon his immaterial *status*, and to reach this the man himself must be within reach, for only through him can the *status* be operated upon, and by submitting to the proceedings as plaintiff, it is his own *status* which is to be operated upon by the judgment,"¹⁰ and so far as the applicant is concerned, there being no fraud, the marriage relation is at an end, and he or she is at liberty to re-marry, whatever effect may be given to such decree by the laws and courts of the domicile of the defendant spouse.

The necessity for considering an action for divorce as one *in rem* instead of one *in personam*, is readily seen by considering the requirements of the latter. In such an action, to sustain the jurisdiction there must be *personal service*. If, therefore, the husband

changed his domicile and his wife remained behind, she could not bring such an action for divorce: 1st. Because, constructive process by her State would be of no avail as against him, he not being a citizen and the process being confined to her own State. 2d. Because of the maxim that the husband's domicile controls that of the wife. The wife, therefore, would be left without a remedy. But this change in the form of the action into one *in rem*, together with the power of acquiring a separate domicile in some cases for the purposes of divorce, have removed these hardships and placed her on a more even footing with man.

The action of divorce being therefore *in rem*, no actual notice to the defendant is necessary, mere constructive notice being held sufficient.¹¹

By constructive notice is generally meant notice given by publication or posting within the jurisdiction of the court for a prescribed period of time. Such notice, however, is only allowed when, on affidavit, it is shown by the moving party that it is the best possible, owing to his ignorance of the whereabouts of the defendant at the time of trial. Upon such affidavit the court issues an order for publication, and if the defendant does not answer personally or by attorney, within the time prescribed by statute, judgment will be rendered for the plaintiff in view of all the facts, and such judgment, unless impeached for fraud, will be held valid as between the parties and as against all the world. The subject of constructive notice was fully examined in the leading case of *Ditson v. Ditson*,¹² Ames, C. J., rendering the decision. We quote freely: "Jurisdiction over the petitioning party alone, as a citizen of a State, is sufficient by the general law to give jurisdiction to the courts of the State to divorce such party, upon such notice, personal or constructive, to the other party to the marriage sought to be affected or dissolved, whether such party be present in or absent from the State, as is possible or customary under the circumstances." Page 103. "To say that the general law inexorably demands personal notice in order to such action, or still more demands that all parties interested in a relation or in property subject to a juris-

¹¹ *Cooper v. Cooper*, 7 Ohio, 238.

¹² 4 R. I. 87.

¹⁰ 26 Alb. L. J. 448 *et seq.*

diction should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent, not upon the claims of justice, but upon the chance locality, or what is worse upon the will of those most interested to defeat it."

That such constructive notice by publication is sufficient to sustain an action for divorce has been held by a majority of the courts.

New York, however, until recently, and then only qualifiedly, admitting the practice, but we can see no reason for it save the uniform adherence of her courts, until 1878 to the older doctrine that marriage is a contract, and that a woman could not have a separate domicile for purposes of divorce. In actions in the admiralty courts, in prize causes and in the State courts in garnishment, attachment, etc., it is well settled that constructive notice is deemed sufficient; in fact without resource to such notice there would often be a total failure of justice. If such constructive notice can suffice to dispose of the most sacred rights of property, when defendant has no notice, we see no reason why it should not have equal force and application to actions for divorce. Quoting again from *Ditson v. Ditson*.¹³ It is a very narrow view of the general law; it is to form a very low estimate of the wisdom which directs its administration, to suppose that when it can do justice to those within its jurisdiction, and entitled to its aid only by dispensing with personal notice to those out of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities. Such a sacrifice of substance to shadows; of the purposes, to the forms of justice might mark the ordinances of a petty municipality, but could hardly be supposed to characterize the system of general law.¹⁴

When it is further considered that citation by personal service is no better for founding jurisdiction than service by publication, since no tribunal can send its process into a foreign jurisdiction, there remain no valid reasons for not allowing to a divorce granted in ac-

cordance with the laws of the State and on service of notice by publication, the same force and effect as to one granted where both parties have submitted to the jurisdiction of the court.

III. *The Effect of an Ex parte Divorce upon the Status of the Parties, Plaintiff and Defendant.*—It has already been indicated that the moving party by submitting his *status* to a decree of the court, becomes absolved from the marital relation and is free to re-marry in the State rendering the decree, and it is perhaps generally conceded that such spouse might re-marry in any other State acknowledging the validity of the decree. While both parties remain in the same State they have a common *status*, subject to the same laws, and hence a decree of divorce becomes absolute, when both submit; but if one removes to another State "his or her *status* as affected by the marital relation may be adjudged upon and confirmed or changed in accordance with the laws of that State." In other words their *status* has become separable and as each State can adjudicate upon the *status* of its own citizens without hindrance from any other, it would seem to follow that a divorce by one of the spouses would not preclude an action for a decree by the other. Some States as Maine and Michigan, have statutes to this effect.¹⁵ But these propositions if carried out lead to seeming anomalies. Thus, the husband obtains from his wife, who remains in New York a valid *ex parte* divorce in Indiana. But as New York does not recognize such divorces, the husband in Indiana and all other States save New York will be considered as having been freed and as no longer having a wife, whereas the wife not having had personal notice nor having submitted to the jurisdiction of the Indiana court is unaffected by its decree, and is hence still a married woman, but without a husband. And so far has this doctrine been pushed in New York that a husband against whom a wife had obtained an *ex parte* divorce in Ohio was held guilty of bigamy for re-marrying in New York during the life-time of his first wife.¹⁶

Thus far we have been going on the presumption that the divorce was simply for

¹³ *Supra*.

¹⁴ *Ditson v. Ditson*, 4 R. I. 87, p. 101.

¹⁵ *Wright v. Wright*, 24 Mich. 180. Also see *Cook v. Cook*, 56 Wis. 195.

¹⁶ *People v. Baker*, 76 N. Y. 78.

separation wherein no property rights, demands for alimony, and questions concerning the charge of children were involved. When such is the case the action partakes somewhat of an action *in personam*, and as such no effect can be given to a decree which will bind an absent defendant. If the defendant be the husband, the decree for alimony of a foreign tribunal against him, he having had only constructive notice, is not binding upon him, on the principle that no State can effect the property or *status* of a citizen of another State. This would be giving extraterritorial effect to the judgment of a court against a non-resident, who has not submitted to its jurisdiction.

IV. *Its Validity as a Foreign Judgment in other States.*—By § 1, art. IV of the constitution of the United States it is provided as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

In accordance with this provision congress passed the act of May 26, 1790, to this effect. "The said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States as they have by law, or usage in the courts of the State from whence the said records are or shall be taken." "Therefore," says Story, "if in such court it hath the faith and credit of evidence of the highest nature, viz., record evidence, it must have the same faith and credit in every other court."

The ancient maxim, *res adjudicata pro veritate accipitur*, lies at the bottom of these federal laws, hence when the judgment or decree of a sister State is produced, the courts of our State must presume that the tribunals of the other had jurisdiction both of the subject-matter and the parties, and acted in accordance with its own statutes. The *onus* of impeaching such a judgment is thrown upon the one against whom it is urged. Says Phillips: "It may be stated now as a principle now uniformly observed and sanctioned throughout the United States, that the judgment of one of the State courts is of the same dignity in every other State as in the

one where it was pronounced, and hence if in the courts of the State where the judgment was pronounced it is conclusive in its operation as evidence or otherwise, it must be equally so and to the same extent and in all the courts throughout the United States."¹⁷

This was the great doctrine laid down in the leading case of *Mills v. Duryea*, ever since followed by the Supreme Court of the United States, as seen by an examination of the later cases of *Cheever v. Wilson*,¹⁸ and *Pennoyer v. Neff*.¹⁹ But while such effect is to be given to the judgments of divorce of other States, the above cases and others maintain that such judgments may be wholly impeached by showing that the court rendering them had not jurisdiction, and it makes no difference whether the judgment comes in question directly or indirectly.²⁰ So when there has been fraud practiced upon the court, by the moving party, as in not obtaining a *bona fide* domicile before making application, or in making false affidavits as to his or her knowledge or ignorance of the whereabouts of the defendant to secure an order for publication and thus avoid personal service. Such fraud vitiates the judgment, but the innocent party must bring action on the fraud within a reasonable time after he receives notice thereof, otherwise the courts of another State will not interfere and allow the party defendant to receive advantage from his own neglect. Such frauds, moreover, may be shown in another State when the action is between the same parties or their privies, and on the same subject-matter. Nevertheless, the courts have always been very reluctant to set aside a judgment of divorce obtained in another State, unless fraud or want of jurisdiction can be conclusively shown. For one of the parties relying upon the validity of the divorce may have re-married, and thus the interests of innocent third parties may have become involved.

Says Peck, J., in *Parish v. Parish*:²¹ "A judgment or decree which affects directly the *status* of married persons by sundering the marital tie, and thereby enabling them to contract new matrimonial relations with other

¹⁷ Phillips' Ev. (Cowen & Hill's Ed.) Note 303, pp. 161, *188.

¹⁸ 9 Wall. 108.

¹⁹ 95 U. S. 714.

²⁰ *Elliott v. Piersol*, 1 Pet. 328.

²¹ 9 Ohio St. 534.

and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society and the happiness and well being of those who, innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who wrongfully perhaps procured its promulgation." Such being the general rule as to the validity of foreign *ex parte* divorces, and such being the faith and credit given them, it would seem to follow, notwithstanding the doctrine of the severalty of *status*, when separate domiciles have been acquired, and the incapacity of the decree of the court of one State affecting the non-resident defendant of another, that the "divorce of one party divorces both,"²² and that both parties must be left at liberty to enter into new marital relations.

As a general resume of the above propositions the following quotation from Bishop, seems appropriate: "Where the parties are domiciled in different States, and one of them obtains in his own State, on constructive notice, a decree dissolving his own marital *status*, but not operating, since it cannot, on the like *status* of the other, what, within the constitutional and statutory provisions, * * * is the effect of the decree in other States? After alluding to the statute of 1790, he continues: "This statute is interpreted to mean what it says. The court in the other State will by proper methods ascertain what are the laws and usages of the State wherein the record was taken, and then give it not the effect accorded a like domestic record by the laws of his own State, but the effect it has in the State where made. * * * If, then, a wife domiciled in Ohio obtains an *ex parte* divorce from her husband, domiciled in New York, the New York court is not permitted to say that her *status* has been reduced to non-marital as to Ohio, but it remains marital as to New York. If the effect of the sentence is in Ohio to make her a single woman there, its effect is also and equally to exactly the same extent to make her a single woman in New York, and such she is made in all the other States in the Union."²³

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²² Cooper v. Cooper, 7 Ohio, 594.

²³ Bishop M. & D., Vol. II, p. 184, § 199.

CARRIER—BILL OF LADING—COLLUSIVELY
ISSUED BY FREIGHT AGENT—LIABILITY
TO BONA FIDE PURCHASER.

FRIEDLANDER V. TEXAS & PACIFIC RAILWAY
COMPANY.

Supreme Court of the United States, April 16, 1889.

A station agent of a railroad company, possessing authority to issue and sign bills of lading, cannot bind the company by a bill of lading of goods which have no existence, fraudulently issued by collusion with a pretended shipper, although the pretended shipper negotiates a draft, with the false bill of lading attached, for value, to a third person, who, being entirely ignorant of the facts, purchases upon the faith of such bill of lading; the railroad company is not liable to the *bona fide* purchaser, because the fraud is utterly outside of the scope of the agent's employment, as his authority is strictly limited to issuing bills of lading for goods actually delivered for transportation.

Mr. Chief Justice FULLER, after stating the facts delivered the opinion of the court.

"The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton fraudulently, and by collusion with said Lahnstein, and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction, was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading," cannot be held to operate as a limitation. The inference to be drawn from the statement is that no cotton whatever was delivered for transportation to the agent at Sherman station. The question arises, then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending, in collusion with such agent, that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose, and perform

different functions. They are regarded as so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover; and as no sale of goods lost or stolen, though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them, or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly as to estop him from asserting his right as against a purchaser, who has been misled to his hurt by reason of such negligence. *Shaw v. Railroad Co.*, 101 U. S. 557, 563; *Pollard v. Vinton*, 105 U. S. 7, 8; *Gurney v. Behrend*, 3 El. & Bl. 633, 634. It is true that, while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery. Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, by collusion with another person, issues the document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel. and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. *The Freeman*, 18 How. 182, 191; *The Lady Franklin*, 8 Wall. 325; *Pollard v. Vinton*, 105 U. S. 7. And this agrees with the rule laid down by the English courts. *Lickbarrow v. Mason*, 2 Term R. 67; *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. Div. 147. "The receipt of the goods," said Mr. Justice Miller, in *Pollard v. Vinton*, *supra*, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." "And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice Matthews in *Railway Co. v. Knight*, 122 U. S. 79, 87, 7 Sup. Ct. Rep. 1132, he adding also: "If Potter [the agent] had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Freeman*, 18 How. 182, and *Pollard v. Vinton*, 105 U. S. 7." It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have

enabled Lahnstein to impose upon *Friedlander & Co.* The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents, except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon *Friedlander & Co.*, and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed its agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment, and shipper; nor is the action maintainable on the ground of tort. "The general rule," said Willes, J., in *Barwick v. Bank*, L. R. 2 Exch. 259, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved." See, also, *Limpus v. Omnibus Co.*, 1 Hurl. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and, being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *Banking Co. v. Railway Co.*, 18 Q. B. Div. 714. The law can punish roguery, but cannot always protect a purchaser from loss; and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim. Under the Texas statutes the trip or voyage commences from the time of the signing of the bill of lading issued upon the delivery of the goods, and thereunder the carrier cannot avoid his liability as such, even though the goods are not actually on their passage at the time of a loss, but these provisions do not affect the result here. We cannot distinguish the case in hand from those heretofore decided by this court, and in consonance with the conclusions therein announced this judgment must be affirmed.

NOTE.—The authority to issue and sign bills of lading is usually conferred upon agents of carriers, as steamboat and railroad companies. Such acts are regarded as coming strictly within the line and scope of the duties of these persons. Bills of lading possess a dual character. They are both receipts and contracts. The acknowledgment of the delivery and acceptance of the goods performs the office of a receipt, and like all

mere receipts, this acknowledgment is but *prima facie* evidence, and may be shown not to be true. As to the rest these instruments are contracts. The agent of the carrier can sign such contracts only when he has authority to do so, and he has no such authority when the goods are not actually delivered to him.¹

In an early English case it was said that "the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and a party taking a bill of lading, either originally or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it."² This view has been subsequently approved by the English courts,³ as well as by the courts of this country.⁴ The leading American case is that of *The Schooner Freeman v. Buckingham*,⁵ cited in the principal case. The public is held to have notice that the agent's authority to issue bills of lading is limited to goods actually received.⁶ And it seems that the goods received must belong to the person to whom the bill of lading is given, to render it valid.⁷ Of course, a bill of lading will be good, although issued prior to the receipt of the goods, if they are, in fact, delivered.⁸ The agent possessing no authority to issue bills of lading for goods not delivered, if such are issued, they are absolutely void, and can never be made the foundation of an action, even in the hands of one who has advanced money upon them in good faith and without notice of their fraudulent issue.⁹ There being no distinction between a bill of lading given by a carrier on land and one given by a carrier on water, the agents of both classes of carriers are alike limited to act within the scope of their authority. Thus, where a freight agent of a railroad company, by the procurement of a cotton buyer, signed a bill of lading for 32 bales of cotton which were not on hand, and which were never delivered to the company, or any agent for it, and where an innocent third party paid a draft for the price of the cotton on the faith of the bill of lading attached to it and indorsed to him, and never having received the cotton sued the railroad company for its non-delivery, it was held that, the carrier was not estopped from showing that no cotton was, in fact, delivered for transportation; that the agent had no authority, real or apparent, to sign a receipt or bill of lading until actual delivery of the cotton, and that hence, the company was not liable.¹⁰ The opinion of this case is

very able and numerous authorities are reviewed. While these views are generally sustrained by the English courts, the Supreme Court of the United States,¹¹ and by the highest courts of most of the States,¹² yet a few State courts have deliberately repudiated them. Thus, it is held in a New York case, that a carrier is liable upon a bill of lading issued in its name by an agent having authority to issue bills upon receipt of property for transportation to one who, upon transfer by the shipper upon the faith of the bill has, in good faith, discounted a draft drawn upon the consignee, although no property was, in fact, delivered.¹³ In that case it was said: "It is a settled doctrine of the law of agency in this State, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the power of the agent, and of the existence of which the act of executing the power is itself a representation, a third party dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."¹⁴ The Supreme Court of Kansas has apparently adopted this view.¹⁵

In the leading New York case of *Armour v. R. R. Co.*,¹⁶ the party having produced to the agent of the railroad forged warehouse receipts for certain goods and thereby obtained from the agent receipts or bills of lading for them, making the pretended freight deliverable to the plaintiff as consignee, and having thereupon drawn upon the plaintiff attaching the railroad receipts to his draft which the plaintiff paid, it was held that the railroad was bound to make good to the plaintiff, the defrauded party, his loss. In referring to this case, Hutchinson, in his excellent work on Carriers, observed: "The case was said, however, to differ from the cases referred to, in the fact that by the railroad receipts or bills of lading, the goods were made deliverable directly to the plaintiff, and that no assignment to him by the party practicing the fraud had been necessary or had been resorted to. The receipts were, therefore, equivalent to direct representations to the plaintiff that the goods had been delivered to the road on his account, which it was estopped from denying. The case might have admitted of an agreement, said the court, had the plaintiff been compelled to derive his title through the indorsement of another who, it was conceded, had none."¹⁷

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¹ Hutchinson on Carriers, § 122.

² Grant v. Norway, 10 Com. B. 665.

³ Hubbersty v. Ward, 8 Exch. 330; Coleman v. Riches, 16 Com. B. 104; Bates v. Todd, 1 Moo. & R. 106; Meyer v. Dresser, 16 Com. B. (N. S.) 466; Berkley v. Watling, 7 Ad. & El. 29.

⁴ The Delaware, 14 Wall. 601; Meyer v. Peck, 28 N. Y. 590; Ellis v. Willard, 5 Seld. (N. Y.) 529; The Lady Franklin, 8 Wall. 325; Abbe v. Eaton, 51 N. Y. 410; The Loon, 7 Blatchf. 244; Fellows v. Str. Powell, 16 La. Ann. 516; Dean v. King, 22 Ohio St. 118; Sears v. Wingate, 3 Allen (Mass.), 163; Louisiana Bank v. Lavelle, 52 Mo. 380; Hunt & Macaulay v. R. R. Co., 29 La. Ann. 446; Baltimore, etc. R. Co. v. Wilkins, 44 Md. 11; National Bank v. Walbridge, 19 Ohio St. 425.

⁵ 18 How. 182. See Hutchinson on Carriers, §§ 123 et seq.

⁶ Union, etc. R. R. Co. v. Yeager, 34 Ind. 1; Ryder v. Hall, 7 Allen (Mass.), 456; Hall v. Mayo, 7 Allen (Mass.), 454. See cases in note 4.

⁷ Pattison v. Culton, 33 Ind. 248.

⁸ Bowley v. Bigelow, 12 Pick. (Mass.) 308.

⁹ Robinson v. Memphis & Charleston R. R. Co. (U. S. C. O. W. D. Tenn.), 9 Fed. Rep. 129. See comments on this case in 13 Cent. L. J. 361. Saltus v. Everett, 20 Wend. (N. Y.) 268; Stollenwerck v. Thacher, 115 Mass. 224.

¹⁰ Robinson v. Memphis & Charleston R. R. Co., 9 Fed. Rep. 129.

¹¹ Pollard v. Vinton, 105 U. S. 7; 14 Cent. L. J. 871. See United States cases above cited.

¹² See Hutchinson on Carriers, §§ 622, 123, and opinion of Judge Hammond in Robinson v. Memphis, etc. Co., 9 Fed. Rep., at pp. 140, 141.

¹³ Bank of Batavia v. Railroad Co., 106 N. Y. 196; 12 N. E. Rep. 433; 25 Cent. L. J. 109 (dig.).

¹⁴ North River Bank v. Aymar, 3 Hill, 262; Griswold v. Haven, 25 N. Y. 696, 601; Railroad Co. v. Schuyler, 84 N. Y. 80; Armour v. Railroad Co., 65 N. Y. 111.

¹⁵ Sayings Bank v. Railroad Co., 20 Kan. 519.

¹⁶ 65 N. Y. 111.

¹⁷ Hutchinson on Carriers, § 124. See article on "Bills of Lading," by Adelbert Hamilton, Esq., 14 Cent. L. J. 23.

JETSAM AND FLOTSAM.

"QUIET ENJOYMENT."—A recent English case, *Jenkins v. Jackson*, 40 Ch. D., 71, presents some interesting as well as some amusing features. In this case A had granted a lease to B of two rooms in a building with the usual covenant for quiet enjoyment. Then A let a room above the two to C for dancing and other entertainments. B brought an action against A to restrain such use of the upper room, alleging that the dancing over his head and the behavior of visitors on the stairs was a breach of the covenant and a nuisance. The court very unwillingly, but with great gravity, proceeded to pass on the two important subjects of dancing and flirting. "Let me observe, lest there should be a mistake, that 'quietly' does not mean undisturbed by noise. When a man is quietly in possession, it has nothing whatever to do with noise, though the word 'quiet' is frequently used with reference to noise. 'Peaceably and quietly' means without interference * * * without interruption of the possession." But the dancing defendant did not escape, for the court proceeded to say that the defendant had not been sufficiently moderate in his dancing and music. "Though, of course, dancing will always produce some noise and vibration, and music will always occasion some noise, still, I think there ought to be no real difficulty in conducting dances without any such interference with the plaintiff as would justify an injunction or give a cause of action." (Dancing without vibration and music without noise would be at least a little unusual.) As to "the quiet enjoyment" of the stairs, in other words, the flirting in that portion of the premises, which the court called "unmannerly and offensive behavior," it was decided, of course, that the defendant was not responsible therefor. It would, indeed, be a harsh rule to hold a man responsible for all the flirting done on his premises. All this is good law if a little grotesque by reason of the facts. The most amusing part of the case is the reluctance of the judge to discuss it at all. He says, in effect: Why was this absurd action brought? Or, if brought, why did not you go before a jury? Well, as long as it is here, I suppose I must dispose of it somehow! And he disposed of it so that each side was mulcted in costs.

THE MEDICO-LEGAL SOCIETY of New York, will hold an International Congress of Medical Jurisprudence, in the city of New York this week. In the language of the call, "A congress like this will advance mightily the cause of justice and humanity, and will pave the way for a clearer definition of the principles which should govern the administration of justice in our enlightened age. The intercourse between men eminent in their profession, the exchange of views between them, the treatment and discussion of questions that form an integral part of both law and medicine, by those whose voices are recognized as the leaders of science, will form another link in the universality of all true science."

MINNESOTA STOCKHOLDERS LIABILITY.—The constitution of Minnesota makes the stockholders of a corporation liable for its debts to the amount of the stock owned or held by them, and excepts from the provision corporations organized to carry on a manufacturing or mechanical business. The supreme court has, in two recent cases, decided that only those corporations which are formed exclusively for manufacturing or mechanical purposes are entitled to the benefit of this exception. Other corporations cannot entitle themselves to it by organizing in form under the

"manufacturing corporation act," when in reality the primary object of the corporation, as in the case of *Mohr v. Minnesota Elevator Co.*, decided April 9, 1889, was that of dealing in, shipping and storing grain, cattle and other commodities, in the language of the court "a business wholly foreign to that of manufacturing;" or as in the case of *State v. Minnesota Thresher Manufacturing Co.*, 41 N. W. Rep. 1020, "its purpose is also to carry on some other and distinct kind of business not properly incidental to or connected with that of manufacturing."—*St. Paul Advocate*.

RECENT PUBLICATIONS.

BOOKS RECEIVED.

REPORTS OF CASES ADJUDGED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF NEW YORK. Complete Edition. Copiously Annotated by Embodying all Equity Jurisprudence, with Table of Cases Cited. By Robert Desty. Book V. Containing Paige's Chancery, Vol. 11, Barbour's Chancery, Vols. 1-8, and Chancery Sentinel, Vols. 1-6. Rochester: The Lawyers Co-Operative Publishing Co. 1889.

FEDERAL DECISIONS. Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the Opinions of those Courts from the Time of their Organization to the Present Date, together with Extracts from the Opinions of the Court of Claims and the Attorneys-General, and the Opinions of General Importance of the Territorial Courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XXX. Index and Table of Cases. St. Louis, Mo.: The Gilbert Book Company. 1889.

COMMENTARIES ON THE NON-CONTRACT LAW, and especially as to Common affairs not of Contract on the Every-day Rights and Torts. By Joel Prentiss Bishop, Honorary Doctor Juris Utriusque of the University of Berne. Chicago: T. H. Flood & Co., Law-Book Publishers. 1889.

A DIGEST OF ALL THE REPORTED AMERICAN CASES AND SELECTED ENGLISH CASES, with Synopses of Statutes of General Interest, Reference to articles and Essays in Current Law Periodicals, and to Text-books and other matters of Value to the Profession, contained in the various Law Publications, from July, 1887, to January, 1888. Editors: E. A. Jacob, J. A. Mallory, F. B. Walrath. Associate Editors: W. G. Challis, G. T. Lincoln, M. Cooper, W. Hall, D. Walworth. 1887, Part II, New York: Digest Publishing Co., Publishers. 1889.

QUERIES AND ANSWERS.

QUERY No. 22.

A enters land under homestead law, and commutes same to cash entry, getting land office receipt. The land is levied on and sold at sheriff's sale to satisfy judgment. Two years afterward, A claims land to be exempt to the levy and sale, under the United States law providing that "no land entered and proved up under homestead laws shall be liable for debts contracted previous to the issue of patent." Can A claim exemption under said law at this time, after failure to give notice to officers at the time either of levy or sale? Did he not waive his right to do so by commuting to cash entry? Did he not waive his right to claim such exemption, and did not the land thereby take upon it the nature of a pre-emption entry. Cite authorities. B, the execution plaintiff, became purchaser at sheriff's sale, and received deed of the officer accordingly. The question now arises on a suit to restore court and recorder office evidence which were destroyed by fire. B. A. R.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCOUNT STATED.—Where an account against a party is stated, showing the amount due, and is acknowledged to be correct, it is sufficient to constitute an account stated, though such party has counterclaims which are not deducted.—*Ware v. Manning*, Ala., 5 South. Rep. 682.

2. ADMIRALTY—Collision.—A tug which, on sighting another tug showing red light, crosses the latter's bow to the starboard instead of passing port to port, is in fault for a collision occurring thereupon.—*The America*, U. S. C. O. (N. Y.) 37 Fed. Rep. 813.

3. APPEAL—Freehold.—*Held*, under the facts that the bill by grantee of a mortgagor to redeem involved a freehold in which the appellate court has no jurisdiction.—*Sanford v. Kane*, Ill., 20 N. E. Rep. 810.

4. APPEAL—Freehold.—Under facts herein the right to redeem from a mortgage from which complainant may ultimately be entitled to a freehold, does not present a question involving a freehold so as to allow appeal direct to the supreme court.—*Kirchoff v. Union Mut. Life Ins. Co.*, Ill., 20 N. E. Rep. 803.

5. APPEAL—Evidence.—Though the fact that evidence was objected to be stated, yet, if it be not stated either in the motion for a new trial or in the bill of exceptions on what ground or grounds the objection was predicated in the court below, the supreme court will not adjadicate upon the alleged error.—*Reilly v. State*, Ga., 9 S. E. Rep. 332.

6. ARBITRATION AND AWARD.—It is a good defense to an action at law on an award that the arbitrators, after hearing plaintiff's testimony, adjourned, informing defendant that they would hear his testimony at another time of which he should have notice, but rendered the award without hearing him.—*Graham v. Woodal*, Ala. 5 South. Rep. 687.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Under

Rev. St. Ind. 1881, § 2674, an assignee does not warrant the title of property sold by him, and, without an express agreement made by order of the court, does not assume payment of incumbrances.—*Burns v. Garin*, Ind., 20 N. E. Rep. 798.

8. ASSUMPSIT—Account Stated.—Where plaintiff made a contract with a firm who operated a saw-mill for the sale of certain timber standing on her land, but afterwards the firm was dissolved, and their assets assigned to the defendants, including the interest in the said contract, the plaintiff could recover on an *indebitatus assumpsit* for timber taken by the defendants.—*Ingram v. Lukens*, S. Car., 9 S. E. Rep. 848.

9. ATTACHMENT.—Where one sells personal property, which is afterwards attached by his creditor on the ground that he had fraudulently disposed of his property, and he moves to discharge the attachment for the reason that the affidavit for attachment is not true, and the purchaser appears and takes part in the trial of the motion, and it is therein adjudged that the sale was in fraud of his creditors, such appearance and judgment do not preclude the purchaser from subsequently bringing an action for the recovery of the property attached.—*Thomas v. Baker*, Kan., 21 Pac. Rep. 252.

10. BANKS AND BANKING—Check.—A trustee drew a check on a trust fund, and gave it to defendant in payment of a debt which had no connection with that fund. Defendant, in good faith presented the check to the bank, and obtained the money. The bank, having been compelled to make good the misappropriation, brought this action to recover the amount of the check from defendant: *Held*, that as between them, the payment of the check by the bank was a finality, and conclusively binding on the bank.—*Manufacturers' Nat. Bank v. Swift*, Md., 17 Atl. Rep. 336.

11. BOND—Bail.—In order to render a surety on a bail-bond, returnable to the city court of Savannah, liable for its breach, it is not necessary for the bond to recite whether the offense charged against the principal is a misdemeanor or a felony.—*Clark v. Gordon*, Ga., 9 S. E. Rep. 333.

12. CARRIERS—Passenger.—In an action for injuries by being ejected from a train with unnecessary force, the question of contributory negligence does not enter into the case, as it is no defense against an intentional wrong.—*Chicago, St. L. & P. R. Co. v. Bills*, Ind., 20 N. E. Rep. 775.

13. CARRIERS OF GOODS—Connecting Lines.—A railway company which receives goods, consigned to a point on its line, in the usual course of business, from a connecting carrier, which has carried the goods to its terminus, is entitled to its reasonable freight charges, though the consignor had directed the goods should be carried by another carrier than the one to which they were delivered.—*Price v. Denver & R. G. Ry. Co.*, Colo., 21 Pac. Rep. 183.

14. CARRIERS OF GOODS—Set off.—A common carrier who has brought suit against a wrong doer to recover for the destruction of goods which had been intrusted to him for transportation, and has recovered for their amount, is liable to the owner of the goods for the sum recovered, and cannot recoup against the claim the expenses incurred in the litigation with the wrongdoer.—*Hardman v. Brett*, U. S. C. O. (N. Y.), 37 Fed. Rep. 803.

15. CARRIERS—Negligence.—A charge that where a railroad train, containing passengers, is thrown from the track, and the passengers are injured, the presumption is that the accident resulted either from the fact that the track was out of order, or that the train was badly managed, or both, and that the burden was on defendant to show that it was not negligent in any of these respects, was error.—*San Antonio & A. P. Ry. Co. v. Robinson*, Tex., 11 S. W. Rep. 327.

16. CARRIERS—Negligence.—The statement of a train conductor, in answer to a passenger's question, that the train would stop a certain length of time at an

intermediate station, creates no obligation to stop that length of time, and such question and answer have no bearing on the question of damages for an injury to the passenger.—*Missouri Pac. Ry. Co. v. Foreman*, Tex., 11 S. W. Rep. 526.

17. CARRIERS—Transfer of Franchise. — A railroad company, organized and incorporated under the laws of this State, cannot absolve itself from the performance of duties imposed upon it by law, or relieve itself from liability for the wrongful acts or omissions of duty of persons operating its road, by transferring its corporate powers to them, or permitting them to operate its road as owners of its capital stock. — *Chollette v. Omaha & R. V. R. Co.*, Neb., 41 N. W. Rep. 1106.

18. CARRIERS OF PASSENGERS — Ejection. — The statute prohibits the expulsion of a passenger by a railroad company for non-payment of fare at any point other than a usual stopping place, or near some dwelling house. When, however, a passenger wantonly violates any other reasonable rule of a railroad company, the obligation to transport him ceases, and the company may expel him from the train at any convenient and safe point that may be selected by the officer in charge. — *South. Fla. R. Co. v. Rhoades*, Fla., 5 South. Rep. 633.

19. CARRIERS—Statutes. — Subdivision *a* of § 8, ch. 10, Gen. Laws, 1887, being a part of an act entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the State of Minnesota, is inconsistent with and so far supersedes § 1, ch. 14, Gen. Laws, 1887, known as the "Freedom of Traffic Act," as to operate as a repeal of said section. — *State v. St. Paul M. & M. Ry. Co.*, Minn., 42 N. W. Rep. 21.

20. COMMISSIONERS — Fees. — United States commissioners are entitled to fees for written orders of commitment and discharge of persons necessarily remaining in the custody of the commissioners over night. — *Heyward v. United States*, U. S. D. C. (S. Car.), 87 Fed. Rep. 764.

21. CONTRACTS. — A steam-boat builder is liable in damages for defects of construction which occasion loss to the owner. — *Leathers v. Sweeney*, La., 5 South. Rep. 662.

22. CONTRACTS—Duress. — It is those contracts only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, that can be avoided for duress. — *Sanford v. Sornborger*, Neb., 41 N. W. Rep. 1102.

23. CORPORATIONS—Directors. — Where the directors of a corporation, having the authority to direct its litigation, are themselves guilty of the wrong complained of, a court of equity will interfere at the instance of the stockholders, without proof of a demand and refusal upon the part of the directors to bring the suit. — *Davis v. Gemmel*, Md., 17 Atl. Rep. 259.

24. COSTS — Imprisonment. — Magistrate has no authority to imprison a prosecutor, starting malicious prosecution, without probable cause, for failure to pay costs adjudged against him. — *In re Heitman*, Kan., 21 Pac. Rep. 213.

25. COURTS—Judge. — Construction of Code Ga. § 279 and act 1878 79, p. 71, fixing term of office and providing salary for county judges. — *Anderson v. Ryan*, Ga., 9 S. E. Rep. 331.

26. CRIMINAL LAW—Manslaughter. — An indictment alleging that defendant, carelessly and negligently ran his engine into a passenger-car, thereby causing the death of a certain person, is sufficient, as charging the offense, under Rev. St. Ind. 1881, § 1906, providing that "whoever unlawfully kills any human being without malice, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter." — *State v. Dorsey*, Ind., 20 N. E. Rep. 777.

27. CRIMINAL LAW—Murder. — Where persons combine to commit a crime, and while so engaged in such unlawful act murder is committed by one or more of the conspirators, without the knowledge or consent of

the others, and the act is not the natural or probable outcome of the common design and purpose, but the independent act of one or more of the conspirators: Held, those not participating in it are not guilty of murder. — *State v. Furney*, Kan., 21 Pac. Rep. 213.

28. CRIMINAL LAW — Recognizance. — Where a defendant in a criminal action enters into a bond to appear at the district court, the conditions of the bond are not complied with if he merely appears at court, and departs the same without leave before trial or judgment. — *Glasgow v. State*, Kan., 21 Pac. Rep. 253.

29. CRIMINAL LAW—Assault. — A charge of an assault with deadly weapon with intent to kill includes the lesser charge of assault and battery. — *State v. Schreiber*, Kan., 21 Pac. Rep. 263.

30. CRIMINAL LAW—Murder. — Witness on trial who had for years experimented with guns and who was prepared to state how far distant from the musket used, a person receiving such wound as deceased did, should have been held competent as an expert. — *State v. Jones*, Kan., 21 Pac. Rep. 265.

31. CRIMINAL LAW—Confessions. — Held, that statement claimed to be a confession was not a confession within the well-defined legal meaning of that word, implying an acknowledgment of guilt. — *State v. Crowder*, Kan., 21 Pac. Rep. 208.

32. CRIMINAL LAW—False Pretences. — Defendant was arrested for attempting to obtain money on false pretenses from a railroad company. It was alleged that he sought to obtain damages for two trunks, which he falsely claimed had been lost by the company: Held, that the attorney of the defendant was properly required to testify as to his employment by defendant to demand compensation from the company. — *White v. State*, Ala., 5 South. Rep. 674.

33. CRIMINAL LAW—False Representation. — Where defendant having assigned warrant for witness fees, collects same, a charge that if defendant fraudulently, designedly, knowingly, and falsely represented, whether by words or acts, that he had not assigned the claim, and that he was the owner when in fact he was not, and that by reason thereof he obtained the order, he must be guilty, is correct. — *State v. Hargrave*, N. Car., 9 S. E. Rep. 406.

34. CRIMINAL LAW—Trespass. — On indictment for entering on land without a license, defendant may show that he went on the land in good faith claiming to have or having title thereto; but such defense will not avail unless he show reasonable ground for belief that his claim was well founded. — *State v. Crawley*, N. Car., 9 S. E. Rep. 409.

35. CRIMINAL LAW—Larceny. — A due-bill is an "obligation," within the meaning of Code N. C. § 1064, making an "order, bill of exchange, bond, promissory note, or other obligation" the subject of larceny. — *State v. Campbell*, N. Car., 9 S. E. Rep. 410.

36. CRIMINAL LAW—Disturbance—Public Worship. — Where, on an indictment for disturbing public worship, the gist of the offense charged is the disturbance of a religious congregation, in refusing to let them enter the church and engage in religious services, evidence is admissible that defendant acted under a *bona fide* belief that he had the title to and the right to the possession of the premises. — *State v. Jacobs*, N. Car., 9 S. E. Rep. 404.

37. CRIMINAL LAW—Swindling. — On indictment for swindling, the charge being that defendant, by falsely representing the signatures to a petition presented by him to be genuine, obtained from the county judge a draft, an instruction that, unless the signatures were there at the time of presentation to the judge, and that defendant's false and fraudulent declaration that they were genuine induced the issuance of the draft, defendant should be acquitted, is correct. — *Scott v. State*, Tex., 11 S. W. Rep. 320.

38. DIVORCE—Allimony. — A defendant in a suit for divorce, who omits to allege plaintiff's adultery in his answer, will not afterwards be permitted to set it up in

opposition, to her application for alimony *pendente lite*, when the only excuse offered for such omission is a desire to shield his children from the disgrace resulting from such a charge.—*Pullen v. Pullen*, N. J., 17 Atl. Rep. 810.

39. DOWER—Seizin. — *Held*, sufficient evidence to make such a *prima facie* case of seizin in demandant's husband as would entitle her to dower. — *Stark v. Hopson*, S. Car., 9 S. E. Rep. 345.

40. EJECTMENT—Claimants' Improvements.—Under the Ohio occupying claimants' law, which requires that the value of all improvements made on the land shall be paid for in full, such value is not to be ascertained by what the improvements originally cost the claimant, but by the substantial benefit they confer upon the rightful owner, at the date of the commencement of the action. — *Van Bibber v. Williamson*, U. S. C. C. (Ohio), 37 Fed. Rep. 756.

41. ELECTIONS. — In a proceeding brought by an elector, to contest an election held for the purpose of voting the bonds of a county to aid in the construction of a railroad, the plaintiff must conform strictly with the provisions of that statute, and cannot bring any one in as a defendant than the officers named in the statute.—*Chicago, K. & W. R. Co. v. Evans*, Kan., 21 Pac. Rep. 216.

42. EQUITY—Jurisdiction.—Equity has jurisdiction, upon the filing of a supplemental bill by attorneys alleging that they are assignees of their client of a portion of a fund in the custody of the court, to be distributed in the cause in which such bill is filed, said client being entitled to a portion thereof, to enter a decree preserving the equitable lien of the assignment, by directing the payment of the assigned amount out of the fund.—*Phillips v. Edsall*, Ill., 20 N. E. Rep. 801.

43. EQUITY—Reformation. — Where, in a mortgage of a homestead duly acknowledged and executed, there is a mistake in the description of the land, equity will reform the mortgage, where the quantity of the land conveyed is not thereby increased. — *Wetherington v. Mason*, Ala., 5 South. Rep. 679.

44. EQUITY—Auxiliary Suit. — Where it is held that an action at law cannot be maintained on an insurance policy unless it is reformed, and the action is continued to enable plaintiff to procure such reformation, a bill filed for that purpose is auxiliary to the action at law.—*Abraham v. North German Fire Ins. Co.*, U. S. C. C. (Iowa), 37 Fed. Rep. 731.

45. EQUITY—Jurisdiction. — The circuit court of the United States sitting in Colorado has jurisdiction of a bill filed by the United States to set aside, on the ground of fraud, a patent to land situated in the territory of New Mexico; and, having obtained jurisdiction of the defendants, its decree holding the patent valid is final and conclusive upon the parties.—*United States v. Maxwell Land Grant Co.*, N. Mex., 21 Pac. Rep. 153.

46. EXECUTION—Sale. — Mere inadequacy of price is not sufficient to set aside a sheriff's sale, but it may be considered with other grounds.—*Jones v. Carr*, Kan., 21 Pac. Rep. 258.

47. EXEMPTION.—The horse, harness, and buggy of an insurance agent,—a resident of the State, and the head of a family,—used and kept by him in carrying on the insurance business, is exempt under the act relating to exemptions. — *White v. Williams*, Kan., 21 Pac. Rep. 256.

48. EVIDENCE—Books of Account. — Books of account are receivable in evidence only when they contain charges by one party against the other, and then only under the circumstances and verified in the manner provided by statute.—*Gilbert v. Merriam Saddlery Co.*, Neb., 42 N. W. Rep. 11.

49. EVIDENCE—Opinion. — Farmers who reside in the vicinity of a farm, and are familiar with it, and know its capacities, and testify that they know its value, are competent to give their opinions as to its value, though they know of no sale of any farm in that vicinity. — *Kansas City & S. W. R. Co. v. Baird*, Kan., 21 Pac. Rep. 227.

50. EVIDENCE—Parol. — A bond and mortgage for a sum certain cannot be shown by parol to have been intended to cover whatever should be found due on a settlement, there being no allegation of fraud or other equitable matter.—*Moffitt v. Maness*, N. Car., 9 S. E. Rep. 399.

51. EVIDENCE—Documentary. — In the absence of statute authorizing entries in a book termed the "Record of the Register of Swamp Lands," relating to the disposition of such lands belonging to a county, certified copies of such entries are not admissible in evidence as public records.—*Carrington v. Potter*, U. S. C. C. (Mo.), 37 Fed. Rep. 767.

52. EVIDENCE—Negligence. — Evidence, that after an overflow causing damage to plaintiff's land, the defendant, a railroad company, enlarged and reconstructed its culverts is not admissible. — *Gulf, C. & S. F. Ry. Co. v. McGowan*, Tex., 11 S. W. Rep. 336.

53. EVIDENCE—Negligence. — In an action against a railroad company for injuries received while in defendant's employ, testimony of plaintiff that a foreman of defendant, who was assisting in the work at the time of plaintiff's injury, was afterwards killed on defendant's railroad, is not objectionable as tending to show another instance of defendant's negligence. — *Texas Mex., Ry. Co. v. Douglass*, Tex., 11 S. W. Rep. 333.

54. FACTORS AND BROKERS—Commission. — Construction of contract wherein defendant agreed to pay plaintiff a commission for orders for goods manufactured, from "responsible parties." — *Steinbach v. Montpelier Carriage Co.*, U. S. C. C. (Vt.), 37 Fed. Rep. 760.

55. FEDERAL COURTS—Suits by Assignees. — Though an assignee cannot institute an action in the federal courts because of diverse citizenship, under the act of 1875, unless his assignor could have done so, yet, the action having been brought in the State court the cause is removable.—*Rosenbaum v. Council Bluffs Ins. Co.*, U. S. C. C. (Iowa), 37 Fed. Rep. 724.

56. FEDERAL COURTS. — An action for damages for breach of a contract of lease is an action "founded on contract," in the sense in which that expression is used in the restriction contained in the first section of the act of March 3, 1875. — *Republic Iron Min. Co. v. Jones*, U. S. C. C. (Ga.), 37 Fed. Rep. 721.

57. FORCIBLE ENTRY AND DETAINER. — Under Justice's Code Dak. §§ 34, 37, in order to maintain forcible entry and detainer, the plaintiff must have a general or special title to the premises sufficient to give him the right of possession, and the defendant must be a mere trespasser or intruder without color of right. — *Murry v. Burris*, Dak., 42 N. W. Rep. 25.

58. FRAUDULENT CONVEYANCE — Mortgage. — A mortgage deed executed to secure a valid pre-existing debt, and with no fraudulent intent on the part of the mortgagee, is valid, though the mortgagor executed it for the purpose of defrauding creditors.—*Battle v. Mayo*, N. Car., 9 S. E. Rep. 384.

59. FRAUDULENT CONVEYANCES — Possession. — A provision in a deed conveying real estate and personality to a trustee for the benefit of creditors, reserving possession of the property until the maturity of certain secured debts, eleven months later, the grantor taking the profits to his own use during that time is not, of itself, proof of fraud.—*Paul v. Baugh*, Va., 9 S. E. Rep. 829.

60. HIGHWAYS—Assessments. — Where a second assessment against land-owners is ordered for the purpose of paying the costs of a free gravel road, the land-owners have a right by appeal from the final order to bring before the court all questions affecting the amount of the assessment. — *Board of Commissioners v. Fullen*, Ind., 20 N. E. Rep. 771.

61. HIGHWAYS—Assessment. — Rev. St. Ind. 1881, § 5096, providing for the apportionment of the estimated expense of constructing a free gravel road, does not authorize the auditor to increase the assessment to an amount exceeding the benefits assessed. — *Campbell v. Board*, Ind., 20 N. E. Rep. 772.

62. **HOMESTEADS.** — Under Code Civil Proc. Cal. § 1465, premises suitable and proper for a homestead may be so designated, though they were not, at the husband's death, or at any time afterwards, used for a dwelling, but were used in part for a store, an office, and for storage purposes. — *In re Sharp's Estate*, Cal., 21 Pac. Rep. 182.

63. **HUSBAND AND WIFE—Marriage.** — Where a man and woman declare themselves to be married, and are recognized as such by their relatives and friends, and cohabit for years and a child is born to them, the woman is estopped to claim support as a wife from one whom she marries before the death of the man with whom she had sustained the relation of wife. — *Applegate v. Applegate*, N. J., 17 Atl. Rep. 298.

64. **IMMIGRATION—Detention.** — Under § 2, of the act of August 3, 1892, immigrants cannot be detained or sent back except upon an adverse report made to the collector by the commissioners themselves, or by some person by them authorized, after an examination and a finding that the persons are within some of the prohibited classes. — *In re Bradmadfar*, U. S. C. O. (N. Y.), 37 Fed. Rep. 774.

65. **INFANCY—Power of Attorney.** — Held, that where plaintiff while under age had made power of attorney that if the power of attorney was voidable, plaintiff, to recover the land, should have exercised his right of election within a reasonable time, and should have refunded the price. — *Ferguson v. Houston, E. & W. T. Ry. Co.*, Tex., 11 S. W. Rep. 343.

66. **INTOXICATING LIQUORS.** — A municipal ordinance requiring all persons engaged in selling liquor to procure a license therefor is effective as against one selling liquor within the territorial jurisdiction of the municipality, though outside its corporate limits. — *Emerich v. City of Indianapolis*, Ind., 20 N. E. Rep. 794.

67. **INSURANCE—Notice.** — Sufficiency of notice under the statute requiring that a policy shall not be forfeited for non-payment of premium unless notice shall be mailed, etc. — *Phelan v. Northwestern Mut. Life Ins. Co.*, N. Y., 30 N. E. Rep. 827.

68. **INSURANCE—Life.** — Insurance company is liable on policy, though the representations therein are false, the statements being made correctly by applicant but improperly written down by the agent. — *Kansas Protective Union v. Gardner*, Kan., 21 Pac. Rep. 283.

69. **JUDGMENT.** — A court cannot delegate its judicial functions to its clerk, so that he may set aside a judgment upon the performance of a condition. — *Strickland v. Cox*, N. Car., 9 S. E. Rep. 414.

70. **JUDGMENT—Constitutional Law.** — Act S. O. 1873, provided that a final judgment should be a lien for ten years, and that the creditor might have an additional three years within which to revive it. Act of 1885 repealed the provision allowing the additional three years: Held, that the latter act was unconstitutional as interfering with vested rights when applied to a judgment the lien of which had expired before its passage, but the additional three years for reviving which had not then expired. — *King v. Belcher*, S. Car., 9 S. E. Rep. 369.

71. **JUSTICES OF THE PEACE—Garnishment.** — Property of a debtor, in the possession of a garnishee, and delivered to a justice of the peace, in pursuance to an order made by the justice, must be advertised and sold in the township in which the justice of the peace resides and holds his office. — *Beamer v. Winter*, Kan., 21 Pac. Rep. 261.

72. **LAND CERTIFICATE—Bona Fide Purchaser.** — Held, upon the facts that, as the land certificate was personally, the registration laws did not apply, and the purchaser acquired title thereto as against a subsequent purchaser from the wife, who had no notice of the prior sale except the memorandum on file in the land office. — *Dodge v. Little*, Tex., 11 S. W. Rep. 331.

73. **LIENS—Logging.** — Under Pub. Acts Mich. 1887, No. 229, where the laborer performs work on a large drive of logs, belonging to different owners, he cannot

enforce his lien in whole upon the logs belonging to one or more of the different owners, but he must show the amount of labor expended upon each owner's logs. — *Appleman v. Myre*, Mich., 42 N. W. Rep. 48.

74. **LIMITATION OF ACTION—Adverse Possession.** — Where, at the time adverse possession of land begins, the statute of limitations is twenty years, that statute governs the case, notwithstanding an act passed a year later provided that actions to recover land must be brought within ten years. — *Lyles v. Roach*, S. Car., 9 S. E. Rep. 334.

75. **LIMITATION OF ACTIONS.** — Under the statute, an action to foreclose a mortgage given as security for the payment of notes executed by non-residents of Kansas, payable in another State, will be controlled as to its limitation by the statute of the State where the mortgage and notes were executed and are payable. — *Croocker v. Pearson*, Kan., 21 Pac. Rep. 270.

76. **MANDAMUS—Officer.** — *Mandamus* is the proper action to restore an officer to office from which he has been illegally suspended, and by the same action all the records, instruments, and insignia of office of which he has been deprived by an illegal suspension may be restored to him. — *Metsker v. Neally*, Kan., 21 Pac. Rep. 206.

77. **MASTER AND SERVANT—Negligence.** — Plaintiff held guilty of contributory negligence in use of machinery with which he was familiar. — *Cullen v. Nat., etc. Co.*, N. Y., 20 N. E. Rep. 881.

78. **MINES AND MINING.** — In an action to quiet title to a mining claim it is sufficient for plaintiff to allege that he is "the owner" in terms, without setting out the facts showing him to be such. — *Souler v. Maguire*, Cal., 21 Pac. Rep. 187.

79. **MORTGAGES.** — The consideration of a mortgage may be proved, but the conveying part cannot be contradicted, by parol. — *Murdock v. Cox*, Ind., 20 N. E. Rep. 786.

80. **MORTGAGES—Foreclosure.** — Where the decree for sale on foreclosure orders the land to be first offered in separate parcels, a sale as an entirety without the offer in parcels is void. — *Merriweather v. Craig*, Ind., 20 N. E. Rep. 769.

81. **MORTGAGES.** — A conveyance of land in satisfaction of a judgment, though accompanied by a verbal agreement that, if the grantor makes a sale of the land within five or six months, the land should be reconveyed to him, is not a mortgage. — *Elaton v. Chamberlain*, Kan., 21 Pac. Rep. 259.

82. **MORTGAGE—Foreclosure.** — The question of adverse and paramount title may be litigated in an action to foreclose a mortgage. — *Fisher v. Cowles*, Kan. 21 Pac. Rep. 228.

83. **MORTGAGES.** — A mortgagor left in possession of the mortgaged premises is entitled to the rents, issues and profits of them, without rendering an account of them to the mortgagee, who can never recover them from him. — *Childs v. Hurd*, W. Va., 9 S. E. Rep. 362.

84. **MUNICIPAL CORPORATIONS—Contracts.** — Where the department advertised for proposals for building and repairing the piers, the advertisement reserving the right to decline all bids, the city of New York is not liable to the lowest bidder for damages arising from the rejection of his bid, though Laws N. Y. provide that all contracts shall be let to the lowest bidder. — *Walsh v. Mayor*, N. Y., 20 N. E. Rep. 825.

85. **MUNICIPAL CORPORATIONS—Improvements—Assessments.** — Under Rev. St. Ind. 1881, § 3163, an assessment cannot be rightfully made on more than fifty feet from the front line, and acts 1885, p. 207, authorizing an assessment on 150 feet, being in terms prospective, does not apply to an assessment previously made and enforced by sale. — *Niklaus v. Conkling*, Ind., 20 N. E. Rep. 797.

86. **MUNICIPAL CORPORATIONS—Improvements.** — Under Rev. St. Ind. 1881, § 3165, the alleged invalidity of proceedings for improvement, because of a provision in the ordinance therefor that earth removed should

belong to the contractor, is not subject to inquiry on such an appeal. — *Jenkins v. Steller, Ind.*, 20 N. E. Rep. 788.

87. MUNICIPAL CORPORATIONS — Ordinances. — A city charter authorized the city "to prevent stock of any kind from running at large in the public streets," in pursuance of which an ordinance provided that animals running at large in the city should be impounded and sold after due notice, etc.: *Held*, a valid exercise of police power. — *Folmar v. Curtis, Ala.*, 58 South. Rep. 678.

88. NEGOTIABLE INSTRUMENTS— Consideration.— A negotiable promissory note executed by the individuals constituting the trustees of an incorporated company, due at a future date, given for a past-due debt of the company, is founded on a valuable consideration. — *Fulton v. Laughlin, Ind.*, 20 N. E. Rep. 736.

89. NEGLIGENCE— Railroad Company. — Under the facts, plaintiff injured by defendant's cars: *Held* guilty of negligence in attempting to climb over the train, though told so to do by the trainmen. — *Howard v. Kansas City F. S. & G. Ry. Co., Kan.*, 21 Pac. Rep. 267.

90. NEGLIGENCE—Highways. — *Held*, where plaintiff's horse, traveling on a highway parallel with and adjoining a railroad, took fright at a locomotive, ran upon the track, and was killed by the cars, it was for the jury to say whether the township supervisors were negligent in not erecting a barrier between the highway and the railroad. — *Township v. Graver, Penn.*, 17 Atl. Rep. 249.

91. NEGLIGENCE—Railroad Company. — Verdict for plaintiff set aside where boy was killed on railroad track there being no positive evidence of negligence by the defendant and where he knew of the dangers. — *Mo. Pac. Ry. Co. v. Porter, Tex.*, 11 S. W. Rep. 824.

92. NEW TRIAL— Jury. — Where the jury, in a civil action, is permitted to return a sealed verdict, and such verdict is returned into court by the jury, but upon being polled it is found that the verdict is not agreed to by all the jury: *Held*, not error for the court to again send the jury out to deliberate upon their verdict. — *Morgan v. Bell, Kan.*, 21 Pac. Rep. 255.

93. PARTITION. — Community land used as a homestead by the surviving husband and the minor children of the deceased wife, cannot be partitioned or deprived of its homestead character during the life of the husband or the minority of the children. — *Adair v. Hare, Tex.*, 11 S. W. Rep. 820.

94. PARTNERSHIP. — General reputation is not competent to establish a copartnership in favor of a person claiming to be a member of the firm. — *Adams v. Morrisson, N. Y.*, 20 N. E. Rep. 829.

95. PARTNERSHIP. — Where, after the dissolution of a partnership, all its available assets were collected and applied to the payment of its debts, and plaintiff, one of the members, paid the balance of the indebtedness of the firm, he could maintain an action against the other member of the firm to charge him with his share of the indebtedness so paid, although no balance had been struck between them. — *Jepsen v. Beck, Cal.*, 21 Pac. Rep. 186.

96. PARTNERSHIP— Good-will. — Upon the dissolution of a partnership carrying on the business of an insurance agency in a firm name there is nothing left to which the good-will as a property right of the business can attach, as neither partner has the exclusive right to carry on the old business. — *Rice v. Angell, Tex.*, 11 S. W. Rep. 338.

97. PENAL ACTIONS—Oleomargarine. — In an action for the statutory penalty prescribed for violations of the laws which prohibit the manufacture and sale of oleomargarine, the burden of showing that the product in question was manufactured or in process of manufacture at the time of the passage of the act, so as to be exempted, is on defendants. — *People v. Briggs, N. Y.*, 20 N. E. Rep. 820.

98. POWER—Will. — A power to convey land given by a will to three ex cutors, all of whom accept the trust, cannot be executed by one alone. — *Wright v. Dunn, Tex.*, 11 S. W. Rep. 330.

99. PRINCIPAL AND SURETY. — A co-surety upon a note, who takes security from the promisor to indemnify himself against his suretyship, and also for an individual accommodation indorsement of a previous note for the same maker, is not bound to share his security with his co-surety when insufficient to indemnify him for the first indorsement. — *Ticcomb v. McAllister, Me.*, 17 Atl. Rep. 815.

100. PUBLIC LANDS—Pre-emption.— Testimony that a person has been accepted by the United States land-officers as a qualified pre-emptor, or as one entitled to enter public lands, is *prima facie* proof of such qualification. — *Barnhart v. Ford, Kan.*, 21 Pac. Rep. 289.

101. PUBLIC LANDS. — Claim and color of title must be based upon the proper title, and cannot be extended beyond the same. — *United States v. Cameron, Ariz.*, 21 Pac. Rep. 177.

102. QUIETING TITLE— Res Adjudicata. — A decree quieting title in plaintiffs in a suit under Civil Code Proc. Colo. § 257, is conclusive against all adverse claims or interests then held by defendants, whether pleaded in defense or not. — *Burton v. Huma, U. S. C. O. (Colo.)*, 37 Fed. Rep. 738.

103. QUIETING TITLE. — Where on action to quiet title, the complaint or cross-complaint alleges legal title, recovery cannot be had by proof of equitable title. — *Johnston v. Portlars, Ind.*, 20 N. E. Rep. 792.

104. RAILROAD COMPANY.— *Held*, that an agreement by the railroad company, executed after the subscription of the county, to sell and transfer its road after it was completed, in order to obtain money for its construction, did not discharge or release the county from the payment of its subscriptions. — *Southern Kan. & P. Ry. Co. v. Towner, Kan.*, 21 Pac. Rep. 221.

105. RAILROAD COMPANIES—Sale. — Under Rev. St. Tex. art. 4260, the sale under the execution of the property and franchises of a railway corporation do not destroy its corporate existence, and the purchaser is not liable on a pre-existing contract by the former owner with plaintiff to maintain a depot at a certain place. — *Gulf, C. & S. F. Ry. Co. v. Newell, Tex.*, 11 S. W. Rep. 342.

106. REHEARING. — A case will not be reversed upon petition to rehear unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court. — *Fry v. Currie, N. Car.*, 9 S. E. Rep. 893.

107. REMOVAL OF CAUSES — Practice. — Under the statute, while the court's jurisdiction becomes vested when the petition and bond are filed, the time for pleading does not begin to run till the record is entered. — *Torrent v. S. K. Mer in Lumber Co., U. S. C. O. (Mich.)*, 37 Fed. Rep. 727.

108. REMOVAL OF CAUSES— Corporation. — A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the State or sovereignty by which it is created. — *Rece v. Newport News & M. V. Co., W. Va.*, 9 S. E. Rep. 312.

109. REMOVAL OF CAUSES—Citizenship. — The fact that a corporation owns property, does business, has an office and agents in a State, and is subject to be regulated by its laws, does not affect its citizenship or deprive it of the privileges conferred upon it by the laws of the United States. — *Southern Pac. Co. v. Harrison, Tex.*, 11 S. W. Rep. 168.

110. REMOVAL OF CAUSES—Citizenship. — Where, in a cause removed from a State court to the circuit court of the United States for the Northern district of Georgia, it appears that the complainant is a citizen of the State of Alabama, and the real defendant having an interest in the controversy is a citizen of the State of Ohio, removal having been made by the citizen of Ohio, on motion to remand upon the ground that the citizenship of the parties was not such as to give the circuit court jurisdiction: *Held*, that the cause was removable. — *First Nat. Bank v. Merchants' Bank, U. S. C. C. (Ga.)*, 37 Fed. 657.

111. REFLEVIN. — Question under the facts as to sufficiency of refusal to surrender cattle sued for in re-

plevin, defendant so refusing except upon a condition which was not in law any excuse or justification.—*Johns v. Head*, Kan., 21 Pac. Rep. 238.

112. RES ADJUDICATA.—Where a fact has been once litigated in a court of competent jurisdiction, the judgment rendered therein forever estops the parties and their privies from again litigating the same fact.—*Hall v. Zeller*, Oreg., 21 Pac. Rep. 192.

113. SALE—Rescission.—Where a harvester is sold with warranty, if it is not as warranted the purchaser may return it, and rescind the contract: but if the purchaser retains the machine, he is bound not only to account for its value for the purpose for which it was designed, but for its value either to the purchaser or the seller for any purpose.—*Aultman, Miller & Co. v. McKey*, Kan., 21 Pac. Rep. 254.

114. SALE.—A contract for the sale of goods was made by the seller's agent, to whom the bill of lading was mailed, together with a bill for the goods, in which it was stated that the goods were shipped to the purchaser at a place named. It was agreed by the purchaser that the agent should retain the bill of lading until payment, but the carrier delivered the goods to the purchaser without presentation of it: *Held*, that the title passed to the purchaser.—*Robinson v. Pough*, Ala., 5 South. Rep. 685.

115. PARTNERSHIP.—An indebtedness growing out of an unsettled partnership is admissible as a set-off in mortgage foreclosure.—*Mills v. Carrier*, S. Car., 9 S. E. Rep. 850.

116. SHERIFFS—Sale.—After a sale of real estate has been made by a sheriff on an order of sale, and the sale confirmed by the court, the sheriff cannot be allowed to show that he has not received the purchase money on the sale.—*Studebaker v. Johnson*, Kan., 21 Pac. Rep. 271.

117. SPECIFIC PERFORMANCE.—Where two or more parties enter into a commutative contract containing mutual stipulations and covenants, either one is liable, through his fault or misfortunes, for the expense or inconvenience of the other. The contract is a law between them, and either may sue for a specific performance or the reparation of the loss occasioned by the non-performance of the other.—*Kelly v. Devall*, Ind., 5 South. Rep. 657.

118. SPECIFIC PERFORMANCE.—In all cases for specific performance the contract must be accurately stated in the bill, and the proof must in every essential particular correspond with the contract thus set up.—*Carswell v. Walsh*, Md., 17 Atl. Rep. 335.

119. STATUTE—Rule of Construction.—Decisions of another State construing a statute contrary to its plain import will not be followed in construing a similar statute subsequently enacted here, especially where such statute has been adopted in other States, and has been there construed according to its terms, before its adoption here.—*Spokane Manuf. Co. v. McChesney*, Wash. Ter., 21 Pac. Rep. 198.

120. SUNDAY—Judgment.—A judgment rendered on Sunday is void.—*City of Parsons v. Lindsay*, Kan., 21 Pac. Rep. 227.

121. TAXATION—Constitutional Law.—The easement in the streets of a city, which a street-car company has acquired by contract with the city, is an interest in realty, and taxable as such; and an assessment of the corporate franchise, together with such easement, at a gross sum, is not objectionable as being a separate and independent assessment upon the franchise.—*South Nashville St. R. Co. v. Morrow*, Tenn., 11 S. W. Rep. 848.

122. TAXATION—Parties.—The heirs are not necessary parties to an action to cancel a tax-deed by the executor and sole devisee, in which defendant files a plea in reconvention in the nature of a cross-action of trespass to try title.—*Lufkin v. City of Galveston*, Tex., 11 S. W. Rep. 340.

123. TAXATION.—A tax upon personal property in the unorganized county of B imposed under act Dak. March 12, 1885, by and for the exclusive local benefit of

the contiguous organized county of S, is an attempt to tax one community for the benefit of another, and therefore void.—*Ferris v. Vannier*, Dak. 42 N. W. Rep. 81.

124. TAXATION—Municipal Corporations.—It is not necessary that a lot should abut upon the street to be paved and curbed in order to make it subject to taxation, for such improvements; it is sufficient if it lies in that half of the block next to the street paved and curbed.—*Olson v. City of Topeka*, Kan., 21 Pac. Rep. 219.

125. TRESPASS—Evidence.—In trespass for assault upon and for soliciting the plaintiff, a married woman, to commit adultery with the defendant, specific acts of unchastity by her with other men prior to the alleged assault cannot be shown in defense.—*Gore v. Curtis*, Me., 17 Atl. Rep. 314.

126. VENDOR AND VENDEE—Bona Fide Purchaser.—A party who purchases real estate with knowledge that another has a contract of purchase for the same is not a bona fide purchaser, and if he acquires such knowledge at any time before the payment of the consideration he will not be protected as a purchaser in good faith.—*Veith v. McMurtney*, Neb. 42 N. W. Rep. 6.

127. VENUE—Pleading.—An application by defendants for change of venue to another county, on the ground that they are residents of such county, which does not show that plaintiff is not a resident of the county where the action is brought, is properly refused.—*DeWein v. Osborn*, Colo., 21 Pac. Rep. 189.

128. WATER COMPANIES—Tariff.—Under the Omaha water-works ordinance the company has a right in fixing charges for water to treat each building separately; and the United States, as owner of the Fort Omaha reservation, is not entitled to be supplied as a single consumer.—*United States v. American Water-works Co.*, U. S. C. C. (Neb.), 37 Fed. Rep. 747.

129. WATER AND WATER COURSES—Drainage.—A township drain commissioner has no jurisdiction to locate a township drain on the line of a county drain which has been neither vacated nor abandoned.—*Zabel v. Harshman*, Mich., 42 N. W. Rep. 44.

130. WATERS AND WATER COURSES.—The power to regulate commerce among the several States comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried, and to this end congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the water way.—*The City of Salem*, U. S. D. C. (Oreg.), 37 Fed. Rep. 846.

131. WATERS AND WATER COURSES—Navigable Stream.—Where the whole of a river is above tide-water it is *prima facie* unnavigable, and the burden of proving that it was impressed with the character of a public highway is on the one asserting it.—*Olive v. State*, Ala., 5 South Rep. 638.

132. WILL—Devise.—The devise over to the oldest son of the devisee for life, by which he was given the estate "in fee," was a devise in fee simple, and the subsequent limitations are not to be considered as limitations upon the preceding, and only to take effect after them, but are to be taken as alternatives, in case the preceding should fail.—*Pennington v. Pennington*, Md., 17 Atl. Rep. 529.

133. WILL—Legacy—Ademption.—Construction of will under which it is held that testator had by collecting certain claims caused ademption of the legacies.—*Georgia Infirmary v. Jones*, U. S. C. C. (N. Y.), 37 Fed. Rep. 750.

134. WILLS—Construction.—Testator devised his homestead farm, constituting nearly the whole of his estate, to two sons jointly. To four other sons and daughters he gave each the sum of \$500 in cash, which sums were to be taken as in full of the several legatees' interest in the farm: *Held*, that the legacies were general, rather than specific.—*Roquet v. Eldridge*, Ind., 30 N. E. Rep. 733.

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CURRENT EVENTS.

THE first prosecution under the criminal clause of the Interstate Commerce Law was had before United States District Judge Thayer and a jury, in Hannibal, Mo., June 1. The case will, of course, attract general attention, particularly as the defendant was convicted of the charge of unjust discrimination in the fixing of railroad rates. On page 524 of this issue will be found a statement of the case and the charge of the judge to the jury, which is a clear exposition of the law applicable to the third section of the act.

WHETHER the decision, lately rendered by the United States Supreme Court, in the Myra Clark Gaines Case, does or does not exhaust the possibilities of litigation, over the issues involved, is a question concerning which authorities differ. The fact that the case has been decided by the highest judicial tribunal in the land should, under ordinary circumstances, be regarded as disposing of the matter forever. But all deductions from experience are liable to be at fault when applied here. More than a quarter of a century ago, Justice Mayne, of the supreme court, predicted that Mrs. Gaines' suit would be pronounced by the future historian the most remarkable case in the annals of American jurisprudence. Even then, it had been some twenty-five years in progress, and had come before the supreme bench no fewer than five times. The litigation was begun in 1834. It appears to be ended in 1889. The immense bulk of the record can be imagined, when it is stated that it requires two strong men to lift the mass, and that the printing cost \$10,000. Mrs. Gaines survived two husbands, who spent their fortunes in assisting her to fight the city of New Orleans, and then she died, too soon to reap the reward of her life-long forensic struggle. Though the decree lately rendered is in favor of her heirs, yet of the enormous sum involved in

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the whole litigation, a part has been consumed in costs, and another part lopped off, by the court, as not sufficiently ascertainable to become the subject of an award.

Perhaps the most edifying conclusion to be drawn from a view of this celebrated case is that, although Hamlet may have been mad, there was much method in his madness, when he enumerated "the law's delay's" among the causes which may well drive a person to suicide.

THE report of the eleventh annual meeting of the Alabama State Bar Association, held in December, 1888, has come to us. We have found in its perusal much pleasure and food for reflection. The address of the president, Wilbur F. Foster, contains an interesting collection of the more important recent enactments of congress and the several States. His plea for a more uniform system of legislation, and illustrating the unfairness of the present condition of the law, by a reference to the subject of marriage and divorce laws in the different States was well presented. Had the address been prepared a few weeks later, he would have had the case of *Pennegar v. State*¹ as a text, showing the diversity of the laws of Tennessee and Alabama, where that, which by the former State is declared a crime, the latter State seems to think commendable. The paper by Mr. Inge, on "Lawyers in Politics," contained statistics on the subject which are full of interest. Perhaps the most interesting paper, and certainly that which excited the most discussion, was that by Mr. W. C. Ward, suggesting reforms in procedure in the Alabama courts. He advised the abbreviation of opinions by appellate courts, the abolishing of the law allowing a debtor to prefer a creditor, and especially called attention to the hardships resulting from the maintenance in separate tribunals of law and equity jurisdictions, urging a union of the two in all courts, a proposition which precipitated a vigorous discussion among the members. The paper of Mr. R. T. Simpson, on "Legal Education and Admission to the Bar," was a statement of the requirements for admission to the bar in the various countries and States. Mr. Thomas

¹ Published in full and annotated 28 Cent. L. J. 380

H. Watts, Jr., read a paper entitled "To what Liabilities do the Exemption Laws Extend?" which was full of Alabama law. And Mr. John Randolph Tucker came all the way from Virginia to tell the Alabama bar about the law as administered by Bracton and Glanville in the thirteenth century.

NOTES OF RECENT DECISIONS.

THE quandary of a suitor desiring to bring an action against a municipal corporation when there is no officer in existence on whom process may be served is discussed by the United States Supreme Court in *Amy v. City of Watertown*, 9 S. C. Rep. 530. The charter required service on the mayor. The mayor had resigned, and there was no successor, and service was made upon the ex-mayor and also on the city clerk, and an active member of the executive board. The provision as to holding over did not apply to resignation, for another provision of the charter declared that resignations should take effect when filed. The court held that there was no one upon whom process could legally be served. They say:

The question then is reduced to this, whether, in case the mayor has resigned, and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of process on the city clerk and on a conspicuous member of the board is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes and displaces the common law, we are brought to a question of words, and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. *Kibbe v. Benson*, 17 Wall. 624; *Alexandria v. Fairfax*, 95 U. S. 744; *Settlemyer v. Sullivan*, 97 U. S. 444; *Evans v. Dublin, etc. Co.*, 14 M. & W. 142; *Walton v. Universal Salvage Co.*, 16 M. & W. 438; *Brydolf v. Wolf*, 33 Iowa, 509; *Hall v. Atl. & Pac. R. Co.*, 64 Mo. 561; *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. St. 398. The courts of Wisconsin strictly adhere to this rule. *Conger v. Railroad Co.*, 17 Wis. 478; *City of Watertown v. Robinson*, 59 Wis. 513; *City of Watertown v. Robinson*, 69 Wis. 280. The two cases last cited related to the charter now under consideration. In the first case, service was made upon the city clerk and upon the chairman of the board of street commissioners whilst the board was in session, in the absence of the mayor, who could not be found after diligent search. The court, after referring to the provisions of

the charter and the revised statutes on the subject, say: "The question whether the revised statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the service to be made upon the mayor, but no service was made upon that officer, as appears by the return of the sheriff. The principle is too elementary to need discussion, that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law." In the last case (decided in 1887) service was made in the same manner as in the previous one, and the court say: "When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est*. There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. * * * When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute." * * * Individuals may be actuated by improper motives, and may take advantage of defects and imperfections of the law for the purpose of defeating justice. The mayor of Watertown may have been actuated by such a motive in resigning his office immediately after being inducted into it. But he had a legal right to resign; and if the plaintiffs are prejudiced by his action, it is *damnum absque injuria*. The plaintiffs are in no worse case than were the creditors of the city of Memphis after the repeal of its charter and the establishing of a taxing district in its stead. The State has plenary power over its municipal corporations, to change their organization, to modify their method of internal government, or to abolish them altogether. Contracts entered into with them by private parties cannot deprive the State of this paramount authority. See *Meriwether v. Garrett*, 103 U. S. 472. The cases of *Broughton v. Pensacola*, 93 U. S. 266, and *Mobile v. Watson*, 116 U. S. 289, cannot aid the plaintiffs in this case.

AN interesting question of contributory negligence in crossing railroad tracks, was decided by the Supreme Court of Indiana, in *Penn. Ry. Co. v. Stegmeier*, 20 N. E. Rep. 843. There it was held that if a railway company maintain for years a gate and flagman at a busy street crossing, in accordance with a city ordinance, the absence of the flagman, and his permitting the gate to remain open, constitute an affirmative assurance to one having knowledge of such practice that the crossing is safe at the time, and therefore the latter cannot be said, as a matter of law, to be guilty of contributory negligence in attempting to cross without taking the precautions usually required to discover approaching trains. The court says:

Here the failure of the company to obey the local law gave the deceased assurance that the tracks were clear and the crossing safe, but, when he had gone upon the crossing, he found two trains rapidly approaching him, one from the east and one from the west, and the fact that he met his death by being struck by one of them does not authorize the inference that he was guilty of such contributory negligence as bars a recovery; for he was thrown off his guard, and exposed to a sudden danger that he had a right to expect would not be encountered. If he had carelessly gone upon the track at a crossing where there were no gates or no flagman required, we should have a very different case, but he was not negligent in going upon the tracks, because he was justified in believing that there were no approaching trains. It was the act of the appellant, and not his own, which created this belief. It was through no fault of his that he entered a place of danger. The case at bar is to be discriminated from those in which the injured person enters upon a track where there is no affirmative assurance of safety, for here the fact that the gates were up and no warning given by the flagman was an affirmative assurance of safety, upon which a citizen might act without being chargeable with negligence. This case is essentially unlike one where the only negligence is the mere failure to sound a whistle or ring a bell, for here the assurance was that there was no train near the crossing. This assurance constitutes the distinctive feature of this class of cases, for the reason that it is in the nature of an invitation to cross and of a declaration that there are no approaching trains. This essential feature clearly marks the case—distinguishes it from such cases as *Railway Co. v. Hedges*, 20 N. E. Rep. 530. The case before us belongs to that class in which railroad companies are held responsible because they put the traveler off his guard and lead him into danger. The general rule upon this subject is thus stated by one of our text-writers: "Where a person is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to the duty of looking or listening for the approach of a train, he cannot, as a matter of law, be said to be guilty of negligence *per se* for neglecting to do so. Thus where, as is the case in some localities, the company maintains gates at certain crossings, which are closed at the approach of a train, he has, if they are open when he is near the crossing, a right to rely upon it that it is safe for him to cross; and if the company neglects its usual duty, and does not close them, or otherwise notify travelers of the approach of a train, it cannot relieve itself from liability simply because the traveler neglected to look or listen for himself." 2 Wood, Ry. Law, 1328; 2 Shear. & R. Neg. § 466; *Railway Co. v. Schneider*, 17 N. E. Rep. 324. * * * It was said by Treat, J., in *Trust Co. v. Railway Co.*, 27 Fed. Rep. 159, that "at the crossings in a populous city, where gates and watchmen are provided, passengers and pedestrians have a right to suppose when the gates are opened, and no warning to the contrary given by the watchman, that they can proceed with entire safety. If accidents should happen through the gross negligence of the management of the gates by the watchman connected therewith, *prima facie* the railway company must answer for the damages sustained. Trifling matters as to the movements of the passenger or pedestrian in crossing under such circumstances cannot exonerate the railway company, whose duty it was to protect said crossing and give warning as to safety thereof." In *Wanless v. Railroad Co.*, L. R. 6 Q. B. 481, L. R. 7 H. L. 12, it was said that "it appears to me that the circumstance that the gates at this level crossing were open at this particular

time amounted to a statement and a notice to the public that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates with a view of crossing the line might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open. Then, when inside the gates, the boy who in this case was injured saw what was inconsistent with the gates being open, namely, he saw one train passing; and it may very possibly be the case that that circumstance embarrassed him, and that, his eyes and attention being fixed upon that particular train, when it passed out of the way he failed to see the other train." The reasoning of the judge from whom we quote forcibly applies to this case. The deceased was not simply thrown off his guard, but he was also assured that there were no approaching trains, and this assurance dispensed with the vigilance that under other circumstances would have been required of him. This assurance, too, completely relieved him from the imputation of negligence in going upon the tracks; and the evidence of the approach of trains from opposite directions an instant after he entered on the track supplies sufficient ground for the inference that his failure to see and avoid the train was attributable to the confusion produced by the sudden peril to which the wrong of the company had inexcusably exposed him. *Railroad Co. v. Boggs*, 101 Ind. 522; *Gearny v. R. R. Co.*, 101 N. Y. 519; *R. R. Co. v. Hutchinson*, 120 Ill. 589.

THE question as to the power by *mandamus* to compel the approval of an official bond, came before the Supreme Court of Florida, in *State v. Barnes*, 5 South. Rep. 722. It appeared here that M was elected to the office of sheriff, and presented his bond to the comptroller for approval. The comptroller refused his approval because one of the sureties had withdrawn, and the circumstances in reference to the assent of the others to the withdrawal were such that in his opinion there was serious doubt as to the validity of the bond. It was held that the question of the legality of the bond was one directly within his discretion, and his determination in regard to it, even if wrong, cannot be controlled by *mandamus*, and that while *mandamus* is a proper remedy where an officer, in the performance of discretionary duty involving a right given by law, bases his refusal of the right on a matter or ground outside of his discretion, it is not available where said matter or ground is within the discretion to be exercised by him. The court says:

The rule long established and governing in this State is thus given by Mr. High: "In all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, *mandamus* will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And where-

ever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by *mandamus* to set them in motion, and to require their action upon the matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, or attempt by *mandamus* to control or dictate the judgment to be given." High, Extr. Rem. § 42. See *Towle v. State*, 3 Fla. 202; *State v. Van Ness*, 15 Fla. 317; *McWhorter v. Railway Co.*, 5 South. Rep. 129. * * * A further contention for the relator is that *mandamus* is the "proper remedy for compelling the approval of official bonds, where it appears that the officer or the court invested with discretionary authority has acted mistakenly or unwisely by the reason given for refusing to approve, and which thus resolves itself into a question of law." This, as we understand it, is entirely subversive of the rule itself. If official discretion cannot be controlled or overridden by *mandamus* except for abuse of it, what matters it in any given case that the discretion has been guided by a mistaken reason? The prohibition to interfere does not lose its force because a wrong reason has led to a wrong conclusion. The books abound in cases where the courts refuse *mandamus* notwithstanding the mistake or error of the officer whose discretion is sought to be controlled, and it would be an anomaly to hold that refusal is proper where only a wrong conclusion is reached without giving the reason for it, but not proper if the reason be given, and it is found not a good one. Looking to the authorities quoted to sustain the contention for relator, the first, *State v. County Court*, 41 Mo. 221, must be discarded, because the writ was granted there to relieve against abuse of discretion. *Nelson v. Edwards*, 55 Tex. 389, was a case in which the court said that, if the bond offered by Edwards was rejected by the commissioners to approve, because in their opinion Nelson was entitled to the office, *mandamus* would lie, evidently because the commissioners went outside of their discretion in at all considering the controversy between the parties as to which of the two was entitled to the office. *Gulick v. New*, 14 Ind. 93, was a case where the clerk whose duty it was to approve sheriffs' bonds, refused because another was in the office claiming title to it. Like the last case, the discretion exercised extended to a question of contested title to office, and the court held that *mandamus* was proper, as a *prima facie* showing of title was sufficient to entitle the applicant to approval of his bond, otherwise sufficient. *Case of Prickett*, 20 N. J. Law, 134, was another similar case of disputed title to office, as was also the case of *Beck v. Jackson*, 43 Mo. 117. *Daniels v. Miller*, 8 Colo. 542, 9 Pac. Rep. 18, was a case where the clerk refused to approve an appeal-bond because the court held that appeal did not lie. The supreme court, holding that the law did allow appeal in the case, ordered *mandamus*. *State v. Lewis*, 10 Ohio St. 128, was a case where the officers to approve sheriffs' bonds refused because in their opinion the bond was not presented within the time for approval required by law. The court, holding that the commissioners mistook the law as to the time for presenting bonds, granted *mandamus*. *Insurance Co. v. Cleveland*, 76 Ala. 321, was a case where the clerk refused to approve an attachment bond because the sureties were non-residents of the county. The law of the State not requiring sureties to be residents of the county, the court, to relieve against the mistake of the clerk granted *mandamus*. The last two cases resting on mistake of law, it is important to observe that it

was law not connected with the sufficiency of the bonds as to its form legality, and sureties and therefore law outside of the discretion given for the approval of bonds. The use of *mandamus* in such cases does not conflict with the general rule. And in regard to all these cases it will be seen that what appears to be a departure from the rule is not so in fact. They only check the exercise of discretion when assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion. It remains to adjust the present case to our view of the law as herein expressed. It cannot be said that the respondent, in refusing to approve relator's bonds, acted capriciously or arbitrarily. It appears from the petition itself that he was indulgent to relator, giving his counsel, when asked, time and opportunity to present the case in its fullest merits, and even to fortify it by supplemental papers. And respondent, in his return, states that he had legal advice to aid him in his decision; so there is every indication that he exercised his discretion with due deliberation, and in good conscience; and there is no suggestion that he did not. It is not a case, then, in which it can be justly claimed that the law authorizes *mandamus* because of capricious or arbitrary action. Nor is it a case calling for *mandamus* because respondent went out of the way to exercise his discretion on any question not properly within it, or because he gave a reason, if a wrong one, for his decision, on a question to which his discretion did not properly reach. In either case, we have seen that *mandamus* has been allowed. But it should not be here, because the discretion was exercised, and the reason for the decision given, on questions which were of the very essence of the sufficiency of the bond.

In a prosecution for assault, with intent to commit rape, it is essential for the court to charge that the force intended to be used must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The Supreme Court of Texas so holds, in *Brown v. State*, 11 S. W. Rep. 412. They say:

The State's case, then, is an assault with intent to rape by force, and to warrant conviction the evidence must show force, and this force must be of a certain character, viz.: "Such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case." Pen. Code, art. 529. This article constitutes a part of the definition of "rape" or "assault to rape," when force is relied on for conviction. Make this provision a component part of article 528 of the Penal Code, and we would have this definition of "rape:" "Rape" is the carnal knowledge of a woman, without her consent, obtained by such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and the other circumstances of the case. An assault with intent to commit rape is constituted by an assault, or an assault and battery, with intent to have carnal knowledge of the female by the use of such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case. To be guilty of this

offense the accused must have intended to accomplish his purpose by the use of this character of force. This proposition is absolutely correct, for, if his intention falls short of this, it would be impossible for him to be guilty of an assault with intent to rape; because we have seen (threats and fraud not being in the case) that, to constitute rape, such force must be actually used. Therefore the conclusion is inevitable that, to be guilty of an assault with intent to rape, the accused must have intended to use such force; it being impossible for him to intend to rape, without intending to do that which constitutes rape. See 1 Bishop Crim. Law, §§ 729, 731, 745. There can be no doubt of the soundness of this doctrine. We have seen that in law a man does not intend to commit a particular offense, if the act he intends would not, when fully performed, constitute such offense. The conclusion from all the authorities is that nothing short of the specific intent to commit the substantive offense will answer. And in rape, and in assault with intent to commit rape, the party cannot be said to intend to commit the substantive offense unless he uses or intends to use all such force as is necessary to overcome all resistance; and unless the jury are so charged, the charge will fail to inform them as to what is requisite to constitute the substantive crime.

Wilson, J., dissents, saying:

According to my understanding of the statute, if a man assaults a woman with the specific intention to have carnal connection with her by force, against her will, he commits the offense of assault with intent to rape. The assault is the use or attempted use of force, and the intent requisite to constitute the crime is not an intent to use the force contemplated in article 529, *supra*, or any specific character of force, but is an intent to forcibly, and against the will of the woman, have carnal connection with her. The force intended to be used by the assaulting party may not be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case; yet if there was an assault, and the assaulting party intended to ravish the woman, or at least to make the attempt to do so, taking the chances of being able to accomplish his design, I think he would be guilty of an assault to rape. To illustrate: A man meets a woman in day-light in a city, on a public street, in the presence of hundreds of people. He is a small, delicate man; she is a large, athletic woman. He assaults her, and attempts to throw her down, and the evidence conclusively shows that his intent is to have carnal knowledge of her without her consent. He could not reasonably suppose that he could overcome her resistance, or that the people present would allow him to accomplish his design, yet he may unreasonably believe that perchance he can succeed, and may make the effort under such unreasonable belief, willing to take the chances of the venture. Would he be guilty of an assault with intent to rape? I think he would, but under the opinion of the majority of the court, as I understand it, he would not be guilty of that offense.

THE power of a telegraph company to restrict its liability, was considered by the Supreme Court of New Mexico, in *Western Union Tel. Co. v. Longwill*, 21 Pac. Rep. 339. There it was held that a telegraph company cannot stipulate that it will not be

liable for damages on account of negligence in the delivery of a message, unless a claim therefor in writing is presented within sixty days from the date of the receipt of the message. The court says:

In *Railroad Co. v. Lockwood*, 17 Wall. 357, Mr. Justice Bradley, after an exhaustive discussion of the question of the power of the common carrier to stipulate for exemption from liability on account of negligence, or want of proper care on the part of the carrier or its agents, sums up the conclusions of the court as follows: "(1) That a common carrier cannot stipulate for exemption from responsibility, when such exemption is not just or reasonable in the eye of the law. (2) That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." While the weight of authority is perhaps against classing a telegraph company as a common carrier, still the same reason that makes void the contracts of common carriers for exemption from responsibility for the negligence of the carrier or its employees, makes void the same kind of contracts of telegraph companies. *Telegraph Co. v. Blanchard*, 68 Ga. 299; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Telegraph Co. v. Cohen*, 73 Ga. 522; *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Telegraph Co. v. Brown*, 58 Tex. 170. While telegraph companies are not charged with all the duties and responsibilities of common carriers, they cannot contract for restriction of liability for injuries occasioned by culpable negligence or gross carelessness, or willful misconduct of their employees. *White v. Telegraph Co.*, 14 Fed. Rep. 710. The courts are divided in opinion as to whether a stipulation between the sender of a message and the company, provided that a claim for damages shall be presented within a day named, or within a reasonable time, can be entered into and upheld as a contract. Instead of being a reasonable business regulation, we think the condition named and annexed to the message was an effort on the part of the company to restrict its legal liability to sixty days. It would introduce into the local jurisprudence of every State, territory, or country in which it is sued a species of private statute of limitation, or non-claim. It would avoid the policy of the State or territory in the matter of the time in which actions both in tort and contract should be brought. But aside from this we think there can be no sound reason for holding that in cases where no contract for total immunity from legal responsibility can be made, none can be made for a conditional release or discharge, because public policy alike denies the power to contract on the subject in either instance. In support of this view, in addition to the cases herein referred to, we cite the following: *Johnston v. Telegraph Co.*, 33 Fed. Rep. 362; *Telegraph Co. v. Cobbs*, 47 Ark. 344, 1 S. W. Rep. 558; *Telegraph Co. v. McKibben*, 14 N. E. Rep. 584.

As to the effect of a release and discharge of a joint tortfeasor, the Supreme Court of Pennsylvania, in *Seither v. Phil. Traction Co.*, 17 Atl. Rep. 338, hold that, where one injured by a collision between two cars of different companies accepts a certain sum in full of all claim for the injuries against one of the companies, and executes a release, in which he agrees to prosecute the other company, and reimburse the first out of the amount recovered, such agreement and release bar an action for the same injuries against the other company, citing *Tompkins v. Railroad Co.*, 66 Cal. 165.

PROSECUTION BY INFORMATION.

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I. WHEN AN INFORMATION WILL LIE.—The fifth amendment to the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." Whether a crime is an "infamous" one, within the meaning of this provision, depends upon the character of the punishment which a conviction will entail, rather than upon the effect of such conviction upon the party's competency to testify as a witness.¹ But neither this constitutional provision nor the phrase "due process of law" in the fourteenth amendment can operate to prevent the States from adopting the procedure by information, even in capital cases.²

In early times informations were principally, if not exclusively used, in the federal courts, in prosecutions for the recovery of fines and forfeitures, such as those imposed by the revenue and embargo laws,³ or the stamp laws,⁴ or liquor laws;⁵ but in more recent times this mode of instituting a prosecution has become more general in those

courts, several respectable cases holding the doctrine that no crime is "infamous," within the meaning of the constitution, that has not been declared to be so by congress;⁶ a conclusion in which the supreme court does not concur, however.⁷

In California, murder may be prosecuted by information.⁸ In Indiana, one charged with felony may demand that he be so prosecuted without delay.⁹ In Louisiana, in other than capital cases, the district attorney may elect to prosecute either by indictment or information.¹⁰ In Hampshire, a crime not capital nor punishable by imprisonment for more than one year, may be charged in an information.¹¹ In Texas, misdemeanors punishable by imprisonment may be so prosecuted.¹² And in Connecticut, the holding of an indecent exhibition, may be.¹³

But where a statute requiring an indictment is repealed, an information will not lie for an offense committed prior to the repeal;¹⁴ nor can an information be filed at a term of court at which the accused was recognized to appear, after the discharge of the grand jury without finding an indictment.¹⁵

II. WHAT IS AN "INFAMOUS" CRIME.—The true distinction between infamous and non-infamous crimes, as respects the use of informations in their prosecution, is undoubtedly this: A crime punishable capitally, or by imprisonment in a State's prison, or penitentiary, is infamous—one not so punishable is not. Thus, it has been held that an offense punishable by imprisonment for a term of years, at hard labor, is infamous;¹⁶ and punishment by imprisonment for more than one year has been held to be "infamous" pun-

⁶ U. S. v. Wynn, 3 McCrary, 266; U. S. v. Petit, 11 Fed. Rep. 58; U. S. v. Cross, 1 MacArth. 149.

⁷ *Ex parte* Wilson, 6 Crim. L. Mag. 667, 674. The word "indicted" in U. S. Rev. Stat., § 1032, has been held to include a prosecution by information. U. S. v. Borger, 19 Blatchf. (U. S.) 249.

⁸ *People v. Campbell*, 59 Cal. 243, 3 Crim. L. Mag. 29. And the same rule prevails in Manitoba. *Queen v. Connor*, 2 Man. L. J. 235.

⁹ *Heanley v. State*, 74 Ind. 99. See also *Davis v. State*, 69 Ind. 130.

¹⁰ *State v. Cole*, 38 La. Ann. 843; s. p., *Douglas v. State*, 72 Ind. 383.

¹¹ *State v. Ingalls*, 59 N. H. 88.

¹² *Reddick v. State*, 4 Tex. App. 32.

¹³ *Knowles v. State*, 3 Day, 103.

¹⁴ *People v. Tisdale*, 57 Cal. 104.

¹⁵ *State v. Boswell* (Ind.), 7 Crim. L. Mag. 743.

¹⁶ *Ex parte* Wilson, 6 Crim. L. Mag. 667. See also *Jones v. Robbins*, 8 Gray (Mass.), 329, 349.

¹ *Ex parte* Wilson, 6 Crim. L. Mag. 667, 672, disapproving, as to this point, a number of United States circuit and district court decisions. U. S. v. Shepard, 1 Abb. (U. S.) 431; U. S. v. Maxwell, 3 Dill. (U. S.) 375; U. S. v. Block, 4 Sawy. (U. S.) 211; U. S. v. Miller, 3 Hughes (U. S.), 553; U. S. v. Baugh, 4 Id. 501, 1 Fed. Rep. 784; U. S. v. Yates, 6 Fed. Rep. 861; U. S. v. Field, 21 Blatchf. (U. S.) 330, 16 Fed. Rep. 778; *In re* Wilson, 18 Fed. Rep. 33.

² *Hurtado v. People*, 110 U. S. 516; *State v. Boswell* (Ind.), 7 Crim. L. Mag. 743, and cases there cited.

³ U. S. v. Hill, 1 Brock. 156, 158; U. S. v. Mann, 1 Gall. 3, 177; *Walsh v. U. S.*, 3 Woodb. & M. 341; *Story Const.*, § 1780.

⁴ U. S. v. Isham, 17 Wall. (U. S.) 496; U. S. v. Buzzo, 18 Id. 125.

⁵ U. S. v. Block, 4 Sawy. 211, 213.

ishment.¹⁷ On the other hand, it is held that stealing from the mails;¹⁸ a conspiracy to make counterfeit coin;¹⁹ passing base money so made;²⁰ and embezzlement,²¹ are not infamous crimes within the meaning of the fifth amendment to the constitution of the United States.

While it is well settled that incompetency to be a witness is not the test of infamy in this connection, but rather the punishment to be inflicted upon the accused in case he be found guilty;²² yet whether an offense, to the conviction and punishment of which a disqualification to hold office is appended by statute, is thereby made infamous, is a matter of some question.²³

An "infamous punishment" is not to be limited to, or held to mean a "cruel or unusual punishment," because such punishments are absolutely forbidden by the federal and State constitutions, whether the procedure leading up to them be by indictment or information.²⁴

III. FORMAL REQUISITES OF AN INFORMATION.

—1. *The Affidavit or Complaint.* — In the federal practice, to properly institute a prosecution by information there must first be a complaint, supported by an oath or affirmation, showing probable cause, followed by an arrest and examination; and if the accused is held to bail or committed, the district attorney, on filing the magistrate's or commissioner's return with the proofs, will have leave to file the information.²⁵ In Indiana, the affidavit as well as the information must state that the defendant is in custody on the charge preferred against him, and that the grand jury of the county is not in session.²⁶ An information is necessary as well as an affidavit, and if there be no information, and no offer to file one, the affidavit will be

quashed and the prosecution ended.²⁷ So also, the information will be quashed if the affidavit be insufficient, *e. g.* if it fail to name with certainty the county and State in which the alleged offense was committed.²⁸

In Texas, also, a misdemeanor cannot be prosecuted in the county court by a mere complaint without an information;²⁹ and an information is insufficient, which, without itself alleging the inculpatory act, refers to the "affidavit which is herewith filed and shows" the commission of the act by the accused.³⁰ The affidavit is indispensable, and must appear as part of the record on appeal.³¹ The "credible person" who may make it means a *competent* as well as a credible witness.³² The essential facts may be stated on information and belief.³³

2. *Form and Contents of the Information.* —

No standard of penmanship is required in an information, and reference may be made to the supporting affidavit to solve a doubt as to the spelling of a word.³⁴ The information need not show that the accused has been held to answer, or that the charge has been found true by a grand jury;³⁵ or that there has been any examination before a committing magistrate;³⁶ or why the prosecution was not commenced by indictment.³⁷

A description of the prosecutor as "prosecuting attorney," instead of as "county attorney," is not a fatal defect;³⁸ and it need not be alleged that he informs under his official oath.³⁹

3. *Naming the Accused, or Person Injured.*

—The name of the accused should be alleged, but an information for conspiracy may be against a single individual, naming the co-

¹⁷ U. S. v. Todd, 25 Fed. Rep. 815. See also U. S. v. Brady (Star Route Case), 3 Crim. L. Mag. 69.

¹⁸ U. S. v. Wynn, 3 McCrary (U. S.), 266, 9 Fed. Rep. 886.

¹⁹ U. S. v. Burgess, 3 McCrary (U. S.), 278, 9 Fed. Rep. 896.

²⁰ U. S. v. Field, 21 Blatchf. (U. S.) 330; U. S. v. Gates, 2 Crim. L. Mag. 520.

²¹ U. S. v. Reilly, 20 Fed. Rep. 46.

²² *Ex parte Wilson*, 6 Crim. L. Mag. 667, 671, citing 4 Bl. Comm. 94, 95, 310; Cooley Const. Lim. 291.

²³ See U. S. v. Waddell, 112 U. S. 78, 82.

²⁴ *Ex parte Wilson*, *supra*, at p. 674.

²⁵ U. S. v. Shepard, 1 Abb. (U. S.) 431; U. S. v. Miller, 1 Sawy. (U. S.) 701.

²⁶ Lindsay v. State, 72 Ind. 39; State v. Henderson, 74 Ind. 23.

²⁷ State v. First, 82 Ind. 81. S. P., in Missouri, State v. Huddleston, 75 Mo. 667; State v. Sebecca, 76 Mo. 55; State v. Kelm, 79 Mo. 515; State v. Briscoe, 80 Mo. 643.

²⁸ State v. Beebe, 83 Ind. 171.

²⁹ Garza v. State, 11 Tex. App. 410.

³⁰ Brown v. State, 11 Tex. App. 451; Thomas v. State,

12 Id. 227.

³¹ Wadgymer v. State, 21 Tex. App. 459.

³² Thomas v. State, 14 Tex. App. 70.

³³ Toops v. State, 92 Ind. 13. S. P., Brown v. State, 11 Tex. App. 451. In Louisiana, however, such an affidavit is insufficient, and an amendment cannot be allowed. U. S. v. Theraud, 20 Fed. Rep. 62.

³⁴ Irwin v. State, 7 Tex. App. 109.

³⁵ U. S. v. Moller, 16 Blatchf. (U. S.) 65.

³⁶ People v. Shubrick, 57 Cal. 565.

³⁷ State v. Frain, 82 Ind. 532.

³⁸ State v. Nulf, 15 Kan. 404.

³⁹ State v. Sickles, Brayt. (Vt.) 132.

conspirators;⁴⁰ and an *alias dictum* in the affidavit will not cause a variance between it and the information.⁴¹ The information is amendable as regards names;⁴² and it seems, the name of the person injured or killed, or intended to be, need not be alleged.⁴³

4. *Conclusion and Signature*.—The conclusion should be, as in an indictment, "against the peace and dignity of the State;"⁴⁴ but where it concludes "against the form of the statute," etc., and the offense charged is not a statutory one, the words quoted may be rejected as surplusage.⁴⁵

Where there are a number of counts the signature of the prosecuting officer may be affixed to the last count only, the pages of the instrument being all fastened together;⁴⁶ and the deputy district attorney may subscribe his principal's name.⁴⁷ An information may be good even though unsigned, if accompanied by the sworn complaint made before the prosecuting officer.⁴⁸

5. *Filing*.—The information may be filed in the office of the clerk of the court, at the same time as the affidavit upon which it is founded;⁴⁹ or as soon as convenient;⁵⁰ and if the information and its supporting affidavit be attached to each other, or if both be written on the same sheet of paper, and the clerk's file-mark be put upon the outside fold, it is a substantial compliance with the statutory requirement that the affidavit "shall be filed with the information."⁵¹

IV. CHARGING THE OFFENSE.—1. *In General*.—The information being the official act of the public prosecutor, and not the act of person upon whose affidavit it is based, it must clearly appear upon its face, that the charge against the accused is preferred by the official prosecutor.⁵² The information must be self-sufficient, irrespective of the affidavit, though it should conform to the

latter as respects all material averments. If necessary allegations are wanting in the information they cannot be supplied by the affidavit; it is the information, not the affidavit, that the accused is called upon to answer.⁵³ If a good and sufficient charge of the offense is set out, the insertion of unnecessary averments is not fatal.⁵⁴ So, if the allegations are positive, it is not essential that the preliminary examination of the prosecuting witness be in writing.⁵⁵ But an information merely charging the accused to be guilty, as the distinct attorney verily believes, is bad on motion to quash.⁵⁶

An information for a first offense need not allege that it is for a first offense;⁵⁷ but an information for additional punishment must set forth the previous convictions with sufficient particularity to identify them, and show the character of the offenses charged.⁵⁸

An information for a statutory offense must identify and distinguish it from every other, and set forth specifically its statutory components;⁵⁹ but in general, it is sufficient to follow the language of the statute; and if the defendant insist upon greater particularity, he must show that the case falls within some exception to the general rule.⁶⁰

2. *Alleging the Acts Constituting the Offense*.—The acts relied upon as constituting the offense must be set out. Thus, an information for cheating, or for conspiracy to cheat and defraud, must set out and describe the pretenses and devices, and indicate the means whereby the cheat was to be accomplished, and specify the person or persons sought to be cheated;⁶¹ an information for exhibiting a show must state acts of indecency, barbarity, or immorality, in order that the court may see whether the offense is within the statute, or is an offense at common law;⁶² and where a penalty is imposed for "each hour of delay" in doing a certain act, an information which

⁴⁰ *People v. Richards* (Cal.), 6 Crim. L. Mag. 856.

⁴¹ *Harrison v. State*, 6 Tex. App. 256.

⁴² *State v. Murphy*, 55 Vt. 547.

⁴³ *State v. Newton*, 30 La. Ann. pt. II, 1253. And see *Rivers v. State*, 10 Tex. App. 177.

⁴⁴ *Calvert v. State*, 8 Tex. App. 538.

⁴⁵ *Southworth v. State*, 5 Conn. 325.

⁴⁶ *State v. Paddock*, 24 Vt. 312.

⁴⁷ *People v. Darr*, 61 Cal. 554; *U. S. v. Nagle*, 17 Blatchf. (U. S.) 258.

⁴⁸ *Rasberry v. State*, 1 Tex. App. 664.

⁴⁹ *State v. DeLong*, 88 Ind. 312.

⁵⁰ *People v. Haley*, 48 Mich. 496.

⁵¹ *Schott v. State*, 7 Tex. App. 616.

⁵² *Prophit v. State*, 12 Tex. App. 233.

⁵³ *Pittman v. State*, 14 Tex. App. 576.

⁵⁴ *State v. Welch*, 37 Wis. 196; *Smith v. State*, 85 Ind. 553.

⁵⁵ *People v. Hare* (Mich.), 7 Crim. L. Mag. 188.

⁵⁶ *Vannata v. State*, 81 Ind. 210.

⁵⁷ *Kilbourne v. State*, 9 Conn. 500.

⁵⁸ *Wilde v. Com.*, 2 Mete. (Mass.) 408. See also *Evans v. Com.*, 3 Id. 453.

⁵⁹ *Hall v. People*, 43 Mich. 417.

⁶⁰ *Whiting v. State*, 14 Conn. 487; *Brewer v. State*, 3 Tex. App. 248; *People v. Lewis*, 61 Cal. 366.

⁶¹ *People v. Arnold* (Mich.), 3 Crim. L. Mag. 60; *State v. Johnson*, 1 Chip. (Vt.) 129.

⁶² *Knowles v. State*, 3 Day (Conn.), 103.

omits to allege the number of hours delay with which the accused is charged, is fatally defective.⁶³

Where the information names one offense and the facts stated in it constitute a different one, a conviction for the offense named will be set aside.⁶⁴

3. *Charging Two or More Offenses.*—While, as a general rule, an information charging two or more distinct offenses is bad on demurrer⁶⁵—as where larceny is charged in one count and embezzlement of the same property in another,⁶⁶ yet it is held in Kansas, that where the separate offenses are all misdemeanors of a kindred character, and charged against the same person, they may generally be joined in separate counts in one information, to be followed by one trial for all, with a separate conviction and punishment for each, the same as though all such offenses were charged in separate informations and tried at different times.⁶⁷

However that may be in other jurisdictions, an information is not objectionable as charging two offenses, when it charges but one offense punishable by the authority prosecuting, even though another offense, cognizable in another jurisdiction, may be also set out therein.⁶⁸ And the allegation of a former conviction is not a distinct charge of another triable offense, so as to make the information objectionable.⁶⁹

4. *Averments as to Time and Place.*—The averment as to the time of the commission of the offense must be of a day certain, prior to the filing of the information, and within the period limited for the prosecution of the offense;⁷⁰ and the date must not be an impossible one, such as "A. D. one thousand eight and seventy five."⁷¹

So also, the place of the crime must be stated in the information; the complaint cannot be referred to to supply the defect;⁷² but

if the venue is properly laid in the caption, the body of the instrument may refer to the caption for the venue.⁷³

If the proof as to the *situs* of the crime differs from the allegation the variance will be fatal;⁷⁴ and the same is true as to the allegation of time of commission of the offense, where the affidavit and information do not agree;⁷⁵ but the particularity requisite in an information is not necessary in the supporting affidavit, nor are discrepancies between them material provided they accord in substance. They should agree as to the time and place of the offense, the names of the accused and injured party, and their allegations descriptive of the offense should substantially conform.⁷⁶

V. AMENDMENT AND SUBSTITUTION. — In Kansas, where an information filed in February, 1883, charged that defendant *did*, in December, 1883, commit an offense, an amendment was allowed charging the figure "3" to "2," so as to show a date anterior to the filing of the information;⁷⁷ and where the original information is lost or destroyed, the county attorney may file another one, the original having been duly filed, even though no preliminary examination may have been had in the case, and although no copy of the original information may have been preserved.⁷⁸

In Michigan, a variance between a promissory note on which the charge was based, and the information, the latter omitting the words "North Branch," appended to the date of the note, was cured by amending the information;⁷⁹ and in that State the assistant prosecuting attorney may make such amendments to the information as are authorized by statute, in the necessary absence of his superior, and with the permission of the court.⁸⁰

In Missouri, where the name of the accused has been omitted in one of the blanks, the information may be amended, at the trial, on

⁶³ *Linney v. State*, 5 Tex. App. 344.

⁶⁴ *Watson v. State*, 29 Ark. 299.

⁶⁵ *People v. Quivise*, 56 Cal. 896.

⁶⁶ *People v. De Coursey*, 61 Cal. 134.

⁶⁷ *State v. Chandler*, 31 Kan. 201. See also *State v. Schweiter*, 27 *Id.* 499.

⁶⁸ *State v. Smouse*, 49 Iowa, 634. See also *State v. Collins*, 33 La. Ann. 152; *Town of Eldora v. Burlingtongame*, 61 Iowa, 32.

⁶⁹ *People v. Boyle*, 64 Cal. 153.

⁷⁰ *State v. Ingalls*, 59 N. H. 88; *Kennedy v. State*, 22 Tex. App. 603; *Regina v. Ingalls*, 42 L. T. 533.

⁷¹ *Blake v. State*, 3 Tex. App. 149.

⁷² *Lawson v. State*, 13 Tex. App. 83.

⁷³ *Strickland v. State*, 7 Tex. App. 34.

⁷⁴ *Evans v. State*, 17 Fla. 192.

⁷⁵ *Hawthorne v. State*, 6 Tex. App. 562; *Swink v. State*, 7 *Id.* 73.

⁷⁶ *Cole v. State*, 11 Tex. App. 67.

⁷⁷ *State v. Cooper*, 31 Kan. 505. S. P., in *Louisiana, State v. Snow*, 30 La. Ann. pt. I, 401.

⁷⁸ *State v. Plowman*, 28 Kan. 539. See also *Stiff v. State*, 21 Tex. App. 255.

⁷⁹ *People v. Mott*, 34 Mich. 80.

⁸⁰ *People v. Heussler*, 48 Mich.

such terms as shall work him no injustice.⁸¹

In Nebraska, a magistrate has no right to alter an information, in any material part of it, without the consent of the person who made it. And, if made with his consent it should be re-verified before any further step is taken under it. Still, if such alteration be made, as in changing the value of property alleged to have been stolen so as to reduce the offense from grand to petty larceny, without a re-verification, and the accused go to trial without objecting, the judgment will be good, whether of acquittal or conviction.⁸²

In New Hampshire, informations which are not found upon the oath of a jury, may be amended by the court, or by a single judge at chambers.⁸³

In Texas, formal, but not substantial defects are amendable.⁸⁴ Thus a mistake in defendant's name may be corrected;⁸⁵ while an information which fails to charge an offense cannot be so amended as to make it charge one.⁸⁶ So also, in Kentucky, an additional charge cannot be added by amendment.⁸⁷

STEWART RAPALJE.

¹ State v. Krue, 5 Mo. App. 589.

² Lewis v. State, 15 Neb. 89.

³ State v. Weare, 38 N. H. 314.

⁴ Brown v. State, 11 Tex. App. 451.

⁵ Wilson v. State, 6 Tex. App. 154.

⁶ Bates v. State, 12 Tex. App. 26.

⁷ Com. v. Rhodes, 1 Dana (Ky.), 595.

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS.

CHOPE V. CITY OF EUREKA.

Supreme Court of California, April 18, 1889.

A municipal corporation is not liable, in the absence of statutory provision, for personal injuries to one who fell into a sewer which was in process of construction, and was negligently left insufficiently guarded by the officers of the corporation. BEATTY, C. J., and WORKS, J., dissenting.

McFARLAND, J., delivered the opinion of the court:

This is an action to recover damages for alleged personal injuries, caused by the plaintiff falling into an excavation for a sewer within the corporate limits of defendant, a municipal corporation. A general demurrer to the complaint was overruled, a motion for nonsuit was denied, and the jury found a verdict for plaintiff. The defendant appeals from the judgment, and from an order denying its motion for a new trial. The defend-

ant was incorporated by a special charter in 1874. St. 1873-74, p. 91. Its legislative body is a common council, consisting of five members. The charter also provides for a marshal and certain other officers. The common council is given the powers enumerated in § 4408 of the Political Code, and also certain other special powers, but it is nowhere provided that the corporation shall be liable for injuries suffered by individuals through the neglect of the officers of the corporation to properly perform their duties. The facts upon which the judgment rests are these: The records of the proceedings of the common council, introduced in evidence, show the following, and no more: "In regard to certain alleyway nuisances, more particularly that of the sewer leading down the alley from the Western Hotel, and forming a cess-pool at the end of said alley-way, the matter was, on motion, left in the hands of the committee on streets; they to take prompt action thereon." After this the city marshal, for the purpose of removing said cess-pool nuisance, commenced the construction of a sewer; and the jury had, perhaps, the right to find from the evidence that in doing so he acted under the direction of one or more members of said committee on streets. The sewer, while in progress of construction, was left open, with a twelve-inch plank across it, and without the protection of guards or lights. On a dark night the plaintiff fell into the sewer and was hurt, and for the damages thus received he recovered the judgment. Without noticing any of the other points made by appellant, it is sufficient to say that it has long been the settled law of this State that a municipal corporation is not liable for personal injuries to individuals, such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability. There is, no doubt, some conflict of decisions on the question in other States, although it is to be observed that in the New England and some other States there are statutory declarations of the liability. But in California the doctrine above stated has been clearly and continuously adopted, and, if any change in the law is desirable, that change must be made by the legislature. And so far, at least, the legislature has shown no disposition to make the change. *Winbigler v. City of Los Angeles*, 45 Cal. 36; *Tranter v. City of Sacramento*, 61 Cal. 275; *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. Rep. 177; *Crowell v. Sonoma Co.*, 25 Cal. 315; *Huffman v. San Joaquin Co.*, 21 Cal. 430. The nonsuit, therefore, should have been granted, and the verdict and judgment were against the law and the evidence. Judgment and order reversed, and cause remanded.

We concur: Sharpstein, J.; Patterson, J.; Thornton, J.

WORKS, J., (*dissenting*.) I cannot concur in the conclusion reached, or the doctrine announced, in the foregoing opinion, that a city cannot be held liable for damages for injuries resulting under the circumstances of this case. The obstruction of

the street was the direct act of the city. The work being done, which resulted in such obstruction, was the work of the city, and not of a contractor. To deny all remedy, as against a city, under such circumstances, is, in many cases, a practical denial of justice. It may be that some of the cases cited in the prevailing opinion are broad enough to cover this case, and justify the conclusion reached, but if so they should, in my judgment, be modified. Most of the cases are for mere negligence of the corporation to keep public highways in repair, or perform some other duty devolving upon its officers. *Huffman v. San Joaquin Co.*, 21 Cal. 427; *Sherbourne v. Yuba Co.*, 21 Cal. 113; *Winbigler v. City of Los Angeles*, 45 Cal. 36; *Tranter v. City of Sacramento*, 61 Cal. 271; *Moore v. City of Los Angeles*, 72 Cal. 287, 13 Pac. Rep. 855; *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. Rep. 177. Whether these cases state the law correctly or not it is not necessary to determine. It is enough to say that they differ materially from the case under consideration. Two of the cases cited may be fairly construed as broad enough to cover this case. *Crowell v. Sonoma Co.*, 25 Cal. 313; *Howard v. San Francisco*, 51 Cal. 52. But so construed they cannot, in my judgment, be supported either by reason or authority. Mr. Dillon, in his valuable work on Municipal Corporations, states the rule thus: "Where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation, (not acting through independent contractors, the effect of which will be considered presently,) no question has been made or can reasonably exist as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care. Even in those States in which a municipality is not held impliedly liable to a private action for neglecting to keep its streets in repair, it is yet held to be liable if it, or its officers under its authority, by positive acts, place obstructions on the streets or by such acts otherwise render them unsafe, whereby travelers are injured. Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others; but, as in such case the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability." 2 Dill. Mun. Corp. (3d Ed.) § 1024. I take this to be a correct statement of the law, and one that is supported by an overwhelming weight of authority. 1 *Shear & R. Neg.* §§ 273, 288, 289, 291; *Galveston v. Posnansky*, 62 Tex. 118; *Barnes v. District of Columbia*, 91 U. S. 541; *Ehrgott v. New York*, 96 N. Y. 264; *Nelson v. Canisteo*, 100 N. Y. 89, 2 N. E. Rep. 473; *Thomp. Neg.* 735, 736, notes; *Max-*

millian v. New York, 62 N. Y. 160; *Harper v. City of Milwaukee*, 30 Wis. 365, 372; *Barton v. City of Syracuse*, 36 N. Y. 54; *Eastman v. Meredith*, 36 N. H. 284, 294; *City of Denver v. Rhodes*, 9 Colo. 554, 562, 13 Pac. Rep. 729. Innumerable cases might be cited to the same effect, but to do so would unnecessarily extend this opinion. Many of them will be found cited in the text-books above referred to. For the reasons stated I am of the opinion that the judgment and order appealed from should be affirmed.

BEATTY, C. J. I concur in the foregoing opinion of Justice WORKS.

NOTE. — The authorities upon the point upon which this case turns are in unsolved confusion, and cannot be reconciled upon principle. Courts, recognized as able and learned, maintain the position held by the majority of the court in this case, while others, equally able and learned, support the position of the minority; and thus the law of the particular State of which the court is the creature is determined. The holding of the courts of most States is in accord with the California view, as declared by the majority of the court. The Supreme Court of the United States, and of the courts of last resort in New York and Illinois, hold the view of the judges in the minority in this case. Neither position, so far as I have been able to observe, in any State in the leading cases had the united support of the entire court, but the conclusion reached was by a majority of the judges. In the leading cases, determining the doctrine of the Supreme Court of the United States, reported in 91 U. S. 540 to 557, the opinions in the three cases, settling the doctrine of that court, were concurred in by four members and the chief justice, and dissented from by four members, a bare majority. The leading case, holding that no liability exists, in the absence of statutory declaration, the view, in my judgment, most in consonance with reason and principle, is the case of *Hill v. Boston*, 122 Mass. 344. In the opinion of the court, by Chief Justice Gray, nearly all the cases are reviewed and criticised.

In the year books, 5 Edw. IV, pl. 24, the common law doctrine is thus declared: "If there be a common way, and it is not repaired, so that I am damaged by the miring of my horse, I shall not have an action for that against those who ought to repair the way, but it is a popular action, in which no individual shall have an action on the case, but it is an action by way of presentment," and the reason that case was not maintainable is because the way ought to be repaired by the police.¹

So far as counties, quasi corporations, are concerned, this rule is still maintained almost without exception.² Its application, while acting as the agency of the State, to cities, and not merely in matters strictly municipal, has not been so generally accepted, but is the general rule still.³ The difficulty seems to arise from a disagreement as to what is a mere corporate or municipal function, and not the act of the city as the arm of the State; and this must be de-

¹ *Russell v. Men of Devono*, 2 T. R. 667; *Bartlett v. Crozier*, 17 Johns. 339; *West v. Lockport*, 16 N. Y. 161 and note.

² *Dillon on Munic. Corp.* (3d ed.) §§ 997, 1014; *Hill v. Boston*, 122 Mass. 344; *People v. Auditors*, 75 N. Y. 317.

³ *Novasota v. Pearce*, 46 Tex. 525; *Detroit v. Blackeby*, 21 Mich. 84; *Hill v. Boston*, 122 Mass. 344.

terminated by a fair view of the charter.⁴ Municipal corporations have what have been denominated public rights and private rights, public and private duties.⁵ Those things which it does in its private capacity, as the maintenance of gas and water-works, or a sewer system, which are in the nature of special privileges, not enjoyed by the public generally, and not such as further the ends of the State, are referable to this character of the city; and the rights growing out of them are taken just as any other person, natural or artificial, would take them, subject to liability for negligent use.⁶

Those acts which a municipality does as the agency of the State, in the absence of statutes declaring liability, though done negligently, to the damage of a private person, afford no cause of action to the person injured. It is the State, acting through its local agent. No wrong can be attributed to the State. It is a public wrong, for which the State has provided a remedy, by punishment of the unfaithful officer.⁷

Legislative enactment is necessary to impose additional liabilities, the intention to do which must be clearly manifested.⁸

In the case of *Barnes v. District of Columbia*,⁹ the acts of congress were given considerable importance, and under the construction given by the court the liability for the breach is placed upon a duty "peculiarly municipal." Considered in the light of the expression "peculiarly municipal," the case does not appear to be so greatly at variance with other authorities, declaring the generally accepted authority. Mere acceptance of a municipal charter is not considered as conferring such a benefit as will render a corporation liable to a private action for neglect of duties thereby imposed, when we consider that the purpose of the creation of such corporations is to exercise a part of the powers of the State, duties imposed upon all cities of the commonwealth as representatives of the public, create only a public duties, and will not support an action by an individual, though he sustain special damages.¹⁰

Judge Dillon, in his work on *Municipal Corporations*, places the ground of liability, in the absence of statutory declaration upon an implied liability, but the cases cited by him do not seem to recognize such doctrine. In each case the corporation was held liable, without mention of any such ground.¹¹ He admits in a later section that the implied liability cannot be well sustained without a special charter. And while Mr. Justice Hunt is quoted as saying that the law of the country must be deemed settled, four justices dissent from the opinion of the learned justice in the case in which he used the language.¹² The last case cited, and the case of *Hill v. Boston*, contain citations of all the leading cases in the various States.

⁴ Dillon on Munic. Corp. (8d ed.) § 1017.

⁵ *Id.* § 26; *People v. Detroit*, 15 Am. Rep. 302.

⁶ *Pittsburg v. Grier*, 22 Pa. St. 384; *Philadelphia, etc. R. Co. v. Davis (Md.)*, 10 Cent. Rep. 553; *Hitchins v. Frostberg*, 11 Atl. Rep. 826; *Evanston v. Gunn*, 99 U. S. 660; *Johnston v. Dist. Col.*, 118 U. S. 19; *Manchester v. Erricson*, 105 U. S. 347; *Hannon v. St. Louis Co.*, 67 Mo. 213; *Detroit v. Corey*, 9 Mich. 165; *Bailey v. Mayor*, 8 Hill, 581; *Storrs v. Utica*, 17 N. Y. 104; *Jones v. New Haven*, 34 Conn. 1, and cases cited; *W. S. F. Society v. Philadelphia*, 31 Pa. St. 185.

⁷ *Hill v. Boston*, 122 Mass. 344; *Detroit v. Corey*, 9 Mich. 165.

⁸ *Hill v. Boston*, 122 Mass. p. 361.

⁹ 91 U. S. 540.

¹⁰ *Hill v. Boston*, *supra*.

¹¹ § 1014, and cases cited in note 1.

¹² Dillon on Munic. Corp. § 1023; *Barnes v. Dist. Col.*, 91 U. S. 550.

INTERSTATE COMMERCE ACT.

CRIMINAL PROSECUTION.

The case of the United States against Tozer, which was tried before Judge Thayer of the United States District Court at Hannibal, Mo., a few days ago, will attract national attention on account of the fact that it is the first trial had under the criminal section of the Interstate Commerce Law. The defendant, who was an agent of the Missouri Pac. Ry. Co., was prosecuted upon a number of counts of an indictment charging him as agent of the railroad company with unjust discrimination in the charging of rates of freight from Hannibal to Hepler, Kansas. It appears that in 1887 a certain firm in Hannibal shipped to Hepler, Kansas, by way of the Mo. Pac. Ry. Co., one barrel of sugar on which they paid the local freight rate of forty cents per 100 pounds. About the same time the same firm shipped two barrels of sugar from Chicago to Hepler by way of Hannibal, the proportion allowed the Mo. Pac. Ry. Co. from Hannibal to Hepler, by the C., B. & Q. Ry., who contracted for the entire journey, was thirty-four cents per 100 pounds, or twelve cents less than the firm paid for transportation of the first barrel the same distance. The defendant was convicted upon two counts of the indictment. The charge of the court is interesting, but we have space only for that portion pertaining to counts two and three upon which defendant was convicted. The United States was represented by Geo. D. Reynolds, U. S. Attorney; T. P. Bashaw and Chas. Clafin Allen, of counsel.

Judge Thayer charged:

"Section three of the Interstate Commerce Act is as follows: 'It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any * * * person, company, firm or corporation on any * * * description of traffic in any respect whatever; or to subject any * * * person, firm, company or corporation * * * to any undue or unreasonable prejudice or disadvantage in any respect whatever.'

The second and third counts of the indictment are framed under the third section, the second count charging in substance that defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference and advantage over the Hayward Grocery Company in rates on sugar, and the third count charging that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice by giving the Chicago, Burlington & Quincy Railroad a lower rate on sugar than was given the Hayward Grocery Company.

In arriving at a verdict on the second and third counts, you will have to consider and determine the same questions among others that arise under the first count—that is to say:

1st. Was defendant an agent of the Missouri Pacific Railway Company?

2d. Did he charge the Hayward Grocery Company forty-six cents per 100 pounds for transporting sugar from Hannibal to Hepler, Kansas?

3d. Did he charge the Chicago, Burlington & Quincy Railroad Company only thirty-four cents per 100 pounds for transporting sugar from Hannibal, Missouri, to Hepler, Kansas; and

4th. Was the service rendered the Chicago, Burlington & Quincy Railroad a like and contemporaneous service to that rendered the Hayward Grocery Company, and was it rendered in the transportation of a like kind of traffic under 'circumstances and condi-

tions' substantially similar to those attending the service rendered the Hayward Grocery Company?

The second count of the indictment charges that the defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference; and the third count charges that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice and disadvantage; but the court holds and so instructs you that if the defendant charged the Hayward Grocery Company a greater rate than it charged the Chicago, Burlington & Quincy Railroad for a 'like contemporaneous service' done under 'substantially similar circumstances and conditions,' then such act was within the meaning of the law both an undue and unreasonable preference, and advantage given to the Chicago, Burlington & Quincy Railroad, and an undue and unreasonable prejudice or disadvantage to which the Hayward Grocery Company was subjected.

Therefore, if you find in the affirmative on all four of the questions that I have proposed and before stated, you must return a verdict of guilty on the second and third counts as well as on the first count.

Now, gentlemen, I presume you will have no difficulty in answering the first three of the questions as they are simple questions of fact.

The fourth proposition is more difficult because it involves the inquiry as to what is meant by the statute when it speaks of 'a like and contemporaneous service in the transportation of traffic under substantially similar circumstances and conditions.'

It is impossible for me to explain that phrase in a manner that will fit all cases, hence, I shall not attempt it.

I will take the precise case that you have to decide, and, in view of the facts testified to, give you a few directions with respect to the clause in question.

In the first place the service rendered to the Hayward Grocery Company on June 17, 1887, was contemporaneous with that rendered to the Chicago, Burlington & Quincy Railroad on June 15, 1887, within the meaning of the law.

In the second place the service so rendered for the Hayward Grocery Company was like that alleged to have been rendered to the Chicago, Burlington & Quincy Railroad within the meaning of the law, because the same kind of property was carried for each party for the same distance over the same route.

The next question is, was the service in both cases rendered under substantially similar circumstances and conditions? This is the vital point.

The defendant says the circumstances and conditions were substantially dissimilar because the Chicago, Burlington & Quincy Railroad Company furnished more traffic, or if not more traffic, nearly as much traffic to the Missouri Pacific Railway Company as the Hayward Grocery Company and all other Hannibal shippers combined.

Well, suppose that to be the fact. It did not, under the law, render the service to the Chicago, Burlington & Quincy Railroad, a service rendered under substantially dissimilar circumstances and conditions to that rendered for the grocery company, within the meaning of the Interstate Commerce Law, and did not justify a difference in rate.

The fact that one man is a large shipper and another a small shipper does not entitle the carrier to make a difference in the rate, if the property carried in each case is of the same class and the distance and route is the same.

Defendant next says the circumstances and conditions of the two alleged shipments were substantially dissimilar, because one shipment originated at Hanni-

bal and the other at Chicago, and that in the case of the two barrels of sugar the property was being carried through from Chicago to Hepler, on a through rate of fifty-one cents per 100 pounds, agreed upon by and between the Missouri Pacific Railway Company on the one hand and the Chicago, Burlington & Quincy Railroad Company on the other.

This presents a different question, and on this point I instruct you as follows:

If you believe and find from all the evidence in the case that the lines of railroad of the Chicago, Burlington & Quincy Railroad Company and of the Missouri Pacific Railway Company form a continuous line of railroad from Chicago, Illinois, to Hepler, Kansas, passing through Hannibal, Missouri, it being an intermediate shipping point, and that the two roads connect at Hannibal and interchange traffic at that point; and if you find that prior to June 15, 1887, the Chicago, Burlington & Quincy and Missouri Pacific Railway Company had agreed upon and established a through rate from Chicago to Hepler on all property shipped from Chicago to Hepler via Hannibal over such continuous line, and that such established through rate on sugar was fifty-one cents per 100 pounds from Chicago to Hepler; and if you find that the two barrels of sugar on which defendant is alleged to have charged the Chicago, Burlington & Quincy Railroad at the rate of thirty-four cents per 100 pounds for the transportation thereof from Hannibal to Hepler, was sugar that was received by the Chicago, Burlington & Quincy Railroad Company at Chicago to be carried over such continuous line to Hepler for said agreed and established rate of fifty-one cents per cwt.; and that the Chicago, Burlington & Quincy Railroad Company on receipt of said two barrels of sugar, issued to the shipper thereof the bill of lading for two barrels of sugar that has been read in evidence, then the court instructs you that the charge for transportation on said two barrels of sugar from Hannibal to Hepler, alleged to have been made by defendant, was not a charge for a service rendered the Chicago, Burlington & Quincy Railroad Company under circumstances and conditions substantially similar to the circumstances and conditions attending the service rendered the Hayward Grocery Company, within the meaning of the Interstate Commerce Act, and you should find the defendant not guilty of the charge laid in the first count of the indictment.

Now, gentlemen, in the event that you find under the last instruction that the services rendered the Chicago, Burlington & Quincy Railroad Company and the Hayward Grocery Company were not rendered under similar circumstances and conditions and accordingly acquit under the first count, then a further question arises under the second and third counts which you must consider and determine.

Under the third section of the act it is made an offense to give one person undue and unreasonable preference or advantage, or to subject a person to an undue and unreasonable prejudice or disadvantage.

As before remarked, the second and third counts are under these sections.

It is shown by the testimony that the Missouri Pacific Railway Company's proportion of the alleged through rate from Chicago to Hepler on sugar as thirty-four cents per 100 pounds, and that its local rate on sugar from Hannibal to Hepler is forty-six cents per 100 pounds.

Now, conceding that some difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate is permissible, owing to the different conditions affecting the two shipments, the question that I submit to you under the

second and third counts, is whether the difference shown in this case between the two rates of twelve cents per 100 pounds is, under all the circumstances of the case, a reasonable difference or an undue and unreasonable difference not justified by the different circumstances under which through shipments from Chicago and local shipments from Hannibal are made.

If you find that the difference in rate of twelve cents per 100 pounds is an undue and unreasonable difference, and, as before explained, that defendant as agent of the Missouri Pacific Railway Company knowingly and willfully gave the Chicago, Burlington & Quincy Railroad the advantage of such difference in the shipment of the two barrels of sugar mentioned in the indictment—then you may return a verdict of guilty on the second and third counts although you acquit on the first count.

If, on the other hand, you find that the difference in the rate now in question is neither undue or unreasonable considering all the circumstances and conditions affecting local as compared with through shipments, you will render a verdict of acquittal on the second and third counts.

In determining the last question submitted to you as to the reasonableness or unreasonableness of the difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate, I give you full liberty to consider all the facts, circumstances and reasons adduced by the various witnesses in justification of the difference shown, and I ask you to consider the same carefully and fairly without any prejudice or bias whatsoever.

RECENT PUBLICATIONS.

THE LAW OF AGENCY, Including Special Chapters on Attorneys, Auctioneers, Brokers and Factors. By Floyd R. Mechem. Chicago: Callaghan & Co. 1889.

This is, we believe, the first effort as a book writer on the part of the author of this work, though he has long been favorably known by essays which have appeared from time to time in various law magazines. He has contributed to this JOURNAL, some of the results of his pen and we feel sure our subscribers will uphold us in declaring his work as thorough and satisfactory, and his style clear and terse.

This book pretends, and seems to be, a complete treatise on the law of agency, including special chapters on attorneys, auctioneers, brokers and factors. It contains something over nine hundred pages and cites nearly seven thousand cases. It is undoubtedly the most complete work on the subject of agency yet published, though we are inclined to think it is not as philosophical a discussion of the subject as may be found in other treatises. There is one feature of the book which we think will meet with especial approval and satisfaction, and that is a logical and clear division of the general subject into sub-heads and chapters. Mr. Mechem's success in this regard is all the more to be commended because the subject is one, which extending through all departments of the law, has no well defined boundary lines, and renders the making of them more or less difficult. The subjects of Ratification of Agency and of Delegation of Authority are most exhaustively considered. But we have found the chapters on the Duties and Liabilities of the Agent to his Principal, of the Agent to Third Persons, of the Principal to the Agent, of the Principal to Third Persons, of Third Persons to the Agent and of Third Per-

sons to the Principal, the more interesting and valuable, for within those chapters is emphatically the substance of the law of agency, many questions erroneously classed under that head and discussed at length by the author in other chapters, properly belonging to treatises on Contract and Evidence.

The arrangement of the book and its mechanical execution are in every way praiseworthy. The index is carefully prepared, and, taken all in all, we feel no hesitation in commending it to the profession.

QUERIES AND ANSWERS.

QUERY NO. 23.

A died testate, leaving a wife B and two adult children, C and D. In the will the testator left a life estate to B in certain real estate, with the remainder to the infant children of C, also a life estate to D in certain real estate, with the remainder to the said infant children. Other real estate was left in fee-simple to C. All the real property was thus disposed of. The personal property left was not sufficient to pay debts. B, the wife, renounces the will, "and thereupon she shall be entitled to such part of his estate (the husband), real and personal, as she would have been entitled to if he had died intestate," which, in this case, would be one-third. All parties are willing for the widow to take her one-third interest, in money value, and for the will, in other respects to be carried out. How can this be done without prejudice? What effect will the renunciation of the will, by the widow, have upon the interests of the life tenant D and the remainderman? What will be the effect upon the fee-simple estate of C.

W. C.

HUMORS OF THE LAW.

"I'll tell you a story, boys," said Col. Ingersoll, while waiting for the Kerr jury to come in on Friday afternoon.

"During the good old days in California," continued the colonel, "it was the law that the holder of a claim should be liable to lose it if he let it remain idle for ten days in succession. Well, there was one fellow who had been working faithfully, when he was taken sick and had to take to his tent. Another fellow came along and jumped his claim. The first man pleaded and argued, but the other was not to be moved. So when the first man recovered he sued the interloper.

"The case came up before the justice. He was very sorry, he told the plaintiff, but the law was absolute on the question, and the defendant could not be ousted. No sooner had he finished than the plaintiff jumped up and hit the defendant a stinging blow behind the ear. The defendant fell over, and the plaintiff jumped on him and began to pummel him soundly. The constable ran up and was trying to part the fighters, when the judge arose, and pounding on the desk, yelled to the constable:

"—— you, sir, leave them alone! The law is the law, but if the gentlemen want to compromise they mustn't be interfered with!"

"WELL," said an Irish attorney, "if it please the court, if I am wrong in this I have another point that is equally conclusive."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ARBITRATION AND AWARD. — Where it is agreed to submit a controversy "to some disinterested third party," and two arbitrators are selected, one of whom is interested, by being a stockholder of one of the parties, their award is void, unless the party seeking to sustain it shows that the adverse party had knowledge of such interest before the award was signed, and either waived the objection or acquiesced in the arbitrators' continuing to act.—*B. & O. Ry. Co. v. Canton Co., Md.*, 17 Atl. Rep. 394.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Code Ala. § 1873, and 1883, do not authorize judgment creditors to redeem land which has passed under a general assignment by the judgment debtor for benefit of creditors, including such judgment creditors, and has been sold by the assignee.—*Comer v. Constantine, Ala.*, 5 South. Rep. 773.

3. ATTACHMENT. — In an action to recover the possession of specific personal property, the court, or judge in vacation, may, for good cause shown before judgment, compel the delivery of the property to the officer, or party entitled thereto, by attachment, and may examine the defendant as to the possession or control of the property.—*In re Farr, Kan.*, 21 Pac. Rep. 273.

4. ATTACHMENT — Unliquidated Damages. — In an action for the breach of contract to sell goods on commission, in refusing to allow plaintiff to carry out the contract, requiring an affidavit for an attachment to state the amount of the demand due plaintiff, an attachment was not authorized; such contract not affording any certain standard by which the amount of damages could be ascertained.—*Hochstadder v. Sam, Tex.*, 11 S. W. Rep. 408.

5. ATTACHMENT. — Upon the issue as to whether the transfer of the property attached to the claimants was

made by the debtor with fraudulent intent, it was competent for the plaintiff to show that on the day following such transfer the debtor conveyed other property with the fraudulent intent of defeating her creditors.—*Bernheim v. Dibrell, Miss.*, 5 South. Rep. 693.

6. ATTORNEY AND CLIENT. — An attorney may testify in behalf of his client, and the fact that his compensation as an attorney in the action is contingent on the result of the litigation does not render him incompetent as a witness. The interest he may have in the action goes to his credibility, but not to his competency.—*Cent. Branch U. P. Ry. Co. v. Andrews, Kan.*, 21 Pac. Rep. 276.

7. ATTORNEY AND CLIENT—Embezzlement. — An attorney who collects money for a client acts as the agent as well as attorney, and may be convicted of embezzlement for appropriating the money to his own use with intent to deprive the owner.—*People v. Converse, 42 N. W. Rep. 70.*

8. ATTORNEY AND CLIENT—Disbarment. — An attorney who, after having been employed by one party to a litigation, and having ceased to be thus employed, seeks employment by the adverse party, offering to impart to the latter important information, is guilty of such a breach of trust as requires his disbarment.—*United States v. Costen, U. S. C. C. (Colo.)*, 38 Fed. Rep. 23.

9. BANKS AND BANKING. — Where a bank delivers to another bank money and securities to pay a creditor, and the account is kept in the name of the depositing bank or its owner absolutely, and not as trustee for the creditor, the bank making the deposit may withdraw it at any time before the creditor has notice of the transaction.—*Brockmeyer v. Washington Nat. Bank, Kan.*, 21 Pac. Rep. 300.

10. CARRIERS—Negligence. — Where a passenger is injured by the concurrent negligence of the carrier and a third person, the negligence of the carrier is not imputable to the passenger, so as to bar the right of the latter to recover of the third person.—*New York, P. & N. B. Co. v. Cooper's Admr., Va.*, 9 S. E. Rep. 321.

11. CONSTITUTIONAL LAW. — The act entitled "An act fixing the time for the opening and closing of saloons and gaming-houses" is not repugnant to the constitutional provision that each act "shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title.—*Ex parte Livingston, Nev.*, 21 Pac. Rep. 322.

12. CONTRACTS — Restraint of Trade. — Plaintiff agreed to furnish for the defendant everything necessary to run a barber-shop, and the latter agreed not to do any work as a barber for any one else, or to open a shop for himself in such town at any time. The proceeds of the business were to be equally divided between them: *Held*, that the stipulation of the defendant was in restraint of trade and void.—*Carroll v. Giles, S. Car.*, 9 S. E. Rep. 422.

13. CONTRACT — Counterclaim. — Plaintiff having failed to establish the contract declared on, defendants cannot recoup their damages for breach of the contract actually made and alleged in their answer. There can be a recoupment only on the contract, sued on.—*Holderman v. Berry, Mich.*, 42 N. W. Rep. 57.

14. CORPORATIONS—Forfeiture. — Where the legislature has declared that, if the holders of a franchise to collect tolls for the navigation of an artificial channel shall permit the channel to become so obstructed as to impede navigation, "the collection of tolls by them shall be suspended until all obstructions shall be removed" amounts to a waiver of the right to have a forfeiture of the franchise declared for such cause.—*State v. Morris, Tex.*, 11 S. W. Rep. 332.

15. COURTS—Judge. — Under statutes disqualifying a judge in a criminal case if he has been counsel for the State or the accused, a judge is not disqualified from the mere fact that he was district attorney at the time when the accused was tried before an examining court in his district.—*Wilks v. State, Tex.*, 11 S. W. Rep. 415.

16. COURTS — Jurisdiction. — The courts of New

Mexico have no jurisdiction, in passing upon the validity of an action to the territorial legislature, to review the action of that body in respect to its organization, or the election and qualifications of its members. — *Chares v. Luna*, N. Mex., 21 Pac. Rep. 841.

17. COVENANTS—Damages. — In an action against a remote warrantor to recover damages for the failure of title to certain lots, where it appears that such lots constituted a part of a large tract of land which had been conveyed by the defendant for a single consideration, and the title to the whole tract had failed, the damages recoverable by the plaintiff cannot exceed the proportion of the consideration received by the remote vendor which the value of the lots conveyed to the plaintiff bears to the value of the entire tract conveyed by the defendant. — *Witzman v. Hirsch*, Tenn., 11 S. W. Rep. 421.

18. CRIMINAL LAW—Appeal. — Where, after conviction, in a criminal case, defendants appeal, but give no appeal bond, or file no affidavit of their inability to give such bond, or to deposit money sufficient to cover the probable costs, as provided by Code Miss. § 2885, when a stay of judgment is desired, the appeal should be dismissed. — *Lum v. State*, Miss., 5 South. Rep. 689.

19. CRIMINAL LAW—Homicide. — It is lawful for an officer to kill a fleeing felon where he cannot otherwise be taken and the necessity for such killing is a fact for the jury to determine. — *Jackson v. State*, Miss., 5 South. Rep. 690.

20. CRIMINAL LAW—Character. — In all cases where a man is on trial, accused of crime, he has the right to introduce evidence to show his general good character or reputation, but the evidence is to be confined to general reputation, and particular acts of good conduct on the part of the accused cannot be shown in evidence, and the same rule applies to the prosecution. — *Reddick v. State*, Fla., 5 South. Rep. 704.

21. CRIMINAL LAW—Homicide. — On a murder trial, defendant having shot deceased with a gun, after fighting and abusive language by both, an instruction that if deceased used the most grievous words of reproach, aggravated with the most provoking circumstances, and upon such provocation defendant killed him with a deadly weapon, it was murder in the first degree, is error. — *Watson v. Commonwealth*, Va., 9 S. E. Rep. 418.

22. CRIMINAL LAW—Obscene Language. — Under Code Ala. § 4081, making it a crime to use obscene language in the presence of a female, it is proper to show, that the woman in whose presence such language was used was in the habit of using similar language in defendant's presence, but not that she had the reputation of using such language generally. — *Golson v. State*, Ala., 5 South. Rep. 799.

23. CRIMINAL LAW—Larceny. — The laws Cherokee Nation prescribe punishment for every person stealing a horse. Under the United States laws, a white person cannot be punished under such law Pen. Code Tex. arts. 708, 709, prescribe a punishment for theft and bringing the stolen goods into the State, but require that the theft must also have been a theft under the laws of the State or territory from which the goods were brought: Held, that one may be convicted in Texas, though he were a white person and took the property from the Cherokee Nation. — *Clark v. State*, Tex., 11 S. W. Rep. 374.

24. CRIMINAL LAW—Stolen Goods. — In a prosecution under Code Ala. § 3794, an indictment is insufficient which fails to allege the "intent not to restore the property," though it is alleged that the defendant "feloniously" bought, etc., property, knowing it to have been stolen. — *Holt v. State*, Ala., 5 South. Rep. 793.

25. CRIMINAL LAW—Arson. — Construction of Code Ala. 1866, § 3780, providing that any person who willfully sets fire to "any prison or jail, or any other house or building which is occupied by a person lodged therein, or any inhabited dwelling-house," etc., is guilty of arson in the first degree. — *Childress v. State*, Ala., 5 South. Rep. 775.

26. CRIMINAL LAW—Embezzlement. — It appeared that defendant had deposited the certificate of stock issued to him but which he had pledged to the corporation for part of its value with a bank as security for his individual note, but there was no evidence that he claimed to be the absolute owner of the certificate, or tried to pledge the corporation's interest therein: Held, under Rev. St. Wis. § 1731, that it would not be presumed that he attempted to pledge more than his own interest, and a conviction could not be sustained. — *State v. Williamson*, Wis., 42 N. W. Rep. 111.

27. CRIMINAL LAW—Former Jeopardy. — Under Crim. Laws Mont. one convicted under an indictment for larceny has not been in jeopardy for the crime of burglary, as larceny is the felonious taking of goods with intent to deprive the owner, and to convert them. — *Territory v. Willard*, Mont. 21 Pac. Rep. 301.

28. CRIMINAL LAW—Bastardy. — A prosecution under the act providing for the maintenance and support of illegitimate children is not local, but may be brought in any county or before any justice of the peace of the State. — *In re Lee*, Kan., 21 Pac. Rep. 282.

29. CURTESY. — Under Rev. St. Wis. 1853, ch. 95, providing that real estate conveyed to a wife becomes her sole and separate property, which she can control as if unmarried, a husband has no curtesy, on his wife's death, in lands conveyed to her during coverture, expressed in the conveyance to be "to her sole and separate use. — *Haight v. Hall*, Wis., 42 N. W. Rep. 109.

30. DEDICATION—Estoppel. — Held, under the facts that plaintiff was estopped by his silence to deny his dedication of the land, and that the condition attached to the gift, if any, was waived. — *Forney v. Calhoun County*, Ala., 5 South. Rep. 750.

31. DEED—Destruction. — Where the grantor in an unregistered deed retains possession of it after delivery, and wrongfully destroys it, the grantee's title is not thereby divested, and his remedy is to compel a re-execution. — *Edwards v. Dickenson*, N. Car., 9 S. E. Rep. 456.

32. DEED—Fraud. — In an action to cancel a deed alleged to have been procured by false and fraudulent representations, it is error to charge, on an issue submitted to a jury, that the jury must be "satisfied beyond all reasonable question" that such representations were made to induce the execution of the deed. Satisfactory proof is all that is required. — *Harding v. Long*, N. Car., 9 S. E. Rep. 445.

33. DEED—Cancellation. — Where by the misrepresentations of third persons plaintiff is made to believe that her deed to defendant is for a smaller quantity of land than it in fact conveys, and defendant is ignorant of the deception and acts in good faith, plaintiff is entitled to have the deed cancelled on the ground that there was no mutual assent. — *De Perry v. De Bercett*, Tex., 11 S. W. Rep. 586.

34. DESCENT AND DISTRIBUTION—Negroes. — Act N. C. Feb. 1879, declaring that "the children of colored parents," born before January 1, 1868, of persons living together as husband and wife, are legitimate children of such parents, with all the rights of heirs and next of kin, applies to the children of colored parents, whether slaves or free, and whether the parents were incapable of entering into the marriage relation by virtue of positive law or their status as slaves. — *Woodward v. Blue*, N. Car., 9 S. E. Rep. 492.

35. DIVORCE—Alimony. — Under § 23, ch. 25, Comp. St. a district court, or this court, upon appellate proceedings in the same case, may, after a divorce is granted at the suit of the husband, make a decree for alimony in favor of the wife out of the property, even though the decree of divorce be against the wife for any of the enumerated causes, except the adultery of the wife. — *Dickerson v. Dickerson*, Neb., 42 N. W. Rep. 9.

36. DOWER. — In a petition filed by a widow in the probate court to have dower in the lands of which her husband died seized assigned to her, the failure to allege in such petition that her right to dower "is not

disputed by the heirs or devisees" is not fatal.—*Serry v. Curry*, Neb. 42 N. W. Rep. 97.

37. EASEMENTS.—Where by a change in the uses of a dominant tenement the enjoyment of an easement of passage to it has become exceedingly oppressive to the owner of the servient estate, and a right of way from necessity does not exist, if the owner of the servient estate obstruct the easement, equity will not interfere, but will leave complainants to their remedy at law.—*McBryde v. Sayre*, Ala., 5 South. Rep. 791.

38. EASEMENTS—Drainage.—The easement of a ditch for drainage purposes over the pasture land of another does not impose upon the owner of the servient estate any liability for damage done to the ditch by his cattle in crossing over it, and in caving in its sides while feeding near it.—*Durfee v. Garvey*, Cal., 21 Pac. Rep. 302.

39. EJECTMENT.—Where plaintiff is not, and defendant is, in possession of land claimed by the former, the proper form of remedy is ejectment.—*Corporation v. Gibbs*, Wash. Ter., 21 Pac. Rep. 315.

40. ELECTIONS AND VOTERS.—Ballots not conforming to the requirements, as to the paper used, should be counted, as the language of the statute only makes it illegal to print or distribute such ballots, and not to vote them, and that construction should be adopted which is most favorable to the validity of an attempted exercise of the elective franchise.—*Kellog v. Hickman*, Colo., 21 Pac. Rep. 325.

41. EMINENT DOMAIN.—In ascertaining the amount of damages to be awarded to the owner of a farm, part of which is taken for a railroad, the tendency to frighten teams, employed on the farm, by the running of trains, etc., is not too remote to be taken into consideration.—*Fayetteville & Little Rock Ry. Co. v. Combs*, Ark., 11 S. W. Rep. 418.

42. EMINENT DOMAIN.—In a proceeding by a railroad company to condemn land for a right of way, the assessment of damages is not necessarily restricted to the injury done to the particular tract described in the petition.—*Fayetteville & Little Rock Ry. Co. v. Hunt*, Ark., 11 S. W. Rep. 418.

43. EMINENT DOMAIN.—The fact that a court refused to enjoin a railroad company from taking possession of land for its railroad before condemnation and payment of compensation did not legalize the possession so taken, or relieve the company from an action at law for the wrongful entry.—*Grand Rapids, L. & D. R. Co. v. Chesebro*, Mich., 42 N. W. Rep. 66.

44. EQUITY—Jurisdiction.—Where a petition is filed in equity by the executrix of an estate, alleging that certain debts are owing by the estate, and that it is necessary to sell land belonging to it to pay such debts, and any part of the indebtedness alleged in the petition is found to be due by the estate, the chancellor has jurisdiction to order a sale of a part of the property to pay such indebtedness.—*McGowan v. Lufburrow*, Ga., 9 S. E. Rep. 427.

45. EQUITY—Jurisdiction.—An action upon a contract by which plaintiff delivered to defendant's intestate a number of sheep, to receive in return, at the expiration of a fixed period, a quantity of wool and an equal number of sheep, is not of an equitable nature, though the accounts between the parties have been carelessly kept.—*Lewis v. Baca*, N. Mex., 21 Pac. Rep. 343.

46. EXECUTION—Redemption.—Where a debtor whose land has been sold on execution surrenders possession to the purchaser and afterwards offers to redeem in compliance with the Code the purchasers or those claiming under him cannot interpose a bill to redeem title derived after the sale from any source.—*Aycock v. Adler*, Ala., 5 South. Rep. 794.

47. EXECUTION—Lien.—A claimant of personal property levied on under execution on foreclosure of a laborer's lien is not concerned as to the regularity or validity of the foreclosure proceedings, and cannot move to have them dismissed.—*Dixon v. Williams*, Ga., 9 S. E. Rep. 463.

48. EXECUTION—Partnership.—A purchaser at a sale upon an execution against one partner, levied upon his interest in partnership property, does not acquire any title to or right of possession of the property. These still remain in the partnership.—*Lane v. Lenpest*, 42 N. W. Rep. 84.

49. EXECUTORS AND ADMINISTRATORS.—The staleness of a demand attacking ancient settlements, made after the lapse of twenty years, and only after the death of the party charged, and excused by no proof of ignorance or concealment, imposes upon the attacking party the necessity of making clear and unequivocal proof.—*Succession of Bobb*, La., 5 South. Rep. 757.

50. EXECUTORS AND ADMINISTRATORS.—A contract by which the administrator, who is also a legatee of the estate, conveys to a firm of attorneys one-half of the assets of the estate, after the settlement of all the claims against it, upon condition of the professional services, etc., of said attorneys rendered in the settlement of the estates, is not illegal because of the attempt to bind the minors' interest, it being only invalid as to them.—*McCampbell v. Durst*, Tex., 11 S. W. Rep. 380.

51. FRAUDS—Statute of.—Sheet of paper written disconnectedly on both sides: *Held*, sufficient memorandum under the statute for sale of land.—*Gordon v. Avery*, N. Car., 9 S. E. Rep. 496.

52. FRAUDS—Statute of.—It being impossible to determine from the telegrams claimed to constitute a contract for sale of land, just what property was intended to be included in the proposition and acceptance, the contract was void under the statute of frauds.—*Breckinridge v. Crocker*, Cal., 21 Pac. Rep. 179.

53. FRAUDULENT CONVEYANCE.—The Rhode Island statute, rendering void conveyances made with the intent "to delay, hinder, or defraud creditors of their just and lawful actions, debts, suits, accounts, damages, or just demands of what nature soever," extends to a claimant for damages for seduction, especially where the claimant has recovered a judgment.—*McKenna v. Crowley*, R. I., 17 Atl. Rep. 354.

54. FRAUDULENT CONVEYANCE.—Where insolvent debtors made conveyances of real estate to creditors, for the purpose of securing a *bona fide* indebtedness, and the creditors withheld the conveyances from record, with an honest belief that their indebtedness, would be paid, and without any agreement or understanding with the debtors, such conveyances are not fraudulent as to the other creditors, because they were not recorded.—*First Nat. Bank v. Jaffray*, Kan., 21 Pac. Rep. 242.

55. FRAUDULENT CONVEYANCE.—Under the California insolvent act of 1880, where a debtor transfers property out of the usual and ordinary course of business it is *prima facie* evidence that the assignee had reasonable cause to believe that the transfer was made by the debtor with a view to prevent his property from being distributed ratably among his creditors.—*Washburn v. Huntington*, Cal., 21 Pac. Rep. 305.

56. GAMING.—*Held*, that a game called "craps," which can be played on any flat surface, and without the intervention of any third party, is not a game to be "played, dealt, kept, or exhibited," within the meaning of the statute.—*Choppell v. State*, Tex., 11 S. W. Rep. 411.

57. GARNISHMENT.—Non-residents of the State are entitled to the benefit of Const. Tex. art. 16, § 23, and Rev. St. Tex. art. 218, providing that no current wages for personal service shall ever be subject to garnishment.—*Bell v. Indian Live Stock Co.*, Tex., 11 S. W. Rep. 344.

58. HIGHWAYS.—The benefits received by a person whose land is taken for a public road are a part of the consideration for the release or condemnation of the land; and such benefits are as much his property as the land itself, and the State cannot deprive him of them, by subsequently discontinuing the road.—*Pearson v. Board*, Mich., 42 N. W. Rep. 77.

59. HIGHWAYS—Defects.—Notice held not sufficiently accurate to comply with the statute requiring notice

of an accident for which damages are claimed against a town for injuries.—*Weber v. Town of Greenfield*, Wis., 42 N. W. Rep. 101.

60. **HOMESTEAD—Conveyance.**—A land owner who is not in debt may, by deed absolute or by mortgage, convey his land that has never been allotted to him as a homestead, without the joinder of his wife in the deed, free from any restriction growing out of the provisions of art. 10, § 8, Const. whether his land was acquired or his marriage was celebrated before or after its adoption.—*Hughes v. Hodges*, N. Car., 9 S. E. Rep. 487.

61. **HOMESTEAD.**—Under Const. Ark. 1874, art. 9, § 6, minor children can recover of widow one-half the rents and profits of homestead, while she was in exclusive possession thereof after the husband's death, though no dower has been assigned her in the land, which was all the real estate owned by her husband, notwithstanding *Manst. Dig. § 2588*. — *Winters v. Davis*, Ark., 11 S. W. Rep. 420.

62. **HOMESTEAD.**—A person making an entry under the homestead laws of the United States may execute a valid mortgage upon land so entered, prior to submitting final proof and receiving the final certificate.—*Lang v. Morey*, Minn., 42 N. W. Rep. 88.

63. **HUSBAND AND WIFE.**—No resulting trust can arise out of an agreement between husband and wife, by which the husband takes the title to land in his own name, and pays part of the purchase price with his own money, and agrees to hold for the wife's benefit, and she subsequently pays the balance of the price.—*Zeller v. Light*, Penn., 17 Atl. Rep. 433.

64. **HUSBAND AND WIFE.**—Under *Pasch. Dig. Tex. art. 3457*, the validity of a conveyance executed by a husband pending a divorce suit, so far as it affected the wife's interests in the community property, depended upon whether it was made with the fraudulent view of injuring her rights. — *Moore v. Moore*, Tex., 11 S. W. Rep. 396.

65. **INFANCY—Chattel Mortgage.**—Where one executes a chattel mortgage while an infant, mere acquiescence or failure to disaffirm by some positive act of repudiation, after attaining majority, is not a legal ratification.—*Hill v. Nelms*, Ala., 5 South. Rep. 796.

66. **INJUNCTION.**—Where parties financially irresponsible, without valid title, but claiming under a void attachment sale, cut timber constituting the principal value of the land purchased, of which others claiming under a purchase in bankruptcy proceedings are in possession, equity will enjoin the continuance of such trespass at the instance of the latter. — *Sullivan v. Robb*, Ala., 5 South. Rep. 746.

67. **INJUNCTION—Party Wall.**—Construction of statute granting to one co-proprietor of a wall in common to demolish old wall and erect new one and defining the procedure. — *Heine v. Merrick*, La., 5 South. Rep. 760.

68. **INSOLVENCY—Conflict of Laws.**—Rev. St. Me. ch. 70, § 33, providing that an assignment in insolvency relates back and dissolves all attachments made within four months of the commencement of insolvency proceedings, is binding upon a citizen of another State, who causes an attachment to be levied here for the enforcement of a debt contracted subsequent to the enactment of the insolvent law. — *Owen v. Roberts*, Me., 17 Atl. Rep. 403.

69. **INSURANCE—Conditions.**—A policy contained covenants that the assured was to keep a set of books showing a record of all business transacted, and to keep them locked in a fire-proof safe at night and at all times when the store was not actually open for business, etc.: *Held*, that the covenant did not require the books to be kept in a safe from sunset to sunrise, but from the time the business of the day was ended, and the store closed for the night. — *Jones v. Southern Ins. Co.*, U. S. C. C. (Ark.), 38 Fed. Rep. 19.

70. **INSURANCE—Mutual Benefit Society.**—Defendant held entitled to reformation of certificate, where there was a mistake in the amount of same, though the

beneficiary was not cognizant of the mistake.—*Gray v. Supreme Lodge, Ind.*, 20 N. E. Rep. 838.

71. **INTOXICATING LIQUORS—Illegal Sales.**—Where an incorporated association purchases beer outside of the State of Kansas, and brings it into the State, and then sells chips to its members, each chip representing a drink or glass of beer, and then furnishes a drink or glass of beer for each chip returned by a member, and the beer is drank as a beverage, and neither the association, nor any of its members, has any permit to sell intoxicating liquors: *Held*, that the member of the association and the president of the association, who is present at the time, and knows of these things, may be prosecuted, convicted, and punished for selling intoxicating liquor in violation of law. — *State v. Horacek*, Kan., 21 Pac. Rep. 204.

72. **INTOXICATING LIQUORS.**—Where the evidence shows respondent was proprietor of the saloon where the liquor was sold to the minors, and was then present, and made no effort to prevent the sale, he cannot object that there is no evidence, though he testifies that he did not see the sale, and had directed his agent not to sell liquor to minors. — *State v. Mavor*, Wis., 42 N. W. Rep. 110.

73. **JUDGMENT—Fraud.**—The statute authorizing "the party aggrieved" to prosecute an action to set aside a judgment obtained by means of the fraud of the "prevailing party": *Held*, not to authorize one not a party to the action in which such judgment was recovered, although he was directly interested in the results, to maintain such statutory action. — *Stewart v. Duncan*, Minn., 42 N. W. Rep. 89.

74. **JUDGMENT—Res Adjudicata.**—Neither a judgment of nonsuit nor one dismissing a suit for want of proper parties will sustain the plea of *res adjudicata*, *Weinberger v. Merchants' Mut. Ins. Co.*, La., 5 South. Rep. 728.

75. **LANDLORD AND TENANT—Lien.**—Under Code Miss. § 1301, a lien on all the agricultural products of the leased premises can be enforced against the agricultural products of the leased premises after their removal therefrom, and must prevail against a bona fide purchaser for value.—*Newman v. Bank of Greeneville*, Miss., 5 South. Rep. 753.

76. **LIENS.**—Under Code Ga. § 1985, providing liens on saw mills, an affidavit for lien properly alleges that the provisions were furnished to the mill of the person named, and not to the person himself.—*Bennett v. Gray*, Ga., 9 S. E. Rep. 469.

77. **LIMITATION OF ACTIONS.**—The limitation of two years prescribed by Civil Code Kan. § 18, subd. 3, for an action for trespass on real property, limits the damages recoverable to those caused within two years next preceding the action, though the trespass was continued for more than two years, and the action was coupled with an action of ejectment, the limitation of which is three years.—*Mo. Pac. Ry. Co. v. Houseman*, Kan., 21 Pac. Rep. 284.

78. **MALICIOUS PROSECUTION.**—Concerning the necessity of disclosing all material facts of the case to counsel, in order to render his advice a good defense to an action for malicious prosecution. — *Smith v. Walter*, Penn., 17 Atl. Rep. 466.

79. **MALICIOUS PROSECUTION.**—Sufficiency of information under Pen. Code Tex. art. 273, providing punishment for malicious prosecution. — *Dempsey v. State*, Tex., 11 S. W. Rep. 372.

80. **MALICIOUS PROSECUTION.**—The facts herein held sufficient probable cause to justify defendant in instituting criminal proceedings. — *McDonald v. Atl. & Pac. R. R. Co.*, Ariz., 21 Pac. Rep. 833.

81. **MASTER AND SERVANT—Negligence.**—Under the facts where plank fell through elevator injuring plaintiff, the latter cannot recover either on the ground of negligence of fellow servant or of being assigned to dangerous work.—*Alford v. Metcalf*, Mich., 42 N. W. Rep. 52.

82. **MORTGAGES—Execution.**—Proof by a subscribing witness to a mortgage that he saw the mortgagor

sign the instrument, and acknowledged that he did so, is not sufficient proof of its execution to authorize its admission to record. — *Edwards v. Thom*, Fla., 5 South. Rep. 707.

88. MORTGAGES. — Where a note and mortgage are proved to have been destroyed by fire, and their contents are proved without contradiction, it is immaterial, on foreclosure, that the mortgage, having but one witness, was not entitled to record. — *Coon v. Bouchard*, Mich., 42 N. W. Rep. 72.

84. MUNICIPAL CORPORATIONS. — A special law, limiting the time for commencing actions against the city of St. Paul for injuries caused by its negligence, construed as not applicable to statutory actions by the personal representatives of a deceased person for negligence causing such death. — *Maylone v. City of St. Paul*, Minn., 42 N. W. Rep. 88.

85. MUNICIPAL CORPORATIONS. — A land-owner has a right to the lateral support of the soil in the adjoining street, and a city is liable for any damage occasioned by removing this lateral support in grading the street. — *Nichols v. City of Duluth*, Minn., 42 N. W. Rep. 84.

86. MUNICIPAL CORPORATIONS—Public Improvements. — Under the charter of the city of Galveston, providing that the council, before beginning any street improvements, shall cause an estimate and report of the probable cost to be made, the report is a condition precedent to the exercise of the power to order the work to be done. — *Frosh v. City of Galveston*, Tex., 11 S. W. Rep. Rep. 402.

87. MUNICIPAL CORPORATIONS. — A contract by which a municipal corporation in effect agrees to loan its credit to a proposed private corporation is forbidden by Const. Tex. art. 11, § 3. — *City of Cleburne v. Brown*, Tex., 11 S. W. Rep. 404.

88. NEGLIGENCE. — In an action for the death of a fireman on defendant's locomotive, evidence of declarations of defendant's servants as to the character of the engine, which was alleged to have been unsafe, made since the accident, and not being in contradiction of the testimony of such servants, is inadmissible. — *Eric & W. F. R. Co. v. Smith*, Penn., 17 Atl. Rep. 442.

89. NEGLIGENCE. — A complaint alleging that defendant, being lawfully in possession of plaintiff's side track, negligently placed a freight-car so near plaintiff's main track that plaintiff's train collided with it, whereby its cars were damaged, shows a cause of action. — *Montgomery Gas-Light Co. v. Montgomery & E. Ry. Co.*, Ala., 5 South. Rep. 753.

90. NEGLIGENCE. — A person traveling on a train which has with it a stock car carrying horses for him, his duty under his contract being "to feed, water, and take care of the horses," is not guilty of contributory negligence from the fact that he was on said car when he was injured, if he was on the car in the performance of this duty. — *Fla. Ry. & Nav. Co. v. Webster*, Fla. 5 South. Rep. 714.

91. NEGLIGENCE—Railroad Companies. — Rev. St. Tex. art. 2399, authorizing an action against a railroad company for injuries causing death, when the death was caused by the negligence of the proprietor, or by "the unfitness, gross negligence, or carelessness of the servants," makes the company liable for gross negligence, and not for ordinary negligence, of servants. — *Sabine & E. T. Ry. v. Hanks*, Tex., 11 S. W. Rep. 577.

92. NEGLIGENCE—Evidence. — It was not error to receive evidence of doubtful admissibility, and such was the character of the evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place, and that he habitually neglected to ring the bell. — *Savannah, etc. Ry. Co. v. Flanagan*, Ga., 9 S. E. Rep. 471.

93. NEGOTIABLE INSTRUMENT. — In an action on a note given by the defendant to the plaintiff, a canal company, for some of its stock, alleged misrepresentations made by the plaintiff are not available to the defendant, where he has not elected to rescind the contract for the sale of stock, and has not set up any

counter-claim for damages on account of such misrepresentations. — *Upper San Joaquin Canal Co. v. Rotch*, Cal., 21 Pac. Rep. 304.

94. PARENT AND CHILD. — The law will not imply an assumption by the father of an infant which is in custody of its mother under a decree of divorce making no provision for alimony, to pay the mother's second husband for the infant's support, when the father has made no demand for the custody of the child, and the mother's second husband has never asked for pay for its maintenance. — *Johnson v. Onsted*, Mich., 42 N. W. Rep. 62.

95. PARTNERSHIP. — On dissolution of a partnership, one member assigned all his interest in the firm assets to his sole copartner, to be by the latter applied to firm debts. Immediately thereafter the latter conveyed all his property of every kind in trust to pay his debts, with no reference to partnership assets or creditors: Held, that such conveyance was void as to partnership creditors. — *Collier v. Hanna*, Md., 17 Atl. Rep. 390.

96. PARTNERSHIP—Dissolution. — On dissolution of a copartnership existing under an agreement, whereby each member contributed equal capital, and were to share the profits and losses equally, advances made by one partner in excess of the amount agreed to be contributed by him must be repaid to him out of the partnership property remaining after paying partnership debts, before the surplus to be divided among the partners, or the loss to be apportioned, can be ascertained. — *Letserman v. Bernheimer*, N. Y., 20 N. E. Rep. 869.

97. PARTNERSHIP. — Plaintiff and W were partners under an agreement which provided that the original amount put into the business, and the amounts received in the course of business, should be the property of plaintiff, and that W should receive as his compensation one-half of the net profits: Held, that this agreement was binding upon defendant, who had full knowledge of it, and that plaintiff was entitled to recover of him funds, other than one-half of the profits, which W had turned over to him in payment of his own individual debt. — *Campbell v. Pence*, Ind., 20 N. E. Rep. 840.

98. PAYMENT—Administrators. — An overpayment made after the settlement of the estate by an executor to a legatee under the mistaken impression that the will authorized it, is not a voluntary payment, and may be recovered. — *Lyle v. Siler*, N. Car., 9 S. E. Rep. 491.

99. PLEADING—Corporations. — An allegation as to the corporate existence of a defendant may be stated in the complaint independently of a cause of action, and is no part of it. — *West v. Eureka Imp. Co.*, Minn., 42 N. W. Rep. 87.

100. PLEADING. — When a defendant demurs to a complaint and the court overrules such demur, and the defendant refuses to further plead, and the court renders judgment against him, he waives the right to urge thereafter such dilatory matter as an omission to allege the county or venue in the complaint in reply. — *Marx v. Croisan*, Oreg., 21 Pac. Rep. 310.

101. PRACTICE IN CIVIL CASES. — In Arizona, an involuntary nonsuit is not proper under Rev. St. Ariz. § 764, providing that at any time before the jury have retired the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his own claim for affirmative relief. — *Bryan v. Pinney*, Ariz., 21 Pac. Rep. 362.

102. RAILROAD COMPANIES. — A claim by the consignee of goods against a railroad company as a common carrier, for the value of goods lost by fire while in possession of the carrier, and before the road is placed in the hands of a receiver in a foreclosure suit, is not entitled to a priority, before the claims of the bondholders. — *Easton v. Houston & T. C. Ry. Co.*, U. S. C. C. (Tex.), 38 Fed. Rep. 12.

103. RAILROAD COMPANIES—Negligence. — A railroad company, having established at a street crossing a gate under the care of a flagman, is bound to close the gate when its cars are passing over the crossing, to give a reasonable warning by whistle or bell, and to pass the

crossing at a reasonably safe speed. — *Whelan & New York, L. E. & W. R. Co.*, U. S. O. C. (Ohio), 88 Fed. Rep. 15.

104. RAILROAD COMPANIES—Taxation. — The facts found by the trial court, construed in connection with the written instrument set forth in the complaint: *Held*, to bring this case within the rule laid down in the case of *plaintiff v. McDonald*, 84 Minn. 182, 25 N. W. Rep. 57, and the lands in controversy are accordingly subject to taxation under Laws 1885, ch. 15, § 5. — *St. Paul & S. C. R. Co. v. Robinson*, Minn., 42 N. W. Rep. 79.

105. RAILROAD COMPANY—Damages. — Where town lots abut upon a street, along which a railroad is constructed, so near as to cause an embankment in the street, so as to deprive the lot-owner of the free use of the streets, to the damage of the owner, he may recover his damages from the railroad company, even though no part of the lot be taken. — *Chicago, K. & N. Ry. Co. v. Hazels*, Neb., 42 N. W. Rep. 93.

106. RECEIVER — Mortgage. — Lands included in a mortgage, which covered also the crops, were incumbered by a prior mortgage to the extent of their value. The debt secured by the mortgage was past due, the mortgagor was insolvent, and refused to deliver the crops to the mortgagee, and appropriated a portion of them to purposes other than payment of the mortgage debt. The crops were in danger of loss unless promptly taken into custody of the court, and the security without them was inadequate: *Held*, that a bill by the mortgagee against mortgagor, averring those facts, showed a *prima facie* case for the appointment of a receiver. — *Ashurst v. Lehman*, Ala., 5 South. Rep. 731.

107. REHEARING. — A rehearing will not be granted where the question which the petition alleges to have been omitted to be decided by the court are necessarily determined, though not in express terms, by the determination of an alternative question in the case. — *State v. Barnes*, Fla., 5 South. Rep. 703.

108. REMOVAL OF CAUSES. — In foreign attachment proceedings, where the defendant files a petition for the removal of the suit to the circuit court of the United States, alleging that the amount involved is sufficient to give jurisdiction to the federal court, and that the plaintiffs are citizens of Georgia, while the defendant is a citizen of England, and the record, down to the time of filing the petition, does not show the residence of the parties, nor the amount involved to be otherwise than as alleged by defendant, it is error for the court to refuse to grant the petition. — *Horan v. Strachan*, Ga., 9 S. E. Rep. 429.

109. REMOVAL OF CAUSES — Constitutional Law. — Since the inferior federal courts owe their existence and powers entirely to congress, that body has full power over them. The provision of the act of March 3, 1887, therefore, that the circuit court shall remand a cause removed, etc., is not, as regards pending causes, unconstitutional. — *Birdseye v. Shaeffer*, U. S. C. C. (Tex.), 87 Fed. Rep. 821.

110. REPLEVIN—Attachment. — A defendant in an attachment suit, whose goods are seized by an officer in obedience to the writ, cannot maintain replevin against the officer for the goods so taken into legal custody. — *Hawk v. Lepple*, N. J., 17 Atl. Rep. 851.

111. REPLEVIN—Evidence—Fraud. — Plaintiff owned a horse, which his brother sold as his own to defendant, and assigned the note taken in payment to plaintiff, who brought replevin on the ground of misrepresentations as to the property of the sureties on the note: *Held*, that plaintiff could rely on these representations, and could show what was done at the sale, and what was said by the seller and by defendant, and for whom the seller was acting at the sale. — *Pangborn v. Ruemenapp*, Mich., 42 N. W. Rep. 78.

112. SALE—Mortgage. — An instrument of writing by which the maker binds himself to pay a sum of money, and mortgages and conveys a mule as security, with a recital that part of the debt is the purchase money for the mule, and a further provision that it was to remain the vendor's property until paid for, shows

a conditional sale, with reservation of title. — *Smith v. De Vaughn*, Ga., 9 S. E. Rep. 425.

113. SALE — Parol Evidence. — Where a sale of a chattel is consummated by a written bill of sale, which contains a description of the property, the receipt for the purchase money, and a warranty of title, parol evidence is inadmissible to prove an additional parol warranty of the soundness of such chattel. — *Rodgers v. Perrault*, Kan., 21 Pac. Rep. 287.

114. SLANDER. — Words are actionable in themselves only where an offense is imputed by them for which the party is liable to indictment and punishment, either at common law or by statute. To say of a married woman that she is a prostitute is necessarily to impute to her the guilt of adultery, and, as adultery is indictable, such words are actionable *per se*. — *Davis v. Sladden*, Oreg., 21 Pac. Rep. 140.

115. SPECIFIC PERFORMANCE. — Where a written contract is entered into to discontinue an action in the marine court, and to vacate a judgment entered therein, in favor of a defendant, and such contract is lost, there is no adequate remedy at law for a violation of such contract, and an action may be maintained for specific performance. — *Deen v. Milne*, N. Y., 20 N. E. Rep. 861.

116. TAXATION—Sale. — Rev. St. Ind. 1861, § 6487, providing that no tax sale shall be valid if the description is so imperfect as to fail to describe the land with reasonable certainty, etc., applies to a suit brought after its passage to set aside a sale made previously. — *Mulliken v. City of La Fayette*, Ind., 20 N. E. Rep. 847.

117. TELEGRAPH COMPANY—Negligence. — As to the negligence of telegraph company in giving wrong name of place from which money was telegraphed. — *West. Union Tel. Co. v. Simpson*, Tex., 11 S. W. Rep. 385.

118. TRIAL — Instructions. — Where the jury are correctly instructed that if they find certain facts they shall find for the plaintiff, it is not error to refuse to give the converse of the proposition, that if they do not find such facts they shall find for the defendant. — *Clark v. Carlisle Gold Min. Co.*, N. Mex., 21 Pac. Rep. 356.

119. TRUSTS—Purchase Money. — Where a purchaser of lands, unable to make the deferred payment, borrows for that purpose money from a third person, to whom he procures the title to be conveyed by his vendor, the third person agreeing to convey to the purchaser upon repayment of advances, the relation between the parties is that of vendor and vendee and not mortgagee and mortgagor. — *Mosely v. Mosely*, Ala., 5 South. Rep. 732.

120. TRUSTS. — Where a trustee obtains from his *cestui que trust* a release of his contingent remainder in the trust fund, for inadequate consideration, without informing him that a part of the fund has been used in the purchase of land which has been conveyed to the trustee's wife, such release should be held invalid for the suppression of a material fact. — *Waldrop v. Leaman*, S. Car., 9 S. E. Rep. 468.

121. VENDOR AND VENDEE. — Whoever purchases land upon which a former vendor or lessor has imposed an easement, charge, or restriction in the manner of its use, such as would be enforced by a court of equity as against his vendee or lessee, the party purchasing the land with notice will take it subject to such easement, charge, or restriction. — *Newbold v. Peabody High's Co.*, Md., 17 Atl. Rep. 372.

122. VENDOR AND VENDEE. — An absolute and unconditional deed of premises, in which the consideration is expressed to be that the grantee shall provide for the support of the grantor during her natural life, cannot be rescinded on the ground of the subsequent failure of the grantee to furnish the promised support. — *Meyer v. Swift*, Tex., 11 S. W. Rep. 378.

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CURRENT EVENTS.

A CORRESPONDENT of the *Albany Law Journal*, calls attention to the fact that the Supreme Court of California in deciding the case of *Sesler v. Montgomery*, 28 Cent. L. J. 474, that words spoken to a wife by the husband, not in the presence of any other person do not constitute a publication within the meaning of the law of slander, treated the question as an entirely new one. He cites the case of *Wermhak v. Morgan* L. R. 20 Q. B. Div. 635, in which the precise point was decided by the Queen's Bench Division. Mr. Odgers in his law of libel and slander (published before this decision) says: "The question seems never to have arisen in England, possibly because in every such case there has been an immediate and undoubted publication of the same slander or exaggerated version thereof by the wife to some third person, for which the husband would be equally liable in damages and which would be easier to prove."

The most peculiar thing about the California case is that the court seems to have reversed itself on rehearing, without any disclosed reason except the very good but not often admitted one that they were in the first instance wrong upon principle, there being no authority, precedent or argument before them on the rehearing not known to them in the original decision. In the latter (28 Cent. L. J. 30) they say "that husband and wife are one person is a mere fiction" and that on principle a communication by a husband to his wife is a publication. In the opinion on rehearing they declare that "it is no more a fiction than any other general principle of law," and that such a communication does not constitute a publication.

THE legislatures of Missouri, Kansas, and Texas have enacted statutes against pools, trusts, agreements, combinations and confederations in trade, all of which are of doubtful efficacy, and, in the case of the Missouri one at least, illustrate, in a marked degree, the harm that results from hasty legislation.

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Of course, being new, there is room for much difference of opinion as to how its provisions will be construed and applied. It was framed without any legislative investigation of the business operations it seems intended to affect and without any consultation with business experts who might have given the legislature some light on the subject. In this regard they could with profit have followed the example of the New York legislature, who, through a committee of the senate, made thorough investigation of the subject. The aim of the Missouri legislature doubtless was merely to relieve business of the tyrannical domination of these trusts. But there is reason to fear that the provisions of the statute strike not only at such combinations, and ineffectively as it may yet appear, but also at some of the harmless and common agreements between individuals and firms in the same line of trade, and that it will hamper private individuals in the conduct of their private business much more than it will the trust for whom the trap was set. If this turns out to be the case and the legislation merely operates as an additional obstruction to the freedom of commerce between private individuals, it will prove a veritable boomerang in the hands of the anti-trust crusaders.

THE action of the Missouri legislature, in this regard, differs very materially from that of New York, a committee of the latter as above mentioned having submitted a report advising deliberation in dealing with these combinations. They define the trust proper as a combination of two or more persons, partnerships, or corporations in which the absolute control of the property of certain competing interests is placed in the hands of trustees, to be managed by them for the advantage of all concerned, and several owners of the competing properties receiving "certificates" of their interest in the trust in exchange for the property conveyed to it by each, so that each owner of the conveyed property becomes a joint owner of all of the trust estate, his interest corresponding to the value of the property placed in the trust by him. Tried by this measure they say that

many of the organizations commonly known as trusts are not trusts at all, but corners or combinations merely, whose general purpose is to lessen competition and regulate prices. They conclude that while the trust is full of dangers and should be repressed and hedged around by law, it is not, of necessity, a monopoly nor inconsistent with the public advantage within certain reasonable limitations, that the danger arising from the exercise of its power is greatly lessened by the inventions and discoveries of the age; that the new elements on which the principle of combination seizes are balanced and offset by other and, if possible, more powerful forces of modern civilization, and that such balancing forces are far more potent to that end than any arbitrary rules of legislative enactment. They hold that the right of combination among capitalists, manufacturers or common carriers for every purpose consistent with the public welfare should not be unnecessarily restrained but that combinations aiming at monopoly should be rigidly prohibited. They counsel deferring legislative action until the court of last resort shall have passed upon the questions raised in the action by the attorney general against the Sugar Trust.

In this connection, the language of Chief Justice Fuller in *Gibbs v. Consolidated Gas Co.*, reported on page 534 of this issue will be of interest. There the principle is clearly announced, though not necessary to the decision of the case, that combinations among those engaged in business impressed with a public or *quasi* public character which are manifestly prejudicial to the public interest cannot be upheld and that it is too well settled to admit of doubt that "a corporation cannot disable itself by contract from performing the public duties which it has undertaken and by agreement compel itself to make public accommodation or convenience subservient to its private interests."

From this decision it seems apparent that the common law imposes on corporations whose business is impressed with a public or *quasi* public character every disability imposed by these statutes, and it may be, every disability which ought in reason and fairness to be imposed.

Our sympathies are decidedly with the Supreme Court of Georgia in their recent declaration of war against long winded transcripts of records, A case recently appealed to that court, the record of which contained 275 closely written pages, made up in great part of colloquies and court wranglings between counsel, witticisms and retorts of counsel, remarks of the stenographer and page after page of the most irrelevant matter, was refused consideration, the court stating that while they were willing to do everything possible in the discharge of their duties, life was too short and the time required for other litigants too valuable to waste days in reading such a record as that presented. We are rejoiced to see this stand and protest on the part of the court, and trust others will follow the example. There are lawyers who seem to regard a record of a trial court as a narrative of their personal achievements, their legal prowess, their acumen, their brilliant sallies and quick repartee. The sooner such practitioners are lead to think otherwise, and records are eliminated of everything not necessary to a decision of the legal questions involved, the better it will be for the courts and litigants, to say nothing of the profession, the better class of which do not offend in this regard.

NOTES OF RECENT DECISIONS.

A DECISION involving the validity of contract for services in aid of an illegal purpose and one which, to some extent, strikes at the doctrine of combination between corporations, is that of the United States Supreme Court in *Gibbs v. Consolidated Gas Company*, 9 Sup. Ct. Rep. 553. The plaintiff sued for compensation for services he had rendered in negotiating and consummating a contract for a combination between gas companies. The court lay down the rule that if the contract for combination was forbidden by statute or by public policy, the plaintiff could not recover for services in negotiating the contract. The court directly holds that such a combination as was here attempted was in the teeth of an express statutory prohibition. But their decision is not put wholly on that ground as incidentally their opinion is indicated on

the subject of public policy as forbidding combination. Chief Justice Fuller says:

The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. pt. 2, p. 508, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a State of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and, if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Cloth Co. v. Lortsont*, L. R. 9 Eq. 345. "Cases must be judged according to their circumstances," remarked Mr. Justice Bradley in *Navigation Co. v. Winsor*, 20 Wall. 64, 68, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced." Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld. The law "cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of, what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong—are void." *Bish. Cont.* § 549; *Iron Co. v. Extension Co.*, 28 Cent. L. J. 454; *Trist v. Child*, 21 Wall. 441; *Irwin v. Williar*, 110 U. S. 499, 4 S. C. Rep. 160; *Anot v. Coal Co.*, 68 N. Y. 558; *Salt Co. v. Guthrie*, 35 Ohio St. 686; *Woodruff v. Berry*, 40 Ark. 261; *Railroad Co. v. Railroad Co.*, 3 Rob. (N. Y.) 411; *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 484; *Railroad Co. v. Collins*, 40 Ga. 582; *Coal Co. v. Coal Co.*, 68 Pa. St. 173. It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests. "Where," says Mr. Justice

Miller, delivering the opinion of the court in *Thomas v. Railroad Co.*, 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

An interesting question of privileged communications was decided by the Supreme Court of Wisconsin in *Selden v. State*, 42 N. W. Rep. 218. There defendant was prosecuted for perjury alleged to have been committed in making affidavit that he did not know and could not ascertain where his wife could be found, the purpose of the affidavit being to procure publication of summons in an action for divorce. The circuit court allowed a witness, who was the wife's attorney in the divorce suit, to produce letters written by the husband to the wife during marriage, though the contents were not shown, but only the address, date, etc., which tended to show that defendant did know where his wife was. The court here held this to be error upon the ground that such letters were confidential communications between husband and wife, and also confidential papers between an attorney and client. They say:

So far as Knowles, the attorney of the defendant, Emma, was concerned, the production by him of the letters as genuine was a double violation of this protected confidence: First, of that reposed in him by his client, Emma S. Selden, and, secondly, of that between herself and her husband—without her consent. If these letters were confidential, as between herself and her husband, they were none the less so in the hands of her attorney, Knowles, and, if she could not disclose them, of course he could not. But, besides this, he was betraying her confidences also, which was a double violation of the rule. She had demanded a return of these letters before he so disclosed and produced them. It is surprising that when she was unwilling herself to disclose or produce these letters of her husband, and was unwilling that her attorney, Knowles, should do so, Knowles should have been allowed to authenticate and produce them, and that the district attorney should have been allowed to introduce them in evidence, to the extent they were offered, to convict the husband of the crime with which he was charged. In her letter to her counsel, Knowles, Dated December 1, 1888, she demanded a return of the letters, as she says, "in your charge and left with you while you were acting as my attorney and counsel. I intrusted them with you as such counsel, to be used only in assisting me in litigation, and from which to secure your advice. The letters I consider confidential communications between myself and husband, and in

no other way, and while I was your client I intrusted them with you knowing the confidential relations existing between attorney and client." This letter was in evidence. The authorities cited by the attorney-general are very far from being applicable to a case like this. Knowles was not an "eavesdropper," or a person who merely overheard communications or conversations between husband and wife, and it made no difference in favor of their admissibility that he used the letters as his authority for making the original complaint against the plaintiff in error, or in instituting the prosecution against him. It is a case where the husband is on trial for a crime which did not involve any personal violence or injury against herself, and what he had said or communicated to her as his wife is sought to be proved against him, either by his (the attorney's) voluntary disclosure of them as a witness, or by the production of his letters containing such communications; and, more than this, the letters containing such confidential communications are confided to her counsel for no such purpose, and he voluntarily authenticates and produces them, in violation of her confidences with her husband, and her confidences with himself as her counsel, and without her consent and against her directions. There is not an authority by the decision of any respectable court that sanctions the disclosure of such confidences between husband and wife and attorney and client. Both branches of this evidence are made incompetent by our statute. These statutes express the most stringent rules ever laid down by the courts for the protection of connubial and professional confidences. They would seem to have been specially made for this case. The facts here meet every letter of these statutes. Aside from these statutes, this disability of husband and wife and of an attorney has been established by numberless decisions of the courts in this country and in England. The principles upon which it is established have become elementary. Only a few cases need be referred to, and such as are particularly applicable to the facts. *Mills v. U. S.*, 1 Pin. 73; *Yager v. Larsen*, 22 Wis. 184; *Bliss v. Franklin*, 13 Allen, 244; *State v. Welch*, 26 Me. 30.

A CONSTRUCTION of the national banking act is to be found in the decision of *Thompson v. St. Nicholas Nat. Bank*, 21 N. E. Rep. 57. There it was held that the provision of the national banking act which makes it unlawful to certify checks unless the person drawing the check has on deposit with the bank an amount of money equal to the amount of such check, etc., does not render void the making or payment of such check, as a matter of contract between the bank and a depositor who, to secure the bank, has pledged certain bonds. The court says:

The main contention of the appellants is that the transaction by which the defendant certified checks for Capron & Merriam, without having an equivalent amount of money on deposit to meet them, was a violation of section 5208 of the United States Revised Statutes, and that no valid debt against Capron & Merriam was created thereby; or, in other words, that the defendant did not become a *bona fide* holder of such bonds by reason of payments made in pursuance of such alleged illegal and prohibited arrangement. *

* * It will be seen that the statute affirms the legality of the contract of certification, and expressly prescribes the consequences which shall follow its violation. It therefore appears that, so far from making the contract of certification void and illegal, its validity is expressly affirmed, and the consequences which follow a violation are specially defined, and impliedly limit the penalty incurred to a forfeiture of the bank's charter and the winding up of its affairs. There is a clear implication from this provision that no other consequences are intended to follow a violation of the statute. It would, indeed, defeat the very policy of an act intended to promote the security and strength of the national banking system if its provisions should be so construed as to inflict a loss upon them, and a consequent impairment of their financial responsibility. The decisions of the Supreme Court of the United States are uniform in giving this construction to the provisions of the national banking act. *Bank v. Stewart*, 107 U. S. 676; *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99. The principle decided in *Bank v. Stewart* seems to be in point. There the bank made a loan upon the security of shares of its own stock, which loan was prohibited by section 5201 of the United States statutes. After the debt became due the bank sold the shares and applied their proceeds to the payment of the debt. The administrators of the debtor sued to recover the proceeds of the sale, and it was held that they could not recover, as the contract had been executed. In *Bank v. Matthews* the court held that a mortgage on real estate taken to secure an existing indebtedness and for future advances was a valid security in the hands of the bank, although by sections 5136 and 5137 of the Revised Statutes of the United States it was impliedly prohibited from taking such securities. It was held that the government alone was entitled to prosecute for the offense committed by the bank in taking a prohibited security, Justice Swaine saying: "The impending danger, of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress." The same principle was held by this court in *Bank v. Savery*, 82 N. Y. 291.

A good example of a statute void as impairing the obligation of contracts, is found in the case of *Phinney v. Phinney*, 17 Atl. Rep. 405, decided by the Supreme Court of Maine. It was there held that a mortgage must be governed by the law in existence when executed, both as to its foreclosure and redemption, and that an act extending the time of such foreclosure and redemption was void as impairing the obligation of contracts. The court says:

Does the legislative act upon which this bid is founded so affect the rights of the mortgagee that the obligation of his contract is impaired, and thus entitle him to protection at the hands of the court? While it is not intended to disturb the proper application of the principle that a State, to a certain extent and within proper bounds, may regulate the remedy, yet, if by subsequent enactment it so changes the nature and extent of existing remedies as materially to impair the rights and interests of a party in a contract, this is as much a violation of the compact as if it absolutely destroyed his rights and interests. The constitutional prohibition secures from attack, not merely the con-

tract itself, but all the essential incidents which render it valuable, and enable its owner to enforce it. Thus it was said in the case of *Bank v. Sharp*, 6 How. 301: "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations—dispensing with any part of its force." The doctrine is also there asserted that if, in professing to alter the remedy only, the rights of a contract itself are changed or impaired, it comes within the spirit of the constitutional prohibition; and when the remedy is entirely taken away, or "clogged by condition of any kind, the right of the owner may indeed subsist and be acknowledged, but is impaired." "And the test, as before suggested," remark the court, "is not the extent of the violation of the contract, but the fact that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone." It *Louisiana v. New Orleans*, 102 U. S. 206, Mr. Justice Field, in the course of the opinion, says: "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of those means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent 'weakened.'" See, also, *Green v. Biddle*, 8 Wheat. 84. The result arrived at in all the decisions bearing upon this question seems to be that the legislature may alter or vary existing remedies, provided that in so doing their nature and extent are not so changed as materially to impair the rights and interests of parties to existing contracts. This rule, while somewhat vague and unsatisfactory, is the most certain general one of which the nature of the subject admits. The difficulty arises in its application to particular cases, and distinguishing between what are legitimate changes of remedy and those which impair the obligation of contract. Every case must be determined, in a great degree, by its own circumstances. In a leading case upon this point in the United States court (*Bronson v. Kinzie*, 1 How. 311), the distinction between legislation affecting the remedy only and that which transcends the constitutional limit is carefully given. In that case, as in this, the legislation pertained to the extension of time for the redemption of mortgages. A mortgage was executed in Illinois, containing a power of sale under a decree of foreclosure. Subsequently an act of the legislature was passed, giving the mortgagor twelve months, and any judgment creditor of the mortgagor fifteen months, within which to redeem the mortgaged property from a judicial sale, and prohibiting its sale for less than two-thirds of its appraised value. The court held the act void, as applied to mortgages executed prior to its passage. It was contended in argument in support of the act, as in the case now before us, that it affected only the remedy of the mortgagee, and did not impair the contract. But the court replied that there was no substantial difference between a retrospective law declaring a particular contract to be abrogated and void and one which took away all remedy to enforce it, or incumbered the remedy with conditions that rendered it useless or impracticable to pursue it. The language of Chief Justice Taney, who delivered the opinion of the court, in reference to that statute has an appropriate bearing upon the case before us, and therefore we cannot forbear quoting it: "This brings us to examine the statutes which have given rise to this

controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to ingraft upon it new conditions, injurious, and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives to the mortgagor, and to the judgment creditor, an equitable estate in the premises which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution." This decision has since been repeatedly affirmed. The case of *McCracken v. Hayward*, 2 How. 611, arose the following year, under the same statute law of Illinois, and the same question was involved as in *Bronson v. Kinzie*, *supra*, except that it arose upon the sale of real estate upon execution. The court arrived at the same conclusion as in the former case. The same is true in the case of *Gantly's Lessee v. Ewing*, 3 How. 716, which arose under a similar statute in Indiana, and the court there held that the legislature could not, by such a law, impair or defeat the obligation under the disguise of regulating the remedy. The question was again before the court in *Howard v. Bugbee*, 24 How. 461, upon a statute of Alabama allowing a judgment creditor of a mortgagor to redeem the land within two years after a sale under a decree of foreclosure of the mortgage, and the decision of the court, in accordance with the foregoing principles of the cases cited, was that the statute was unconstitutional, as impairing the obligation of the contract of mortgages, as to all such mortgages as were in existence when the statute was enacted. In various forms and numerous cases the principle has come before the courts, but the doctrine established by the decisions to which we have referred, has been firmly adhered to by the Supreme Court of the United States, and the courts of last resort in most of the States. Additional authorities might be cited, indicating the judicial sentiment and opinion upon this question. *Malony v. Fortune*, 14 Iowa, 417, and *Cargill v. Power*, 1 Mich. 369, where an extension of time for the redemption of a pre-existing mortgage was held unconstitutional: *Blair v. Williams*, 4 Litt. (Ky.) 34, a law extending the time of a replevin bond beyond that in existence when the contract was made, held unconstitutional: *Gunn v. Barry*, 15 Wall. 610, and *Edwards v. Kearzey*, 96 U. S. 595, where it was so held in relation to statutes exempting from sale on execution any substantial part of the debtor's property not so exempt at the time the debt was contracted: *Brine v. Insurance Co.*, *Id.* 627, 637, laws in existence in regard to real estate, when a contract is made in relation thereto, including the contract of mortgage, enter into and become a part of

such contract. See, also, *Ex parte Christy*, 8 How. 328; *Clark v. Reyburn*, 8 Wall. 322; *Walker v. Whitehead*, 16 Wall. 317, 318; *Kring v. Missouri*, 107 U. S. 233, 2 S. C. Rep. 443; *Memphis v. U. S.*, 97 U. S. 298; *Selbert v. Lewis*, 122 U. S. 284, 294, 7 S. C. Rep. 1190; *Butz v. City of Muscatine*, 8 Wall. 575; *Mobile v. Watson*, 116 U. S. 305, 6 S. C. Rep. 398; *Curran v. State*, 15 How. 319. In the case last cited it was said by the court that "it by no means follows, because a law affects only the remedy, that it does impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the constitution, is that duty of performing it which is recognized and enforced by the laws; and, if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same."

The court distinguishes the cases of *Van Baumboch v. Bade*, 9 Wis. 559; *Holloway v. Sherman*, 12 Iowa, 282; *Bank v. Eldredge*, 28 Conn. 556; *Railroad Co. v. Railroad Co.*, 59 Me. 31, saying that in those decisions the foreclosure was under proceedings in equity where the court of chancery was authorized to decree foreclosure—a proceeding which has never existed in this State.

AN interesting question of fire insurance arose in the case of *Royal Ins. Co. v. Lubelsky*, 5 South. Rep. 768, decided by the Supreme Court of Alabama. There, a policy described the insured property as a "dwelling house, when completed to be occupied as a private dwelling house," and provided that if it should become vacant or unoccupied without written permission indorsed on the policy, the policy should be void. At the time of the negotiations, the building was being erected. It was intended that the house should be leased on completion, and the company's agents were so informed, and it was leased two months after the issuing of the policy, but afterwards became vacant and unoccupied, when it was burned. The assured having had knowledge of the vacancy, and not having procured permission therefor, it was held that the policy was forfeited. The court says:

The circumstances surrounding the contracting parties must be taken into consideration in construing this, as all other contracts. When the negotiation for insurance was commenced, as we have said, the house was in process of erection. An agent was authorized to rent it when complete, and the defendant's agents were informed of such purpose. The fence around the premises was completed only two days at most before the date of the policy. In the light of these facts, we must construe the phrase, "when completed to be occupied as a private dwelling-house." The adjudged cases are quite in conflict as to the force to be given phrases analogous to this when inserted in insurance policies. In *Joyce v. Insurance Co.*, 45 Me. 168, it was held that where a house was represented in

a policy as "occupied by" the insured, this was a description merely, and did not amount to an agreement that the insured should continue in occupation of it. In *Protection Co. v. Douglas*, 58 Pa. St. 419, it was held that the insurance of a building as a "dwelling-house," or as an "occupied dwelling-house," does not imply an engagement or warranty that it shall continue occupied while the risk endures. It was regarded by the court as a "matter of description of the subject, rather than stipulation respecting its use." There are other rulings to the same effect. *Insurance Co. v. Usaw*, 112 Pa. St. 80; *Catlin v. Insurance Co.*, 1 Sum. 435. In the case last cited, the phrase under consideration was, "at present occupied as a dwelling-house, but to be hereafter occupied as a tavern." This was held by Judge Story not to be a warranty of continued occupation of the house as a tavern, but, at furthest, a mere representation of an intention to occupy it as such. In *Herrick v. Insurance Co.*, 48 Me. 558, the Supreme Judicial Court of Maine made a distinction between the representation of an expectation and of an existing fact, the latter being in the nature of a warranty, and the former not. The application for insurance there, in describing the property, used the phrase, "will be occupied by a tenant." This was said not to be a warranty that the house should be occupied by a tenant during the whole period of the risk. There does not appear to have been any clause in the policy making it void, as in this case, in the event of becoming vacant or unoccupied. In *Hough v. Insurance Co.*, 29 Conn. 10, the Connecticut Supreme Court of Errors, in a case where the house was described as "vacant, but to be occupied," held this phrase to imply the reservation of the right to put a tenant in the vacant building, not the incurring of an obligation or warranty to do so. If a warranty, it was said that it would be a question for the jury to determine whether it had remained vacant an unreasonable time. In *Alexander v. Insurance Co.*, 66 N. Y. 464, a policy of fire insurance described the plaintiff's property as "his two story extension frame building occupied as a dwelling." The New York Court of Appeals held that this statement as to occupancy was not necessary to the identification of the building, and, inasmuch as it related to the risk, it was a warranty which would make the contract void, if the house was not at the time occupied as a dwelling. It was construed to affect the risk in view of the provision in the policy that if the premises should become vacant and unoccupied the policy would become void. Construing the present policy in the light of surrounding facts, and construing all its parts together, especially the parts quoted and italicized in the beginning of this opinion, we see but one way in which they can be harmonized. The phrase, "when completed to be occupied as a private dwelling-house," must be taken to represent the mutual expectation of the contracting parties that the house was to be so occupied either by the owner, or some one else by his authority, as tenant or otherwise. * * * The evidence shows that the house was vacated by the tenant, and remained unoccupied, or without any furniture or any human being living in it, for fourteen days, and it was destroyed by fire during this time. It is admitted to have become both vacant and unoccupied. Under all the authorities the policy became *inso facto* forfeited, and the liability of the insurer terminated, as the fact of non-occupation was known to the insured, and no permission was procured from the company waiving the observance of this condition. And this is so without regard to the period of time this state of vacancy or non-occupancy continued, because it is the express stipulation of the

parties, and such stipulation is the law of the contract, binding alike on the parties and the court. *Dennison v. Insurance Co.*, 52 Iowa, 457; *Insurance Co. v. Meyers*, 63 Ind. 238; *Cook v. Insurance Co.*, 70 Mo. 610; *Insurance Co. v. Padfield*, 78 Ill. 167; *Gamwell v. Insurance Co.*, 12 Cush. 167; *Soye v. Insurance Co.*, 6 La. Ann. 761; *Alston v. Insurance Co.*, 80 N. C. 326; *Insurance Co. v. Zænger*, 68 Ill. 464; *Insurance Co. v. Thomas*, 74 Ala. 578; *Herrman v. Insurance Co.*, 85 N. Y. 162.

COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

1. Introduction.
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1. *Introduction.* — The term, confidential communication, distinguishes a class of evidence which the law excludes on the ground of public policy. It embraces communications to president, governors, and high State officials; sources of information to detective police; proceedings before grand juries; proceedings within the room of a petit jury; facts offensive to public decency; communications between husband and wife; attorney and client. The rule which excludes such communications is founded on the conviction that greater mischief than benefit would flow to society from their admissibility as evidence. Sometimes it is the character of the information, at other times, it is the rights of the person which urge the rule; but, in either case, the rule is founded on public policy.¹

2. *Attorney and Client — General Rule.* — An attorney cannot be compelled to disclose communications made to him by his client in the line of professional employment.² The considerations which give rise to the rule afford a correct guide in its application and are well stated by Chief Justice Shaw, in *Hatton v. Robinson*, 14 Pick. 422: "The principle of the rule which applies to attorneys and clients is, that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it they should be permitted to avail them-

selves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sustain this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed."

3. *Extent of the Rule.* — The privilege extends to all communications made by the client to his attorney for the purpose of obtaining advice for legal purposes, or to enable him to conduct litigation.³ The rule applies to facts revealed, although they are not essential to a full understanding of the subject presented to the attorney. The client is not presumed to know what is relevant and what is not relevant to his case. For this reason the rule must be applied liberally, that the attorney may be possessed of every fact necessary to establish his client's claim or protect his rights and to give him correct legal advice.⁴ Interpreters, law clerks, and the agents of attorneys come within the rule. Whatever is used as a means of communication between the attorney and client is comprehended.⁵ It was formerly held that the privilege existed only when the communication was made for the purpose of bringing or defending an action,⁶ but courts now apply the rule, not only when attorneys are employed in litigation, but also when they transact business for clients.⁷

4. *Privilege Belongs Only to the Client.* — The secrecy enjoined upon the solicitor or counsel is the personal privilege of the client alone;⁸ the latter may waive it if he chooses

¹ 1 Greenl., § 240; 2 Story Eq., § 932; *Cholusondeley v. Clinton*, 19 Ves. 261; *Evitt v. Price*, 1 Sim. 483; *Peabody v. Norfolk*, 98 Mass. 452; *Morrison v. Moat*, 6 Eng. Law & Eq. 14; *Cromack v. Heathcote*, 2 Broad. & Bing. 21-9; *Granger v. Warrington*, 3 Gilm. (Ill.) 299; *In re Matin*, 5 Blatchf. 303; *Rhoades v. Selin*, 4 Wash. 718.

⁴ *Cleave v. Jones*, 8 Eng. Law & Eq. 554.

⁵ *Dubarre v. Livette*, *Peake's Cas.* 77; *Jackson v. French*, 3 Wend. 337; *Andrews v. Solomon*, 1 Pet. C. C. 356; *Perkins v. Hawshaw*, 2 Stark, 239; *Femoick v. Reed*, 1 Meriv. 114.

⁶ *Williams v. Madie*, 1 C. & P. 158.

⁷ *Greenough v. Gaskell*, 1 My. & K. 102.

⁸ *Lindsey v. Talbot*, Bull. (N. P.), 284; *Wilson v. Rastall*, 4 T. R. 753.

¹ 1 Greenl., § 236-7-8.

² 1 Greenl., § 237-40, note 2; *Coveny v. Tannahill*, 1 Hill, 33; *Follett v. Jeffreys*, 1 Sim. (N. S.) 3.

and call the attorney to testify as to what passed between them.⁹ While counsel will not be allowed to testify whether his client is making the same statement as he made in consultation with him,¹⁰ yet the client can be interrogated as to his own statements to the attorney.¹¹ Although this was formerly the law, courts now seem to hold that if the attorney will not be permitted to divulge a communication, his client cannot be compelled to state the conversation.¹² In *Passmore v. Passmore*,¹³ the court said: "It is every day practice to permit a party to justify his conduct by testifying that what he did was by advice of counsel, and the counsel is allowed to testify for this purpose, to the advice he gave. There is a privilege of secrecy as to what passes between attorney and client, but it is the privilege of the client and he may waive it if he chooses." This rule applies to all communications made after the relation of attorney and client is established; a retainer need not be paid to fix this relation; it will be sufficient if the attorney has undertaken the business and the communication has been made for the purpose of professional advice.¹⁴

5. *Where the Relation does not Exist.*—But this rule does not apply whenever an attorney performs an act for his client. The purpose of the rule is to allow full freedom of intercourse whenever the professional aid of an attorney is required; it cannot be invoked to protect one against his own loquacity and imprudence. Besides, an attorney can have knowledge of many things from his business relation with clients which cannot be said to be known in confidence. Courts have therefore made many distinctions. A man is not acting as an attorney when he is consulted about making a deed;¹⁵ communications, obviously, foreign to the subject under consideration are not privileged,¹⁶ nor if made to one erroneously assumed to be an attorney.¹⁷

⁹ *Passmore v. Passmore's Estate*, 16 N. W. Rep. 171; 17 Cent. L. J. 19; *Fowler v. Schriber*, 38 Ill. 172; *Benjamin v. Coventry*, 19 Wend. 353.

¹⁰ *Rex v. Withers*, 2 Camp. 578.

¹¹ *Greenough v. Gaskell*, *supra*.

¹² *Hemenway v. Smith*, 28 Vt. 701; *Carnes v. Platt*, 36 N. Y. Sup. Ct. 360; *Bigler v. Reglier*, 43 Ind. 112; *State v. White*, 19 Kas. 445; *Phil. Ev.*, § 833.

¹³ *Supra*.

¹⁴ *Sargent v. Hampden*, 38 Me. 581.

¹⁵ *Broad v. Pitt*, 3 C. & P. 518.

¹⁶ *Cobden v. Kendrick*, 4 T. R. 431.

¹⁷ *Fountain v. Young*, 6 Esp. 113.

An attorney who witnesses dealings between his client and a third person may testify as to all communications made at that time;¹⁸ so an attorney may be called to prove a deed to which he is a witness.¹⁹ In regard to a warrant of attorney, an attorney was called to testify to all that passed respecting the execution of the instrument.²⁰ Counsel is a competent witness as to an agreement made with a third person at the request of his client.²¹ Statement made to an attorney to show that the cause in which he is sought to be retained does not conflict with interests he represents for another is not privileged.²² If a man consults an attorney in the presence of a third person, or talks so loudly he is overheard, the privilege cannot be claimed to exclude the attorney in one instance, or the person overhearing, in the other instance.²³ If communications are made to an attorney in the course of professional employment by persons other than his client, or than the latter's agents, and although such communications may be of vast importance to the client, yet it has been decided that they are not privileged. The rule only covers communications made by the client, or whatever agency he may employ.²⁴ Mere statements made in the presence of the counsel, but not made to him, are not privileged.²⁵ Attorney who acts as a mere scrivener in making a deed is not privileged;²⁶ communications made to a student, who is not a clerk, either for the purpose of advice or casually, are not privileged.²⁷

6. *Attorney may be a Witness for some Purposes.*—An attorney may be a witness as to the existence of a paper, to allow secondary evidence as to its contents, but he cannot be compelled to produce or disclose the same,²⁸ or he may be compelled to testify whether his client swore to the answer in chancery on which he is indicted for perjury.²⁹ An attor-

¹⁸ *Coveny v. Tannahill*, *supra*.

¹⁹ *Doe v. Andrews*, Cowp. 845.

²⁰ *Robson v. Kemp*, 5 Esp. 52.

²¹ *Thayer v. McEwen*, 4 Bradw. 418.

²² *Heaton v. Findlay*, 12 Pa. St. 304.

²³ 15 Cent. L. J. 260.

²⁴ *Randolph v. Quidnek Co.*, 23 Fed. Rep. 278; 20 Cent. L. J. 396; *Crosby v. Berger*, 11 Paige, 377.

²⁵ *Shaffer v. Mink*, 14 N. W. Rep. 726.

²⁶ *Machette v. Wanless*, 3 Colo. 169.

²⁷ *Barnes v. Harris*, 7 Cush. 576; *Holman v. Kimball*, 2 Vt. 555.

²⁸ *Coveny v. Tannahill*, 1 Hill (N. Y.), 33; *People v. The Sheriff of New York*, 29 Barb. 622.

²⁹ *Doe v. Andrews*, Cowp. 845; *Studley v. Saunders* 2 Dowl. & 2 Pyl. 347.

ney may also be obliged to identify his client's hand writing.³⁰ An attorney may be compelled to disclose what he did with a certain deed when he got it, but not its contents.³¹ So also, an attorney's clerk can be questioned as to whether he received a certain paper from a client.³² If an attorney sue for his fee, he may testify as to the nature of the services rendered and the character of the work performed.³³

7. *When the Service Rendered by the Attorney is for a Criminal or Fraudulent Purpose.*—A client is permitted to converse with his counsel in the most free manner, either for the purpose of defending an action, or commencing a suit, or for the object of ascertaining his rights and liabilities, or to protect himself against litigation threatened,³⁴ but the law will not allow a client to avail himself of the superior legal knowledge of an attorney in order that he may the more safely evade the law; to extend the protection so far, would hold out an inducement to men to become learned in the law that they may go into partnership with men unscrupulous and artful, with the assurance that they may cover up their part in the dishonest transaction by pleading a privileged relation, as if the license of an attorney was a commission authorizing him to assist and advise others to do what he would not be permitted to do for himself in his own affairs.³⁵ In *Duffin v. Smith*,³⁶ the defendant called the plaintiff's attorney to prove the consideration of the bond as usurious and he was admitted. Lord Kenyon said: "When anything is communicated to an attorney by his client for the purpose of his defense, he ought not to divulge it. But where he himself is as it were, a party to the original transaction, that does not come to his knowledge in the character of attorney and he is liable to be examined the same as any other person." When an attorney advises and assists a client in the perpetration

of a fraud, courts incline to hold the attorney a party to the fraud and that he is not discharging the duty of an attorney in such cases but is "*particeps delicto*." On the other hand, a client may do what the law allows, although the act cannot be commended on strictly moral grounds; but the law does not allow conveyances for the purpose of defrauding creditors, and communications to an attorney to obtain advice and directions to accomplish that end in violation of law, ought not to be protected. There is no consideration that can justify a communication for that purpose; the object is to form a contract which will circumvent creditors, and defraud them out of their legal rights; the contract is illegal and void if the contract is proven; the duty asked of the attorney is to shape matters so the fraud cannot be proven; can it be said an attorney is discharging his professional duty in contributing to such a result. Every attempt on the part of courts to protect communications under such circumstances, is a step in favor of enlarging the opportunities for fraud.³⁷ Justice Bronson, in *Coveny v. Tannahill*,³⁸ says: "The privilege of attorney and client does not extend to every fact which the attorney may learn in the course of his employment. There is a difference in principle between communications made by the client and acts done by him in the presence of the attorney. It may be and undoubtedly is sound policy to close the attorney's mouth in relation to the former, while in many cases, it would be grossly immoral to do so in regard to the latter. It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his attorney, in preparing for his defense, but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation he was retained as counsel to see or aid in the transaction. Indeed, I think there can be no such relation as attorney and client, either in the commission of crime or the doing of a wrong by force or fraud to an individual. The privileged relation of attorney and client, can only exist for lawful and honest purposes." In *Bank of Utica v. Mersereau*,³⁹

³⁰Hurd v. Morning, 1 Car. & Payne, 372; Johnson v. Davenport, 19 Johns. 134.

³¹Hington v. Gage, 8 Viner Abr. 548.

³²Eicke v. Nokes, 1 M. & M. 303.

³³17 Cent. L. J. 201; Snow v. Gould, 74 Me. 540.

³⁴Bank of Utica v. Mersereau, 3 Barb. Ch. 598; Coveny v. Tannahill, 1 Hill (N. Y.), 33; Follett v. Jeffreyes, 1 Sim. (N. S.) 3.

³⁵Amesly v. Earl of Anglesea, 17 How. St. Tr. 1229; Gartside v. Outram, 3 Jur. (N. S.) 39; Story's Eq. Pl. §§ 601, 602; Robinson v. Flight, 8 Jur. 888.

³⁶Peake's N. P. Cas. 108.

³⁷See also 1 Gilb. Ev. 277; Lord Say and Seal's Case, 10 Mod. 40; Russell v. Jackson, 15 Jur. 1117.

³⁸Supra.

³⁹Supra.

the court said: "It may not be a very moral act in a debtor, so to dispose of his property as that his creditors may be effectually prevented from getting execution, but such an act, *per se*, is no fraud, if the disposition be one which the law allows." It is not accurate to speak of cases of fraud contrived by attorney and client together as cases of exception to the rule. They are cases not coming within the rule itself; for the rule does not apply to all that passes between a client and his attorney, but only as to what passes between them in *professional* confidence, and no court can permit it to be said that the *contrivance* of fraud can form part of the *professional* occupation of an attorney or solicitor." The law allows a *bona fide* sale by a grantor to an innocent grantee, although the purpose of the grantor was to defraud creditors. The burden is on the complainant to show that the grantee participated in the scheme to defraud the grantor's creditors. Evidence given by the attorney of the grantor of the guilty intent of the latter will not weigh against the grantee until a combination to defraud is first proven and until this is shown, it will not be evidence on which a conveyance can be set aside. But in all cases where a *bona fide* consideration is not shown in the answer to a creditor's bill, there is no objection to interrogating the attorney as to the character of the transaction. If these are the limitations in the application of the rule, I see little virtue in it; because in one case, when the combination is proven, or in the other, when the answer fails to show a *bona fide* consideration, the complainant has established his right to have the conveyance set aside. But the authorities are uniform and emphatic that if an attorney plans and contrives with his client to dispose of the latter's property so as to defraud creditors, he becomes a principal, a co-conspirator and is obliged to testify.⁴⁰ In Lord Say and Seal's Case,⁴¹ a fraudulent date was inserted in a deed in the presence of the attorney and the latter was obliged to answer a question directed for the ascertainment of that fact. In

Hatton v. Robinson,⁴² an attorney was requested by a debtor to draw up a mortgage deed of his personal property and the debtor disclosed his purpose in making such a conveyance but the attorney's opinion was not asked whether on the statement of facts made to him by the debtor the conveyance would be legal. His communication to the attorney as to the object in making the conveyance was admitted in evidence. In Garteside v. Outram,⁴³ Lord Hatherly said: "There is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a *crime* or a *fraud* and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any *fraudulent intention* on your part; such a confidence cannot exist." The principle of law, therefore, is well settled; but recourse to this exception for the purpose of proving fraud is not clear from difficulties. In Higbee v. Dresser,⁴⁴ the court held: "A mere suggestion of fraud will not furnish sufficient grounds for setting aside so well known and salutary a rule as that which protects communications made between attorney and client. * * * If the evidence disclosed anything having the tendency to show that the witness was acting for himself as a party to the transaction, or that he was consulted in aid of any *dishonest purpose*, the matter would have raised a more serious question." "It seems that the legal adviser cannot be asked whether the conference between him and his client was for a lawful or unlawful purpose, though if from independent evidence, it should appear that the communication was made by the client for a criminal purpose, as for instance if the attorney was asked as to the most skillful mode of effecting a *fraud*, or committing any other indictable offense, it is submitted that on the broad principles of penal justice, the attorney would be bound to disclose such guilty project. Nay, it may reasonably be doubted whether the existence of an illegal purpose will not also prevent the privilege from attaching, for it is as little the duty of a solicitor to advise his client how to evade the law, as it is to contrive a positive fraud."⁴⁵

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⁴⁰ Greenough v. Gaskell, *supra*; Lord Say and Seal's Case, *supra*; Duffin v. Smith, *supra*; Hatton v. Robinson, 14 Pick. 416; DeWolf v. Strader, 26 Ill. 280; 1 Phillips Ev. 833; 1 Greenleaf on Ev. § 240 and note 2; Russell v. Jackson, 15 Jur. 117; Bank of Utica v. Mersereau, *supra*; Reynell v. Spyre, 10 Beav. 51.

⁴¹ 10 Mod. 40.

⁴² *Supra*.

⁴³ 26 L. J. Ch. 113.

⁴⁴ 103 Mass. 523.

⁴⁵ Phillips on Ev. § 833 and citations.

CHATTEL MORTGAGE—GROWING GRAIN—
NOTICE.

GILLILAN V. KENDALL.

Supreme Court of Nebraska, May 2, 1889.

1. A chattel mortgage upon growing grain is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in crib or bin, and a dealer in grain who, in good faith, in open market, purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage.

2. The mortgagor of chattels, until foreclosure, possesses a beneficial interest in the property mortgaged, and will convey a good title by a sale of such property to one who purchases in the open market in good faith, and without notice actual or constructive of the mortgage.

MAXWELL, J., delivered the opinion of the court:

This is an action by the plaintiff against the defendants to recover for certain growing corn, mortgaged by one Ashton to him, and a portion of which was gathered and sold to the defendants. On the trial the plaintiff recovered for the amount due Ashton upon the corn so sold. The plaintiff contends that he is entitled to recover for all the corn sold by Ashton to the defendants, although they had already paid Ashton therefor. The facts are substantially as follows: One Ashton gave two chattel mortgages to the plaintiff in error to secure payment of three of his promissory notes,—one in the sum of \$61.30, another in the sum of \$225.00, and a third in the sum of \$41.50,—which chattel mortgages covered the crop of corn which was growing upon the lands owned by the plaintiff, viz.: the W. $\frac{1}{4}$ of section 30, township 11, range 5, in Lancaster county. These chattel mortgages were duly filed for record in the office of the county clerk on the 3d day of July, 1885, and the 7th day of September, 1885, respectively. During the months of November and December, in the year 1885, the said Ashton gathered and sold, without the knowledge or consent of Mr. Gillilan, a portion of the matured crop of this corn to the defendants, Kendall & Smith, who purchased the same in open market at their elevator in Malcolm, through their agent, John Carpenter. Kendall & Smith are grain buyers at Malcolm, and it was admitted at the trial that they had no knowledge of Mr. Gillilan's lien upon the corn so purchased by them, except such constructive notice as the filing of the chattel mortgage gave them. The plaintiff introduced the notes in question, and the chattel mortgages securing the same, with proof that they were duly filed, and also testimony tending to show that the defendants had purchased from Ashton about 985 bushels of corn, and that such corn was worth, in the market at Malcolm, at the time stated, from 19 to 21 cents per bushel. There is no testimony tending to show the entire quantity of corn produced by Ashton on the land of the plaintiff in section 30, nor what portion of the crop, if any, Ashton was

to deliver to the plaintiff for rent. For aught that appears, the amount of corn still remaining on the farm is sufficient to satisfy the mortgages in question. The court instructed the jury as follows: "A party taking a chattel mortgage upon growing corn, in order to preserve his lien as against innocent purchasers, is bound to see that when the corn is gathered such notice is given to the public of his lien by keeping the same separate and unmixed with other corn as will prevent innocent parties from purchasing such corn; and in this case, if the jury believe from the evidence that the plaintiff, after the execution of the mortgages offered in evidence by him, did nothing more than to file his mortgages in the office of the county clerk, and allowed the corn to become mixed with other corn, and if the jury further believe from the evidence that the defendants, without actual notice of the existence of these mortgages, purchased the corn, or some portion of it, at their elevator in the town of Malcolm, in open market, then the plaintiff cannot recover, and your verdict will be for the defendant." To this instruction the plaintiff excepted, and now assigns the same for error. At law a chattel mortgage passes the legal title in the property mortgaged to the mortgagee, although the mortgagor retains an interest in the property, and may redeem the same at any time before a sale under a foreclosure of the mortgage. In other words, a chattel mortgage is a security in which the legal title to the property mortgaged passes to the mortgagee, but in which the mortgagor retains a beneficial interest. Necessarily, additional labor must be expended on a growing crop to harvest and care for the same. If the mortgagee intrusts this labor to the mortgagor, he to that extent, makes him his employee. If the entire property in the grain had passed to the mortgagee on the execution of the mortgage, then it would be the business of the mortgagee to gather and care for the crop, and if he failed to do so, it would go to waste. Where, therefore, the mortgagor remains in possession, and is permitted to gather the crop, it will be presumed that it was with the consent of the mortgagee. Now, suppose that the security is considerably more than sufficient to pay the debt secured, and is the principal means possessed by the mortgagor for paying ordinary debts, and the means, also, of feeding his stock, and that such mortgagor is feeding his stock from such grain, and selling portions of the same to meet his necessary expenses, and these facts are known to the mortgagee, or he has knowledge of facts sufficient to put him upon inquiry, he certainly cannot follow the grain, and compel the party who has purchased and paid for the same in open market to again pay him for said grain; nor could he claim a lien upon the stock for the grain used to feed it. If the mortgagor was a farmer, and the grain mortgaged included all that he possessed, and it was the intention of the parties that he should continue in the use of the grain for feed or other

necessary purposes about the farm as before the execution of the mortgage, it would not be a breach of the condition to carry out such intention, and the consent of the mortgagee may be implied; and so, that the security shall remain sufficient, the mortgagee would have no cause of complaint. A mortgage of growing crops does not necessarily imply a mortgage of the same grain gathered and placed in a granary or crib, at least so far as constructive notice, to be derived from the filing of a mortgage, is concerned. The lien as between the parties continues, no doubt, but our statutes do not favor secret liens, and this court has so declared in a number of cases. *Edminster v. Higgins*, 6 Neb. 265; *Rhea v. Reynolds*, 12 Neb. 133, 10 N. W. Rep. 549. A mortgage, therefore, of growing grain is not notice of a mortgage on grain in a crib or bin, where it has been lawfully placed there by the mortgagee, or by the mortgagor with his consent. If wrongfully or unlawfully removed, the rule would probably be different. At common law, the purchaser of goods in market overt, if he acted in good faith, ordinarily was protected. 2 Bl. Comm. 449, says: "But property may also, in some cases, be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of the law is that all sales and contracts of anything vendible, in affairs or markets overt (that is, open) shall not only be good between the parties, but also be binding on all those that have any right or property therein; and for this purpose, the Mirror informs us, were tolls established in markets, viz., to testify the making of contracts; for every private contract was discountenanced by law, inasmuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses." It is not the policy of the law to extend the doctrine of constructive notice to cases where the change in an article mortgaged, made with the consent of the mortgagee, will fail to put a purchaser upon inquiry as to a claim held by a lien on the property. Thus a mortgage of clay in the bank would not be notice to a purchaser of brick manufactured from such clay; nor of wool growing upon sheep of a lien upon the cloth manufactured therefrom. If the cases supposed differ from that under consideration, it is only in degree. In the case at bar a large amount of additional labor was required to husk and gather the corn and prepare it for market. If the mortgage lien continue as notice to third parties after such change in the condition of the property, why may not the mortgagee follow the grain to Chicago, New York, or, in case of its shipment, to England or France, to the ports of either country? No one will contend for such a rule, yet if the first purchaser is chargeable

with notice of a secret lien, why is not the second, third, or more remote purchaser? The more salutary rule, no doubt, is to require the mortgagee to look after his security, and, if change is made in its character, to see that his mortgage still imparts notice of his lien on the property to third parties. If the owner of goods stands by and knowingly permits them to be sold as the property of another, he will be estopped from afterwards asserting title thereto, and this rule would seem applicable to mortgages of personal property. There is another reason why the plaintiff cannot recover in this case. There is no proof whatever that the mortgaged property in his possession is not ample to secure his claim, and on the evidence before us he is entitled to recover nothing; but no objection is made on that ground. The grain in question was purchased in the open market. The mortgagor held an interest in the grain itself, and, there being no sufficient constructive notice to third parties, could pass a good title by the sale. The defendants, therefore, were not liable, and the instruction is not erroneous. The judgment of the district court must be affirmed. The other judges concur.

NOTE.—Without discussing the correctness of the conclusions arrived at by the court in the principal case, its decision against the validity of the mortgage lien appears to conflict with the decisions of other courts in somewhat similar cases.

In a case in Indiana,¹ where growing wheat had been mortgaged and the mortgage had been duly recorded and afterwards the mortgagor without the consent or knowledge of the mortgagee had harvested, threshed, removed and sold the wheat, it was held, that the mortgagee could recover the value of the wheat of the purchaser by identifying the wheat purchased as the wheat that was mortgaged, although the purchaser bought the wheat in the usual course of trade without actual notice of the mortgage. In that case, the court adopted the language of the Massachusetts court, in *Coles v. Clark*:² "We must take it as settled, that a mortgage of a chattel vests a property in the mortgagee; not an absolute title indeed, but a present title defeasible upon a condition subsequent. An actual delivery and change of possession is not necessary to perfect the mortgagee's title, if the mortgage is duly recorded; the registration of the mortgage supercedes the necessity of an actual delivery and gives all parties concerned constructive notice of its execution and existence. It seems to follow as a necessary consequence, that goods mortgaged may be safely left by the mortgagee in the custody of the mortgagor without the former's being chargeable with *laches*. Indeed, the most common object of such a mortgage is to enable the mortgagor to give security on the goods and yet for the time being to retain the custody and use of them. Another consequence of this relation is, that as a general rule, the right "of possession follows the right of property; and, therefore, where there is no restraining stipulation, the mortgagee having the right of property, until defeated by the performance of the condition, has, as incident thereto, the right of possession and may therefore take the goods into his own custody or maintain trespass or trover for them

¹ *Duke v. Strickland*, 43 Ind. 494. See also *Hackleman v. Goodman*, 75 Ind. 202.

against any one who takes or converts them for his own use."

In a New York case,³ it seems to have been considered, that a mortgage of growing grass would pass title to the same when cut and stacked upon other land as against a subsequent purchaser at a sale under execution against the mortgagor, although the decision in the case was against the mortgagee, for want of proof that the mortgage was properly filed.

A chattel mortgage upon a growing crop of oats was held to continue to be a lien upon the oats after they had been harvested, threshed and removed from the land as against an attaching creditor;⁴ but not where the statute provided, that "the lien of such mortgage shall cease as against subsequent purchasers unless possession of such crops when harvested be delivered to the mortgagee" and the oats had been cut and stacked without such delivery.⁵

A mortgage of assorted pickles at the time in bulk and salt was held to be a lien as against an attaching creditor of the mortgagor after the pickles had been "greened" and put into bottles and vinegar.⁶

A mortgage of leather cut and prepared for the manufacture of shoes was held to cover shoes subsequently made therefrom by the mortgagor as against attaching creditors.⁷

³ 3 Cush. 399.

⁴ Smith v. Jenks, 1 Denio 580.

⁵ Rider v. Edgar, 54 Cal. 127. See also Kimball v. Sattley, 55 Vt. 285, 45 Am. Rep. 614.

⁶ Goodyear v. Williston, 42 Cal. 11.

⁷ Crosby v. Baker, 6 Allen, 296.

⁸ Pt. mann v. Cushing, 10 Gray, 334.

JETSAM AND FLOTSAM.

Within the past few days three cities have each suffered the loss, through death, of its oldest and perhaps most prominent lawyer. We refer to the death of Peleg W. Chandler, of Boston, Leonard Swett, of Chicago, and Thomas T. Gantt, of St. Louis. In many respects the life and professional standing of these three Nestors of the bar, were alike. All achieved celebrity in their profession, and were known as lawyers and not politicians. None of them held public office with the exception of Judge Gantt, who was for one year by appointment, Presiding Judge of the Court of Appeals, and a distinguished member of two State constitutional conventions. None of them sought or cared for the allurements which ordinarily attach to the life of a politician and though Mr. Swett was as near to President Lincoln as any man of his time, and during those troubled times was a power behind the throne to an extent that few even of his intimate friends dreamed, he remained steadfast to his profession and could not be led into political channels. By constant study and application, aided by great natural powers, he attained an enviable rank as an advocate. Especially as a criminal lawyer he secured distinction.

He was engaged in many of the celebrated cases in the annals of criminal jurisprudence and in thirty-three murder trials in which he was retained he lost but two.

He was a natural orator. Like most great lawyers he depended as much upon argument as evidence, and his reasoning was so clear and his arguments so logical that opposing counsel have often said that though they were sure the facts were at variance with his reasoning his eloquence was enough to convince the jury that his position was correct. His legal earning was varied and thorough and he possessed a

wide knowledge of men and affairs of the day. He was able at a glance to detect the true from the false, and his profound knowledge of the law and his unerring judgment gained him the highest place at the bar and won him the esteem and respect of all classes.

Judge Gantt and Mr. Chandler were somewhat older men than Mr. Swett, they being in the neighborhood of seventy-five years. Mr. Chandler was also prominent during the Presidency of Mr. Lincoln and was one of the most aggressive abolitionists of his time. In 1838 he established the *Law Reporter* and conducted it ten years. Though not a brilliant man he was regarded as an aggressive lawyer of solid and profound attainments and in his time was perhaps as well known and as highly honored as any lawyer in New England.

Of Judge Gantt we can speak more from personal knowledge. He commanded the respect of every one, by his emphatic and rugged honesty, his high minded sense of honor and his unobtrusive and quiet manner. He was not popular in the ordinary sense of the term because he was too honest to court it. He possessed neither the wiles nor the arts of the politician and hence he was not one. Notwithstanding this, he had naturally a most pleasing manner and was the ideal of an honorable, courteous gentleman of the old Maryland school. He stood very high as a lawyer of great learning and wisdom, and of rich scholarly attainments. These, coupled with his strict sense of integrity, earned for him a well deserved and honorable reputation.

SOME good stories are told of Mr. Chandler illustrative of his aggressiveness when he knew he was right. When he was quite a young man, having but recently entered practice, he was called to defend a case at Lowell. Butler, or one of his clients, had purchased a piece of real estate, in which a woman claimed a right to a portion of the rentals. A tenant paid his rent to her and Butler could not get possession. The case was quite a celebrated one. Choate had been in it and several of the distinguished lawyers of the day. Yet still Butler had the best of it, and the utmost that the opposing lawyers had been able to do was to obtain postponements from time to time, upon various pretexts. At length the case was to come up again. The defendant's lawyers had given it up, and as a last resort she came to young Chandler. He appeared in the defense. Gen. Butler's browbeating methods in court are as well known as the man himself. He tried them on the young man. But for once he met his match. Those who remember the occasion still roar with laughter at the remembrance of Chandler's 13 "stories of the cock-eyed man," which he poured, one after another, relentlessly upon Butler's devoted head, and, as the slang phrase of the present day is, fairly wiped the floor with him. Judge, bar, jury and spectators fell into a tumultuous uproar of laughter, which no officers even attempted to quell. At the close of his anecdotes Mr. Chandler gravely, although his talk had not so much as touched the case, asked for a continuance and got it.

The next day the tenant of Mr. Chandler's client, an apothecary by profession, called upon the lawyer and asked what he should do in case Mr. Butler came to eject him by force.

"Kill him," said Mr. Chandler quietly.

"What!" ejaculated the astonished apothecary.

"Shoot him through the head," insisted the lawyer.

"Just give me that in writing."

Mr. Chandler reached for a pen and wrote:—

"If Benjamin F. Butler attempts to eject you from the premises occupied by you, my advice is to shoot him through the head."

The next day Mr. Butler appeared with a posse, prepared to eject the apothecary. The latter showed him his instructions.

"Pooh!" said Mr. Butler, throwing down the paper. "If you should shoot me you would hang."

"That is no affair of mine," returned the apothecary. "The advice of my counsel is to shoot you if you molest me, and I shall do it," he continued, with blood in his eye, as he produced a big seven-shooter.

"D——d if I don't believe he would be fool enough to shoot me," said Butler, as he turned and left the shop.

He at once called upon Mr. Chandler and effected a settlement of the long contested case, granting to the woman a share in the rents which she claimed.

BREACH OF CONFIDENCE.—In the matter of *United States v. Costen*, a proceeding to disbar an attorney on the ground that after having been employed by one of the parties to a litigation, the employment having ceased, he sought employment by the adverse party and offered to impart important information, Judge Brewer, in granting the motion, says: "It is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that the lawyer's tongue is tied from ever disclosing it, and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. I can tolerate a great many things that a lawyer may do—things that in and of themselves may perhaps be criticized or condemned, when done in obedience to the interest or supposed interest of his own client, and when he is seeking simply to protect and uphold those interests. If he goes beyond, perhaps, the limits of propriety, I can tolerate and pass that by; but I cannot tolerate for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession."

RECENT PUBLICATIONS.

BOOKS RECEIVED

LAWYERS' REPORTS, ANNOTATED. BOOK II. All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Edmond H. Smith, Reporter, Buidett A. Rich, Editor in chief of the United States and General Digests, and the Several Reports and Judges of each court, Assistants in Selection. (2 L. R. A.) Rochester, N. Y.: The Lawyers' Co-Operative Publishing Co. 1889.

A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY. By Leonard A. Jones, Author also of Treatises on "Railroad Securities," "Chattel Mortgages," "Liens," Etc., Etc. In Two Volumes. Fourth Edition. Boston: Houghton, Mifflin & Company. New York: 11 East Seventeenth St. The Riverside Press. Cambridge. 1889.

QUERIES AND ANSWERS.

QUERY NO. 24.

A and B are the only children of C and D. In 1852, C and D sold land of D (wife of C), and C invested the proceeds in land, taking title in himself. D dies in 1870. In 1873 C marries E. In 1875, C, being heavily in debt, transfers the land to E, who is now in possession of the land. C dies in 1888. A became of age in 1873, B in 1876, and lived on the land with C up to 1881. A now wishes to get possession of his interest in the land, but B will not join with him in any kind of proceeding to get possession. What interest has A in the land? What remedy has A to get possession of his interest? F. J.

QUERIES ANSWERED.

QUERY NO. 18.

[To be found in Vol. 28, Cent. L. J. p. 446.]

A city of the fourth class in Missouri has no power to pass such an ordinance. The legislature has not expressly given it such power under section 4940 R. S. Mo., and by the rule of construction of *ejusdem generis* it cannot be included in the general police power which the city may exercise under that section. *Knox City v. Thompson*, 19 Mo. App. 523; *St. Louis v. Laughlin*, 49 Mo. 561. Even if under *Robertson v. R. R. Co.*, 80 Mo. 123, the city could pass such an ordinance, it would be void as being unreasonable. *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228.

QUERY NO. 19.

[To be found in Vol. 28, Cent. L. J., p. 446.]

A has a right of action against B. A lessee cannot dispute the title of his landlord. *Taylor on Landlord and Tenant* § 89. In *Ward v. Phila.* 4 Cent. Rep. 662, an owner of land in possession and with full knowledge of his own title who took a lease from a stranger was not permitted to assert his own title against his lessor as a defense to the payment of rent.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. **ACKNOWLEDGMENT.**—Under Civil Code Cal. § 1186, a certificate of acknowledgment of a married woman that she was first made acquainted with the contents of the instrument, and thereafter duly acknowledged, upon examination apart from and without the hearing of her husband, that she executed the same, etc., is insufficient, and the mortgage, as to her, is void. — *Bolinger v. Manning*, Cal., 21 Pac. Rep. 375.

2. **ATTORNEY—Misconduct.**—An attorney who collects money for his clients, and wrongfully converts it to his own use, and as a subterfuge, and in bad faith, claims that the amount converted was the amount he was entitled to as fees, is guilty of such misconduct as warrants his suspension, if not disbarment.—*In re O*—Wis., 42 N. W. Rep. 221.

3. **CARRIERS.**—Where goods are delivered to the defendant carrier for shipment under a bill of lading stipulating that in case of loss the measure of damages should be the value of the goods at the place of shipment, but the carrier was guilty of a conversion of the goods, such stipulation in the bill of lading is properly ignored, and the value of the goods at the place of destination is the measure of recovery. — *Erie Dispatch v. Johnson*, Tenn., 11 S. W. Rep. 441.

4. **CARRIERS — Negligence.**—As to negligence in alighting from moving train by one who goes on car to assist in carrying sick person. — *Louisville & N. Ry. Co. v. Crunk*, Ind., 21 N. E. Rep. 81.

5. **CARRIERS—Return Ticket.**—The purchaser of a round-trip railway ticket, can ride from the terminal station to the station at which the trip begins, though he refuses to surrender the first half on demand made by the conductor in accordance with a rule of the company, requiring conductors to take up the whole of such tickets when tendered as fare from the return station or collect full fare, and, if ejected from the train, may recover damages. — *Chicago, St. L. & P. R. Co. v. Holdridge*, Ind., 20 N. E. Rep. 837.

6. **CEMETERIES.**—Under Code 893, township trustees, having purchased property with township funds, for use as a cemetery, and finding it unfit for that purpose, may sell the same, with a restriction that it shall not be used for a private or public cemetery. — *Bushell v. Whitlock*, Iowa, 42 N. W. Rep. 186.

7. **CEMETERIES.**—The title to the cemetery connected with the parish church in Savannah called "Christ Church" was vested by the provincial act of 1788 in the rector of said church as a corporation. — *Church Wardens v. Mayor*, Ga., 9 S. E. Rep. 537.

8. **CHATTEL MORTGAGES.**—Under Code Ga. § 1866, etc., a chattel mortgage executed in February, but not recorded in the county of the mortgagor's residence, will be postponed to a judgment obtained in the following November. — *Thompson v. Morgan*, Ga., 9 S. E. Rep. 584.

9. **CHATTEL MORTGAGES—Attachment.**—Plaintiff's mother was indebted to both plaintiff and defendants, and at the urgent solicitation of plaintiff gave him a chattel mortgage to secure his debt, which was duly recorded: *Held*, that defendants, upon subsequently issuing an attachment upon their claim, have no rights entitling them to have plaintiff's mortgage postponed as void in law as against their attachment. — *Dalton v. Stiles*, Mich., 42 N. W. Rep. 169.

10. **CONSTITUTIONAL LAW — State Debts.**—Const. Ind. art. 10, § 5, provides that no law shall authorize any debt to be contracted on behalf of the State, except upon the arising of certain contingencies: *Held*, that when, in the exercise of its sound discretion, the legislature determines that a contingency has arisen, and authorizes a debt to be contracted, unless it is plainly apparent that the contingency did not exist which justified the exercise of power, the action of that body is not subject to review. — *Hovey v. Foster*, Ind., 21 N. E. Rep. 89.

11. **CONSTITUTIONAL LAW.**—When an act is done under the provisions of a statute, some of which are void and others valid, it will be presumed to have been

done without reference to the void or unconstitutional provisions, unless there is something clearly indicating the contrary.—*Donuersberger v. Pendergast*, Ill., 21 N. E. Rep. 1.

12. **CONSTITUTIONAL LAW.**—An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault, or neglect on its part, when under the general law of the land no one else is so liable under such circumstances, is void. *Cotrel v. Union Pac. Ry. Co.*, Idaho, 21 Pac. Rep. 416.

13. **CONTRACT.**—*Held*, that ratification and enforcement of contract rights to cut timber amounted to a waiver of plaintiff's right of action in tort for previous excessive cutting of timber.—*Warren v. Landry*, Wis., 42 N. W. Rep. 247.

14. **CONTRACTS — Evidence.**—In an action for obtaining subscriptions to defendants' encyclopedia, where it appeared that defendants agreed to pay plaintiff \$15 for each order that he obtained, defendants may show that the words "\$15 an order for each and every order obtained for the encyclopedia" meant, \$15 for each order obtained for the encyclopedia under which five volumes have been taken and paid for. — *Newhall v. Appleton*, N. Y., 21 N. E. Rep. 105.

15. **CONTRACT — Work and Labor.**—Where one is induced under a mistake of fact, through the fraud or concealment of another, to render valuable services for the latter, he may recover the reasonable value thereof, though they were rendered without any expectation at the time of being paid for. — *Boardman v. Ward*, Minn., 42 N. W. Rep. 202.

16. **CONTRACTS — Performance.**—The defendant agreed that during a certain period of time he would give to the plaintiff all his freight to haul at a certain rate, and the plaintiff agreed to give defendant's freight preference to all other freight: *Held*, that payment by the defendant for freight hauled, after a violation of the agreement to give his freight the preference, would not operate as a condition of the breach.—*Dunn v. Daly*, Cal., 21 Pac. Rep. 377.

17. **CONVERSION.**—*Held*, under items of the will that the executors were given a discretionary power of sale which did not effect a conversion of the realty.—*Scholle v. Scholle*, N. Y., 21 N. E. Rep. 84.

18. **CORPORATIONS—Stock—Assessments.**—Defendant subscribed to the capital stock of a proposed corporation, "and agrees to pay therefor two dollars in cash on each share on or before January 25, 1888, and the balance on each share at such times and in such installments as the same shall be called for by said corporation." St. 1773, provides for the preliminary organization of corporations, and declares that "no such corporation shall transact business with any other than its members until at least one-half of its capital stock has been duly subscribed, and at least 20 per cent. thereof actually paid in:" *Held*, that no action could be maintained by the corporation against defendant, to recover an assessment subsequent to the preliminary one of two dollars, without alleging that the above statutory requirement had been complied with.—*Anvil Min. Co. v. Sherman*, Wis., 42 N. W. Rep. 226.

19. **CORPORATIONS—Treasurer.**—*Held*, that plaintiff had ratified the action of its treasurer in depositing funds with firm which failed and therefore could not hold him personally liable for the loss.—*New York, P. & B. R. Co. v. Dixon*, N. Y., 21 N. E. Rep. 110.

20. **CORPORATIONS.**—Charter rights cannot be acquired by lessee of a corporation without the assumption at the same time of the charter duties. — *Mayor v. 23rd St. Ry. Co.*, N. Y., 21 N. E. Rep. 60.

21. **CORPORATION — Building Associations.**—One who has contracted with a *de facto* corporation, and received the benefit of his contract, cannot object, to the enforcement of such contract, that the corporation was never legally organized, or that the law under which it was organized is unconstitutional, as such an

objection is available only to the State. — *Winget v. Quincy Building & Homestead Assn.*, Ill., 21 N. E. Rep. 12.

22. CORPORATIONS. — Under Civil Code Cal. § 2309, providing that authority to execute an instrument required by law to be in writing can only be conferred by writing, a mortgage of real property of a corporation, executed by an agent whose only authority is verbal, is void. — *Alta Min. Co. v. Alta Placer Min. Co.*, Cal., 21 Pac. Rep. 873.

23. COUNTIES—Division. — How. St. Mich. §§ 458, 460, relating to settlements between the respective boards of supervisors, where two counties are formed out of one, do not contemplate any other division than of existing property and liabilities, nor provide for the assumption by one county of the whole burden of State taxation for both counties until the next equalization. — *Superiors v. Supervisors*, Mich., 42 N. W. Rep. 170.

24. COUNTIES—Census. — The object of appointing a census taker in the organization of new counties is to ascertain the truth of the statements contained in the memorial presented to the governor; the census taker should confine himself to those who are *bona fide* inhabitants in the county at the time of the presentation of the memorial. — *State v. Robertson*, Kan., 21 Pac. Rep. 888.

25. COURTS—Costs. — A suit to foreclose a tax certificate cannot be continued in order to render a judgment for costs, after a redemption of the certificates. The cause of action is the certificate, and the costs are but an incident, which necessarily falls when the cause of action ceases to exist. — *Two Rivers Manuf'g. Co. v. Beyer*, Wis., 42 N. W. Rep. 232.

26. CRIMINAL LAW — Alibi. — The rule in Georgia, consists of two branches: The first is that, to overcome proof of guilt strong enough to exclude all reasonable doubt, the *onus* is on the accused to verify his alleged *alibi*, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of *alibi* is to be considered on the general case with the rest of the testimony, and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. — *Harrison v. State*, Ga., 9 S. E. Rep. 542.

27. CRIMINAL LAW—Perjury. — Where a public school teacher, on making affidavit, as required by law, to the check drawn by the trustees on the county treasurer for his pay, makes a false statement, he may be prosecuted for perjury, under Pen. Code Tex. art. 188. — *O'Bryan v. State*, Tex., 11 S. W. Rep. 443.

28. CRIMINAL LAW—Murder. — How far intoxication may be an excuse for committing murder. — *Terrill v. State*, Wis., 42 N. W. Rep. 243.

29. CRIMINAL LAW—Embezzlement. — Where the evidence tends to show that defendant concealed the facts as to the disposition made by him of some of the property entrusted to him as agent for sale on certain prescribed terms, and that he rendered a false account of his agency in regard to it, and that a demand was made on him for the property in question, which he failed to comply with, a conviction for embezzlement is warranted. — *State v. Pierce*, Iowa, 42 N. W. Rep. 181.

30. CRIMINAL LAW—Record. — A judgment of conviction will not be reversed on the ground that the clerk certified that the testimony taken before the grand jury was read to the trial jury, and that no other evidence was offered by either party, as the clerk had no authority to make such certificate. — *State v. Turney*, Iowa, 42 N. W. Rep. 190.

31. CRIMINAL LAW—Murder. — Conviction of murder in first degree warranted by the facts. — *People v. Kelly*, N. Y., 21 N. E. Rep. 122.

32. CRIMINAL LAW — Rape. — On a trial for rape, where there was evidence of the unchaste character of the prosecuting witness, and the defense was consent, it was error to instruct that the evidence of character was introduced only to affect the credibility of the prosecuting witness, as such evidence was proper to

render the consent more probable. — *Carney v. State*, Ind., 21 N. E. Rep. 48.

33. CRIMINAL LAW—Bigamy. — It is not proper for the court to charge that if the defendant has by his acts induced others to believe, or the public to believe, that the defendant has cohabited with more than one woman, then his acts are unlawful. — *United States v. Langford*, Idaho, 21 Pac. Rep. 409.

34. CRIMINAL LAW—Intent to Kill. — Where the indictment charged defendant with shooting at H with intent to kill H, and the evidence showed that he intended to kill J, an instruction that if the jury find that defendant shot at J intending to kill him, but wounded H, they should find him guilty, is erroneous. — *People v. Robinson*, Utah, 21 Pac. Rep. 403.

35. CRIMINAL LAW—Cattle Brands. — Sufficiency of evidence to prove felonious marking of sheep of another, evidence must identify sheep marked by defendant with his own brand. — *People v. Swasey*, Utah, 21 Pac. Rep. 400.

36. DAMAGES—Liquidated. — A manufacturer agreed to deliver a harvester to plaintiff, with contract of warranty, in exchange for a machine belonging to plaintiff, the latter agreeing to pay in addition thereto a named sum, and, in case the harvester should not do good work, the plaintiff was not to pay any money in consideration of the exchange: *Held*, that such contract did not come within the exception of the statute, and that evidence was admissible of the actual damage sustained by plaintiff from a breach of the warranty. — *Greenleaf v. Stockton, etc. Works*, Cal., 21 Pac. Rep. 869.

37. DEED—Construction. — When an estate is limited in ultimate remainder to the right heirs by blood of the wife, though not to take effect in possession until the death of the husband, the persons contemplated to take in remainder are those kindred of the wife who, according to the laws of inheritance, would take by descent at her death. — *Harrison v. Jones*, Ga., 9 S. E. Rep. 527.

38. DOWER—Mortgage. — Where a purchaser of the equity of redemption, under a mortgage in which the wife of the mortgagor joined, is not bound to pay the mortgage debt, but does in fact pay it in aid of his own title and estate, whereby the mortgage is discharged, the wife's claim of dower is subject in equity to a just contribution. — *Everson v. McMullen*, N. Y., 21 N. E. Rep. 52.

39. DRAINAGE—Procedure. — All that a complaint to collect a drainage assessment need show is (1) that some notice of the filing of the petition for the drainage was given; (2) the filing of such petition; (3) the report of the commissioners of the benefits and damages assessed; (4) the approval and confirmation of such report by the court; and (5) the assessment, or a copy thereof. — *Chaney v. State*, Ind., 21 N. E. Rep. 45.

40. DRAINAGE. — Section 10, of the Indiana drainage act, providing that after the construction of a drain the surveyor of the county in which proceedings therefor were had shall keep the drain in repair to the full dimensions, as required by the original specifications, commits the propriety of such repairs to the discretion of the proper county surveyor. — *Kirkpatrick v. Taylor*, Ind., 21 N. E. Rep. 21.

41. ELECTIONS AND VOTERS. — A disregard of constitutional or statutory directions, except as to the time and place of holding the election, relating to the manner of conducting it, and which does not affect the result as a fair expression of the popular will, does not warrant a rejection of the vote cast. — *State v. Nicholson*, N. Car., 9 S. E. Rep. 645.

42. EMINENT DOMAIN. — Under § 26 of the "rapid transit act," an elevated railroad company may construct a curve so as to make a connection between two of its own distinct lines of road, and may take private property for that purpose. — *In re Union El. R. Co.*, N. Y., 21 N. E. Rep. 81.

43. ESTOPPEL. — Where one who had entered into an agreement for the conveyance of land represents to

one about to make a loan to the vendee, and take a mortgage therefor, that the latter had a sufficient interest in the land to make the mortgage good, the vendor is estopped from afterwards asserting that the vendee did not have a mortgage interest in the land.—*Wischart v. Hedrick, Ind.*, 21 N. E. Rep. 30.

44. EVIDENCE. — It is the duty of the trial court to declare the legal effect of all written instruments submitted in evidence; but a letter is not generally such an instrument. To make it such it must constitute a contract.—*Church v. Melville, Oreg.*, 21 Pac. Rep. 387.

45. EXECUTION. — The levy of execution on land as the property of defendant is sufficient to keep the judgment alive, though the land was not defendant's property at the time. — *Long v. Wight, Ga.*, 9 S. E. Rep. 535.

46. EXECUTION — Under Code Iowa, § 3137, providing proceedings supplementary to execution a referee has jurisdiction to issue warrant for arrest of the debtor on the required proof being made. — *Marriage v. Woodruff, Iowa*, 42 N. W. Rep. 198.

47. EXECUTION. — Affidavit in proceedings supplementary to execution may be amended after a demurrer to it has been sustained. Question as to the sufficiency of affidavit here. — *Burkett v. Bowen, Ind.*, 21 N. E. Rep. 58.

48. EXECUTORS AND ADMINISTRATORS—Sales. — An administrator's sale of land on a petition which merely describes the land sought to be sold, and states that it is an unperfected claim under the homestead laws, and does not state its value, or whether improved or unimproved, productive or unproductive, occupied or vacant, and the like, is void for want of jurisdiction, where, in the order of sale, there is no recital that proofs of the necessity for the sale for any of the statutory purposes were had at the hearing. — *Kertchem v. George, Cal.*, 21 Pac. Rep. 372.

49. FACTORS AND BROKERS. — Where a real estate broker, employed to sell land, or to find a purchaser therefor, negotiates an exchange for other lands, his principal himself making the contract, these circumstances impose no legal duty upon the broker to ascertain correctly the facts which may affect the value of the lands received in exchange. — *Coe v. Ware, Minn.*, 42 N. W. Rep. 205.

50. FALSE IMPRISONMENT. — Necessary allegations in complaint for false imprisonment. — *Ah. Long v. Sternes, Cal.*, 21 Pac. Rep. 331.

51. FEDERAL COURTS—Jurisdiction. — Under act Cong. 1887, a suit brought by two persons on a contract entered into by them as partners cannot be maintained in a district of which the defendant and one of the plaintiffs are non-residents. — *Smith v. Lyon, U. S. C. C. (Mo.)*, 38 Fed. Rep. 53.

52. GARNISHMENT. — A party, in order to establish title to a debt under proceedings in garnishment upon execution, must show that a levy was made by virtue of the execution upon the debt, and that the law relating to such proceedings had been strictly complied with.—*Batchellor v. Richardson, Oreg.*, 21 Pac. Rep. 392.

53. HIGHWAYS. — Where, after a highway has been established, but before it is opened, the adjacent owner, and those claiming under him, occupy for more than ten years the land on which such road is laid out, maintaining a fence around it, and being in exclusive possession, the public is estopped to claim a right in the part so inclosed. — *Orr v. O'Brien, Iowa*, 42 N. W. Rep. 183.

54. HIGHWAYS—Discontinuance. — Under How. St. Mich. § 1298, it is only owners and occupants who can complain of the discontinuance, and a person whose premises are so situated that he could not reach the discontinued way without first crossing a public street, communicating with others in various directions, and furnishing abundant guards against isolation, has no right to complain. — *Kimbal v. Homan, Mich.*, 42 N. W. Rep. 167.

55. HOMESTEAD. — Where part of a tract forming a homestead was under cultivation, and the remainder was valuable principally for its timber trees, and the removal of the trees would impair the security of a judgment against the owner: *Held*, that the judgment creditor was entitled to have the owner restrained from selling and cutting such timber trees for any purpose other than the necessary repairs and improvements.—*Jones v. Britton, N. Car.*, 9 S. E. Rep. 554.

56. HUSBAND AND WIFE. — A married woman with her husband's written consent, may bind her statutory personal separate estate by her engagements in the nature of executory contracts expressly charged thereon in the instrument creating the liability, though the consideration is not for the benefit of herself or her estate.—*Flaum v. Wallace, N. Car.*, 9 S. E. Rep. 567.

57. HUSBAND AND WIFE. — Agreement between husband and wife being executed, the law will recognize it, though, if executory, its validity might have been denied on the ground of its being opposed to public policy in providing for the separation of husband and wife.—*Tallinger v. Manderville, N. Y.*, 21 N. E. Rep. 123.

58. INJUNCTION. — In *ad quod damnum* proceedings against a railroad company, defendant can make the defense that the right of way was acquired and paid for by another company, whose rights defendant has acquired under foreclosure of a mechanic's lien; that plaintiff's claim is barred by limitation; and that he is estopped to deny defendant's right of occupancy. — *Keokuk & N. W. Ry. Co. v. Donnell, Iowa*, 42 N. W. Rep. 176.

59. INSURANCE — Accident. — *Held*, that deceased was not insured for the period in which he was killed, as the order to the railroad company did not under the circumstances amount to payment of the premium. — *McMahon v. Trav. Ins. Co., Iowa*, 42 N. W. Rep. 179.

60. INSURANCE. — A condition of a policy against incumbrances is waived where the assured informed the company's agent of such incumbrances, and the agent wrote the application, which stated that there were no incumbrances, and the assured signed it at his request, and the agent stated in the application that he had inspected the property, and recommended the risk as free from all moral or financial hazard, and was satisfied that the answers were correct. — *Reiner v. Dwelling-house Ins. Co., Wis.*, 42 N. W. Rep. 208.

61. INSURANCE—Conditions. — Effect of provision in a fire insurance policy issued to the plaintiff, that, in case the assured should fail to pay the premium note at maturity, the policy should be and remain null and void, but that this should not prevent the company from collecting by suit or otherwise the note, nor should such attempt at collection be construed to revive the policy, but the same should remain null and void until payment of the note, when the policy should be revived. — *Curtin v. Phenix Ins. Co., Cal.*, 21 Pac. Rep. 370.

62. JUDGMENT—Lien. — A judgment against partners for a firm liability is a lien against their individual real estate, and has preference over an unsecured debt of one of them in the administration of his assets after his decease.—*Pitts v. Spotts, Va.*, 9 S. E. Rep. 501.

63. JUDGMENT — Res Adjudicata. — So much of a former action as was based on the allegation of waste was for an injury to real property, a judgment in such action could not be a bar to the subsequent action for the conversion of the wood, which was personalty. — *Mauldin v. Clark, Cal.*, 21 Pac. Rep. 361.

64. JUROR—Misconduct. — Where it appears that while a case is being considered by a jury two of the jurors tell the others that they are acquainted with a certain witness in the case, and that they do not regard him as worthy of credit, and it appears probable that one of the jurors was influenced in his verdict by such statements, a new trial should be granted. — *Lucas v. State, Tex.*, 11 S. W. Rep. 443.

65. JUSTICE OF PEACE—Appeal. — A party objecting to a decision rendered in a justice's court must in an

intelligible manner, and at the time, make his objection known, in order to have the decision reviewed by proceedings in error. — *Condray v. Stiefel*, Iowa, 42 N. W. Rep. 185.

66. JUSTICE OF THE PEACE—Habeas Corpus.—Where the justice has jurisdiction, and the case has been conducted in strict conformity with the established rules of procedure in such cases, the sufficiency of the evidence upon which the judgment is based cannot be inquired into on habeas corpus. — *Ex parte Marx*, Va., 8. E. Rep. 475.

67. LANDLORD AND TENANT. — Evidence held not sufficient to establish relation of landlord and tenant between plaintiff and his sister who occupied house of the former. — *Colleyer v. Colleyer*, N. Y., 21 N. E. Rep. 114.

68. LANDLORD AND TENANT. — An action for use and occupation will not lie against a party in possession of real estate by the license of the owner. — *Reed v. Lammel*, Minn., 42 N. W. Rep. 202.

69. LIMITATION OF ACTIONS. — Indorsement on note of part payment by the payee is insufficient to take it out of the statute, when there is no extrinsic proof of the time when the indorsement was made. — *Mills v. Davis*, N. Y., 21 N. E. Rep. 68.

70. LOGS AND LOGGING. — Under Rev. St. Wis. § 2386, a complaint praying for a balance due for work on logs, and alleging all the facts essential to entitle plaintiff to a lien on the logs, but not praying for such lien, will not support a judgment for the lien, in the absence of an answer. — *McKenzie v. Peck*, Wis., 42 N. W. Rep. 247.

71. MALICIOUS PROSECUTION—Advice of Counsel. — The rule in actions for malicious prosecution laid down in *Moore v. Railway Co.*, 37 Minn. 147, 33 N. E. Rep. 334, that it is for the court to determine whether a state of facts, over which there is no controversy, constitutes probable cause warranting a prosecution, followed and applied. — *Gilbertson v. Fuller*, Minn., 42 N. W. Rep. 203.

72. MASTER AND SERVANT. — Question as to whether laborer on construction train is a fellow servant with the crew manning the train. — *Prather v. Richmond & D. Ry. Co.*, Ga., 9 S. E. Rep. 530.

73. MARRIAGE. — The presumption of law founded on cohabitation and repute, that a marriage had taken place, will not prevail over proof of a subsequent marriage in fact by one of the parties with a third person; but, notwithstanding such proof, circumstantial evidence, as well as direct, may be used to establish the actual occurrence of such prior marriage. — *Jenkins v. Jenkins*, Ga., 9 S. E. Rep. 641.

74. MARRIAGE — Validity. — Held, that verdict in favor of the existence of a marriage was supported by the evidence, though circumstantial. — *Gall v. Gall*, N. Y., 21 N. E. Rep. 106.

75. MARRIAGE—Validity. — However true it be that what is done in contravention of a prohibitory law is null, and is barren of effect, the law creates an exception, in cases of marriage contracted in good faith, in favor of both spouses, or of one of them and of the issue born of such marriages. — *Succession of Buissiere*, La., 5 South. Rep. 668.

76. MECHANIC'S LIENS. — The fact that plaintiff did not finish a building, the construction of which he had commenced under a contract with defendant, his failure being solely due to the refusal of the defendant to allow him to proceed with the contract, did not preclude him from asserting his right to a lien on the building for the contract price, less the cost of finishing it. — *Charlley v. Hontig*, Wis., 42 N. W. Rep. 220.

77. MINES AND MINING. — Where mining works are idle, time and labor of a watchman and custodian expended on the property in taking care of it is labor done on the claim. — *Lockhart v. Rollins*, Idaho, 21 Pac. Rep. 413.

78. MORTGAGE. — M mortgaged his 80-acre tract to D, his wife joining to release her dower. M then conveyed the north forty-five acres to his wife by warranty

deed, with covenants of seisin, and that the land was free from all incumbrances. Thereafter M gave a mortgage to complainant on the south thirty-five acres, his wife joining to release her dower: Held, that the wife had a right to insist that the south thirty-five acres be first sold under D's mortgage, before resorting to the part conveyed to her. — *Case Threshing-machine Co. v. Mitchell*, Mich., 42 N. W. Rep. 151.

79. MORTGAGE. — A bill of sale, not under seal, absolute on its face, may be shown by parol evidence to have been given as security; and the rule that, to prove that a deed absolute on its face was intended as a mortgage the evidence must be clear, convincing, and equivocal, does not apply. — *Seligman v. Ten Eyck*, Mich., 42 N. W. Rep. 134.

80. MORTGAGE. — Recorded deed and agreement held, under the facts to be a mortgage. — *Baker v. Firemans' Fund Ins. Co*, Cal., 21 Pac. Rep. 357.

81. MUNICIPAL CORPORATIONS. — In an action against a city for damages to plaintiff's property, caused by an excavation in the street in front thereof, it appeared that part of the land was well adapted to be laid out into lots, and would be of most use and value in that form, and that a plat of it had been made, but not recorded so as to make it a legal addition to the city: Held, that it was proper to allow witnesses to refer to and examine the plat with the object of showing the location and situation of that part of the property injured by the excavation. — *Meinzer v. City of Racine*, Wis., 42 N. W. Rep. 230.

82. MUNICIPAL CORPORATIONS—Negligence. — How. St. Mich. § 1445, imposing on municipalities the duty of keeping streets in good repair, must be construed, as to streets in the city of Detroit, with reference to the provision of the charter of that city empowering the common council to grade and pave streets, and must not be construed to nullify such provision; but that portion of a street which is being graded or paved must be closed to public travel in order to suspend the duty to repair, and, unless it is so closed, the duty to repair, and liability for injuries caused by the unsafe condition of the street remains. — *Southwell v. City of Detroit*, Mich., 42 N. W. Rep. 118.

83. MUNICIPAL CORPORATIONS. — In an action for the rent reserved on the lease of a pier by New York city defendant cannot avoid liability on the ground that the lease was not "made at public auction, to the highest bidder," as required by Laws N. Y. 1870, ch. 383, § 37. Defendant having enjoyed the benefit of the lease, is estopped to deny its validity. — *Mayor v. Sonneborn*, N. Y., 21 N. E. Rep. 121.

84. MUNICIPAL CORPORATIONS. — In establishing a grade for a street, and adopting plans for its improvement, the common council acts judicially, and no recovery can be had for the inconvenience thereby occasioned. — *Watson v. City of Kingston*, N. Y., 21 N. E. Rep. 102.

85. MUNICIPAL CORPORATIONS. — Evidence considered sufficient to justify a verdict charging a municipal corporation with negligence in the construction of a culvert, and to justify the verdict as to the amount of damages. — *Buchanan v. City of Duluth*, Minn., 42 N. W. Rep. 204.

86. MUNICIPAL CORPORATION. — Under Rev. St. Ind. 1881, § 3103, as to interstate ferries, the city council can make only such regulations as are conformable to the regulations of the county commissioners, and a complaint for violating on Sunday, an ordinance of a city on a border stream, will be dismissed, as it may reasonably be inferred that the regulations of the county commissioners did not require this on Sundays. — *City of Madison v. Abbott*, Ind., 21 N. E. Rep. 28.

87. NEGLIGENCE—Railroad Company. — Question of negligence for injuries to boy at a railroad crossing by passing train. — *Heddles v. C. & U. W. Ry. Co.*, Wis., 42 N. W. Rep. 237.

88. NEGLIGENCE. — Question of contributory negligence on the part of boy injured by passing wagon

while getting on to platform of car. — *Connolly v. Knickerbocker Ice Co.*, N. Y., 21 N. E. Rep. 101.

89. **NEGLIGENCE—Infant.** — In an action for ejecting plaintiff, a child from defendant's railway train, where it appears that the child had taken the train to go about four and one-half miles, and was put off the train for non-payment of seven cents fare about half a mile from the depot from which she started, evidence that another train was expected to arrive at the place of plaintiff's removal within a few moments is admissible, as bearing on the question whether that was a proper place for such removal. — *Ill. Cent. Ry. Co. v. Latimer*, Ill., 21 N. E. Rep. 7.

90. **NEGOTIABLE INSTRUMENT.** — In an action on notes given for the purchase price of an engine and saw-mill, a plea of breach of warranty and failure of consideration does not vary or contradict the written contract between the parties, and may be made without alleging fraud, accident, or mistake. — *Aultman v. Mason*, Ga., 9 S. E. Rep. 536.

91. **NEGOTIABLE INSTRUMENT.** — Under Code Ga. § 3471, defendant, in an action on a note, after pleading the general issue, may amend so as to allege as a defense that the note was given in part payment for land; that plaintiff represented that he had a complete title to the land, and agreed to deliver a perfect title, but that in fact he failed to give him title, whereby the consideration of the note wholly failed. — *Hall v. McArthur*, Ga., 9 S. E. Rep. 534.

92. **NEGOTIABLE INSTRUMENT.** — An accommodation note has no validity until it has passed into the hands of a third party for value. — *Second Nat. Bank v. Howe*, Minn., 42 N. W. Rep. 200.

93. **NEGOTIABLE INSTRUMENTS—Contract of Guaranty.** — A written instrument, in the ordinary form of a promissory note, with the exception of a clause stating that the note is given to secure the payment of a certain debt, does not become a contract of guaranty by the addition of such clause. — *Clarin v. Esterly Machine Co.*, Ind., 21 N. E. Rep. 35.

94. **NUISANCE.** — Area or alley next to defendant's store piled with boxes held not a nuisance. — *Bond v. Smith*, N. Y., 21 N. E. Rep. 128.

95. **NUISANCE.** — The growing of cotton wood trees near line of plaintiff's fence the effect of the shade of which would be injurious to plaintiff's fruit trees held not a nuisance. — *Grandona v. Lovdal*, Cal., 21 Pac. Rep. 366.

96. **PARTNERSHIP—Assignment.** — Under the facts, held sufficient authority for one partner to execute assignment for the benefit of creditors in the firm name. — *Kump v. Gardner*, N. Y., 21 N. E. Rep. 99.

97. **PARTNERSHIP.** — The fact that defendant, who was a partner of the plaintiff, managed the firm business, while the plaintiff gave it but little attention, did not authorize the entire salary of a clerk employed by them to be charged against the plaintiff, in the absence of a special agreement to that effect. — *Brownell v. Steere*, Ill., 21 N. E. Rep. 3.

98. **PARTNERSHIP—Contract.** — Where plaintiff and defendant formed a partnership to deal in real estate, the defendant could not, in an action brought by the plaintiff for his share of the profits, and for an accounting, object that the partnership agreement was in parol, and void under the statute of frauds. — *Coward v. Clanton*, Cal., 21 Pac. Rep. 359.

99. **QUO WARRANTO—Mandamus.** — While it is true that *quo warranto* is the proper proceeding to try the title to an office, and that it cannot be tried in *mandamus*, such trial of the title means the right to possession of the office, when such possession is held by another, whom the purpose of the action is to oust. When there is no such occupant, *quo warranto* cannot be resorted to. — *Williams v. Clayton*, Utah., 21 Pac. Rep. 398.

100. **REMOVAL OF CAUSES.** — Separate answers tendering separate issues interposed by defendants sued jointly do not create separable controversies, within the meaning of the removal acts. — *Patchin v. Hunter*, U. S. C. O. (Wis.), 38 Fed. Rep. 51.

101. **REMOVAL OF CAUSES.** — As the Illinois statute provides that a cause may be removed for local prejudice to some other court of competent jurisdiction in some other convenient county, to which there is no valid objection, the existence of prejudice was not sufficiently shown to justify removal to the federal court; the affidavit shows that the prejudice is confined mainly, if not entirely, to Cook county. — *Robison v. Hardy*, U. S. C. O. (Ill.), 38 Fed. Rep. 49.

102. **RES ADJUDICATA—Insurance.** — The mere commencement of an action for damages for breach of a written contract, the action being afterwards dismissed without a determination on the merits, does not conclusively bar a subsequent action for reformation of the contract. — *Spurr v. Home Ins. Co.*, Minn., 42 N. W. Rep. 206.

103. **REVIVAL OF ACTIONS.** — The fact that the proceedings in an action, at the time of the death of one of the parties, do not disclose facts showing that the action survives, does not defeat the right to continue it in favor of or against the representative of the deceased, if the cause of action in fact survives. — *Plummer v. McDonald Lumber Co.*, Wis., 42 N. W. Rep. 250.

104. **SALE.** — If it can be inferred from the acts of the parties that it was the intent that delivery of article and payment should be concurrent acts, title will be deemed to have remained in the vendor until completion of payment. — *Empire State, etc. Co. v. Grant*, N. Y., 21 N. E. Rep. 49.

105. **SHERIFF—Bond.** — The act of a sheriff in levying, under a writ, upon the property of a third person, is an official act, for which his sureties are liable. A judgment against a sheriff for official misconduct is *prima facie* evidence in an action for the same wrong against his sureties. — *People v. Mercereau*, Mich., 42 N. W. Rep. 158.

106. **SPECIFIC PERFORMANCE.** — Plaintiff agreed to buy and defendant to sell a certain lot, and afterwards they agreed that the lot and another should be sold by defendant to plaintiff's son at a different price with the right to a reconveyance to defendant of the second lot, within a given time: *Held*, that the first contract was waived, and specific performance could not be decreed. — *Ford v. Euker*, Va., 9 S. E. Rep. 500.

107. **SUBROGATION.** — A judgment creditor, after purchasing his debtor's land at a sale under his judgment, and before the statutory period of redemption expires, has a lien on the land, giving him the right to be subrogated to the benefits of a trust-deed prior to his judgment, under Civil Code Cal. § 2904. — *Swain v. Stockton Sav. & Loan Soc.*, Cal., 21 Pac. Rep. 365.

108. **TAXATION—Exemption.** — Under laws N. Y. the building owned by Young Men's Christian Association not used exclusively for public worship is not exempt from taxation. — *Y. M. C. Assoc. v. Mayor*, N. Y. 21 N. E. Rep. 86.

109. **TAXATION—Legacy.** — Laws N. Y. 1885, ch. 483, § 1, imposing tax on legacies, applies only to the property of resident decedents. — *In re Euston's Estate*, N. Y. 21 N. E. Rep. 87.

110. **TAXATION.** — Plaintiff, under protest, gave the tax collector his note for nearly the whole amount of an alleged illegal tax, paying a small amount in money, and taking the collector's receipt for the tax: *Held*, that plaintiff had no right of action, except as to the money payment, and that it was immaterial that he made a payment on the note after suit brought, or that at the trial he offered to allow a set-off of the balance due on the note. — *Turnbull v. Township*, Mich., 42 N. W. Rep. 114.

111. **TAXATION.** — Act Mich. 1869, § 134, providing for the resale of lands bought by the State at tax-sale remaining unsold for five years, and for charging back to the proper county any deficiency in the amount bid at such resale below the amount bid by the State at the first sale, is invalid, so far at least as it requires losses sustained on previous purchases to be charged back to the county. — *Auditor General v. Board*, Mich., 42 N. W. Rep. 143.

112. **TELEGRAPH COMPANY.** — As to the measure of

damages in actions against telegraph companies for negligence in transmission of message. — *West. Union Tel. Co. v. Du Bois*, Ill., 21 N. E. Rep. 4.

113. **TRESPASS — Contract.** — In suit for trespass against party who claimed under a contract for work done thereupon the right to use water ditch: *Held*, that a party to a valid contract, in the absence of fraud or other special reason, cannot rescind at pleasure, that where there has been part performance a party cannot rescind and still retain the benefits received under the agreement. — *Bowman v. Ayers*, Idaho, 21 Pac. Rep. 405.

114. **TRUST.** — Question whether the facts constitute a constructive trust. — *Gruhn v. Richardson*, Ill., 21 N. E. Rep. 18.

115. **VENDOR AND VENDEE.** — Question as to authority of auctioneer to sell property. — *Muffatt v. Gott*, Mich., 42 N. W. Rep. 149.

116. **VENDOR AND VENDEE.** — Where a vendee gives a note for the price, which is a lien on the land sold, the possession of such note by one purchasing the land from the vendee is *prima facie* evidence of payment by one of them, and, the note being found among the papers of such purchaser after his death, it was presumptively in his possession while living. — *Potts v. Coleman*, Ala., 5 South. Rep. 780.

117. **VENUE.** — Where suit by attachment is instituted in a county other than that of the defendant's residence, but where one summoned as garnishee resides, under Code Miss. § 2418, and which does not provide for a change of venue to the county of the defendant's residence, the granting of a change of venue to the latter county on the ground that the suit was not brought in the proper county will not confer jurisdiction upon the court of the latter county. — *Baum v. Burnes*, Miss., 5 South. Rep. 697.

118. **VERDICT.** — In an action based on the breach of two contracts, one a promise to marry, and the other an agreement to convey certain property to plaintiff in consideration of her services as defendant's housekeeper, the two contracts being inconsistent, and the defense a general denial, it is error to accept a general verdict for plaintiff for a sum greater than the damages alleged from either cause of action. — *Schofield v. Milwaukee*, Wis., 42 N. W. Rep. 212.

119. **VERDICT—Affidavit of Juror.** — In an action on a note, one of the issues was as to whether the defendant, at the time of executing the note, understood that he was executing it for a certain amount, and the jury answered "Yes" to a special interrogatory upon such issue: *Held*, that the affidavits of the jurors were not admissible to show that they intended to answer "No." — *McKinley v. First Nat. Bank*, Ind., 21 N. E. Rep. 86.

120. **WATER AND WATER-COURSES.** — In an action by the owner of a lower mill-site against the owner of the upper one, to determine their respective rights in the water-power, plaintiff has the burden of proving his allegation that the wheels of defendant's mill are lower than the wheels of such mill were when plaintiff's mill-site was conveyed by the common owner of both. — *Mack v. Bensley*, Wis., 42 N. W. Rep. 15.

121. **WATERS AND WATER-COURSES.** — The common-law doctrine of riparian rights, that every riparian owner is entitled to the natural flow of the stream through his land as it was wont to run, is not applicable to streams in Nevada, but the rights should be determined by the doctrine of prior appropriation. — *Reno Smelting Works v. Stevenson*, Nev., 21 Pac. Rep. 817.

122. **WATERS AND WATER COURSES.** — Where one has appropriated the waters of a stream flowing across public lands, by erecting on his own lands a ditch, one acquiring title from the United States takes subject to such appropriation, and he cannot, by obstructions on his own land, divert the water from the ditch of the prior appropriator. — *Geddis v. Parrish*, Wash. Ter., 21 Pac. Rep. 814.

123. **WILL.** — *Held*, in view of the general principal making a life-tenant liable for the interest on a mortgage accruing during the continuance of his estate, and

the plan of the will as evidenced by the provisions mentioned, the direction to "the trustees to pay interest, etc., on mortgages on the homestead out of his estate, did not authorize the application of the principal of the fund to the payment of such interest, as only unequivocal expressions should be given that effect. — *In re Albertson*, N. Y., 21 N. E. Rep. 117.

124. **WILLS — Codicil.** — Where a codicil to a will provides that all of the will inconsistent therewith is revoked, and then proceeds to make a new disposition of all testator's property, making special bequests and devises, and leaving all the residue to certain persons, the will is entirely revoked, except the appointment of executors, which matter was not mentioned in the codicil. — *Newcomb v. Webster*, N. Y., 21 N. E. Rep. 77.

125. **WILL—Devise.** — Testator bequeathed all his property, to his executors, in trust to invest in government bonds, and to pay the income of a small part to his mother for her life, and upon all the rest and residue, including that devised to his mother, upon her death, to his wife for life, remainder over to his surviving children: *Held*, that the will effected a conversion of the property, and put the widow to her election as to the provisions made for her. — *Asch v. Asch*, N. Y., 21 N. E. Rep. 70.

126. **WILLS.** — A devise to executors in trust, with directions to sell the real estate, and to apply the funds to the use of a charitable institution not yet in existence, but which he instructs his executors to procure to be incorporated by a special act of the legislature as soon as possible, but at least within ten years from testator's death, is void for uncertainty. — *Cruikshank v. Chase*, N. Y., 21 N. E. Rep. 64.

127. **WILLS—Remainders.** — In a devise to a wife for life, with remainder to the legal heirs of the testator, to create a contingent remainder the intent so to do must be expressed in words so plain that there is no room for construction. — *Bunting v. Speck*, Kan., 21 Pac. Rep. 268.

128. **WILLS—Undue Influence.** — Upon the contest of a will, on the ground of undue influence exercised by the parents of a principal beneficiary, while portions of letters of the testatrix written before the execution of the will showing unkind feelings towards the beneficiary are admissible, other portions, showing like feelings towards the parents and brother of the beneficiary, they not being provided for in the will, should be excluded. — *Robinson v. Stuart*, Tex., 11 S. W. Rep. 275.

129. **WITNESS — Conspiracy.** — Testimony as to a conversation between witness, the principal, and another, defendant not being present, wherein the principal confessed his guilt, and narrated the circumstances of the murder, is inadmissible until a conspiracy is proved. — *Crook v. State*, Tex., 11 S. W. Rep. 445.

130. **WITNESS — Bastardy.** — In a prosecution for bastardy, where the principal witnesses are the defendant and the prosecuting witness, a charge of the court that, in determining the degree of credibility to be attached to the testimony of the witnesses, the pecuniary interest of the parties in the event of the suit is to be taken into consideration, and that the defendant has a more direct pecuniary interest in the suit than the prosecuting witness, is not error. — *Kenny v. State*, Wis., 42 N. W. Rep. 213.

131. **WITNESS.** — On a trial for murder, evidence of confessions made by a witness for defendant while she was under arrest, charged with complicity in the same crime is admissible to impeach her, though the evidence is such as, by statute, would not be admissible on trial of the witness. — *Hawkins v. State*, Tex., 11 S. W. Rep. 409.

132. **WRITS.** — An objection to the effect of a citation and to its sufficiency to bring an absentee into court as a garnishee in an attachment suit, is substantially an exception to the jurisdiction of the court *ratione personae*, and to be availing, it must be formally presented *in limine*, and by way of exception. — *Gomilla v. Mullen*, La., 5 South. Rep. 548.

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